

CITATION: McCarthy v. Bison Transport Inc., 2026 ONSC 3729
COURT FILE NO.: CV-18-00134314-0000
DATE: 20260625

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOHN MCCARTHY

Plaintiff

– and –

BISON TRANSPORT INC.

Defendant

)
)
) Krista J. McKenzie, for the Plaintiff
)
)
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)
) Michael J. Weinstein and Carter Liebzeit, for
) the Defendant
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) **HEARD:** February 25-27, 2026

REASONS FOR DECISION

CHARNEY J.:

- [1] The Plaintiff, John McCarthy, brings this wrongful dismissal action against his former employer, Bison Transport Inc. (“Bison Transport”). This action was brought as a Simplified Procedure action and proceeded on that basis.

Facts

Employment at Bison Transport

- [2] The Plaintiff was hired as a long haul driver by Bison Transport on October 8, 2013.
- [3] Bison Transport is one of Canada’s largest trucking companies. Bison Transport has approximately 2,000 drivers, who are responsible for a variety of different routes. This includes short-haul routes, as well as long-haul routes that include interprovincial transport and shipments across the Canada-U.S. border.
- [4] As a long-haul driver, the Plaintiff’s duties included the operation of tractor/trailer units on designated routes. These routes included cross-border routes between Canada and the United States. During the course of the Plaintiff’s employment, approximately 22% of the miles that he drove were cross-border routes into the United States.

- [5] The Plaintiff earned \$69,316 in 2015, \$74,074 in 2016, and \$63,486 in 2017 (he was terminated on November 2, 2017).
- [6] The Plaintiff's employment contract provided that in carrying out his duties he must comply with all of the conditions contained in the Employee Manual and Driver Reference Guide of the Employer.
- [7] In October 2013, the Plaintiff attended a five-day orientation session that is required before drivers begin driving for Bison Transport. During the orientation session, Bison Transport trains its drivers on a variety of safety related matters, including the maximum hours limits and its Drug and Alcohol policy. Bison Transport's policies are explained to the new employees and they are asked to sign certain forms and acknowledgments.
- [8] On October 9, 2013, the Plaintiff was provided with, and signed, a Previous Pre-Employment Employee Drug and Alcohol Test Statement confirming that he had not tested positive on any pre-employment drug or alcohol test.
- [9] On October 9, 2013, the Plaintiff was provided with, and signed, a one-page document entitled "Rules of Conduct, including Drug and Alcohol Policy Acknowledgment". The document stated:

To assure orderly operations and provide the best possible work environment, Bison expects employees to follow rules of conduct that will protect the interests and safety of all employees and the company. It is not possible to list all the forms of behavior that are considered unacceptable in the workplace. The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment.

[...]

- Working under the influence of alcohol or illegal drugs
- Possession, distribution, sale, transfer, or use of alcohol or illegal drugs in the workplace [...]
- Violation of safety or health rules

[...]

- Violation of personnel policies

[...]

Bison Transport recognizes that the use of illicit drugs and the misuses of alcohol and medications can limit an employee's ability to safely carry out their job responsibilities and affect the safety of others. Bison Transport

prohibits the use, possession, sale, distribution and/or transport of alcohol or illegal drugs. A Zero Tolerance Policy will be applied to violators.

...

Violation of Federal Motor Carrier Safety Administration Regulations, Canada Customs, US Customs and Border Protection, and Bison Transport Policies regarding drug and alcohol use, possession or transportation can lead to serious consequences, including the loss of border crossing capability, suspension of FAST card, criminal charges, and/or disciplinary action up to and including termination of employment.

- [10] The Plaintiff signed the Rules of Conduct immediately below the statement that: “I Acknowledge that not complying to Rules of Conduct, Drug and Alcohol policies and regulations, Customs policies and regulations, carries with it serious consequences, that may lead to disciplinary action, up to and including termination of employment”.

Bison Transport Drug and Alcohol Policy

- [11] The Bison Transport Drug and Alcohol Policy provides as follows:

The Drug and Alcohol Policy applies to all employees while engaged in company business or working on company premises/property. A greater risk is involved in the performance of certain jobs and they have been identified as safety-sensitive positions. Employees in such positions will be subject to mandatory drug and alcohol testing. Violation of this policy is grounds for disciplinary action.

Illicit Drugs

...

Presence in the body of illicit drugs on company business or premises is strictly prohibited.

...

All Drivers, Owner Operators, Drivers employed by Owner Operators, and Lease Operators are employed in safety sensitive positions and will be subject to Drug and Alcohol testing.

...

Consequence of a Policy Violation

-Bison Transport will provide reasonable accommodation to an employee who is dependent upon alcohol or other drugs.

However, an employee with a positive test result:

- Cannot perform a safety-sensitive function.
- Will be made aware of resource for solving Alcohol and/or Drug problems.
- Must be evaluated by a Substance Abuse Professional.
- Must Comply with the treatment recommendations, and
- Must undergo a return-to-duty test and have a negative result with further unannounced follow up tests as per the Substance Abuse Professional's evaluation.
- All testing is done at the expense of the employee.

Furthermore, an employee with a positive test result for either Alcohol or Drugs will be subject to :

- Suspension with pay, or
- Suspension without pay, or
- Temporary re-assignment to a non-safety sensitive position at a lower pay scale, or
- Termination of employment

- [12] Bison Transport's Drug and Alcohol Testing Procedures provide that "[d]rivers will be required to complete a drug/alcohol test on a random basis or when advised a test is required". The drug and alcohol tests are administered by DriverCheck, an independent third party testing service.
- [13] On November 4, 2014, the Plaintiff failed a mandatory random drug test administered by DriverCheck. The test results indicated that the Plaintiff had tested positive for cannabis on November 4, 2014 at 11:11 a.m.
- [14] Garth Pitzel, the Associate VP, Safety and Driver Development of Bison Transport, spoke to the Plaintiff about the situation at the time. The Plaintiff acknowledged that he had consumed cannabis. He did not suggest that he had any form of addiction or disability.
- [15] Following this conversation, the Plaintiff was placed on an unpaid leave of absence and referred by DriverCheck to a substance abuse professional, Anne Marie Ireland of Choices Counselling and Consulting, who designed a return-to-work program for the Plaintiff. The program included mandatory educational programming and return-to-work testing requirements.

- [16] In November 2014, Ms. Ireland sent Mr. Pitzel a series of letters regarding the Plaintiff's return-to-work program. On November 14, 2014 she advised that the Plaintiff "does not test to have a current problem with substance abuse/addiction".
- [17] On November 19, 2014 she advised that the Plaintiff had fully completed his educational program and indicated that he would be ready to return to work following a negative return-to-work test and should be required to undergo at least 6 random drug screening tests over the next 12 months.
- [18] The Plaintiff returned to work with Bison Transport on November 26, 2014. He underwent further random drug testing, which he passed.
- [19] The Plaintiff was provided with a "Record of Written Warning" on November 27, 2014, which was signed by the Plaintiff and Mr. Pitzel. The Written Warning stated:

This written warning is being issued to you for: Failing drug test by testing positive for THC on Nov 4 2014 ... Leroy [Plett, the Manager of Safety at Bison Transport at that time] and myself have discussed this incident with John. He agrees to all the conditions and will return to work following this meeting. The following corrective action is required by you: John cannot have any violations of Bisons drug and alcohol policy if he has any failed drug or alcohol tests he could face immediate termination.

Termination

- [20] On October 25, 2017, DriverCheck selected the Plaintiff for a random drug test, which was administered on October 27, 2017. DriverCheck notified Bison Transport that the Plaintiff had failed the drug test, as he had tested positive for a marijuana metabolite (THC).
- [21] After Bison Transport was notified, Stephanie Fensom, who was then the Manager of Safety and Compliance, reviewed the Plaintiff's employment file and observed that this was a second failed drug test. The employment file reflected that the Plaintiff had already been given a warning about drug use following his first failed test. The presence of THC in the Plaintiff's system indicated that there was a risk that he was impaired while driving. This risk was not acceptable to Bison Transport.
- [22] Ms. Fensom's affidavit states that following a second failed drug test, Bison Transport will typically speak with a driver and determine if there is an addiction or dependency issue that needs to be addressed by way of a referral to DriverCheck. Before terminating an employee for a second failed drug test, Bison Transport typically gives the driver an opportunity to explain their position on the situation.
- [23] On November 2, 2017, the Plaintiff met with Chris Gehue, Bison's former Safety Counsellor in Ontario, at Bison Transport's Mississauga premises. Ms. Fensom, who is located in Winnipeg, joined the meeting by telephone.

- [24] During the meeting the Plaintiff was asked to explain the failed drug test. The Plaintiff admitted to using marijuana, and said that it was a “single-time” of marijuana use to get close to a female individual, and that it would not occur again. He indicated that he was a casual user of marijuana. He gave no indication that he had an addiction that required accommodation. The Plaintiff acknowledged that he was aware of Bison Transport’s Drug and Alcohol Policy, and that he was aware that a second offence could lead to termination.
- [25] Following that meeting, Ms. Fensom met with Mr. Pitzel to discuss the consequences of the second failed drug test. Her affidavit states:

Having regard for the fact that this was John’s second failed drug test, that the usage of drugs or alcohol by drivers poses significant public dangers, that John’s failed test was repetitive in nature (i.e. each was for marijuana use that John described as single-time, casual use), that John had clearly understood the Drug and Alcohol Policy, and that there was no indication whatsoever that John had any addiction or dependency issue, Garth Pitzel and I together made the decision to terminate John, for cause.

- [26] Following Ms. Fensom’s discussion with Mr. Pitzel, the Plaintiff had a second meeting with Mr. Gehue and Ms. Fensom (who joined by telephone) on November 2, 2017, and was presented with a termination letter that advised that he was terminated from Bison Transport, for cause, effective immediately, due to his breach of the Drug and Alcohol Policy. Bison Transport did not pay the Plaintiff any termination or severance pay and ceased his benefits immediately upon termination.
- [27] The Plaintiff testified that once he received the termination letter he just got up and left the meeting. He was able to find another job at a different transportation company and started working in December 2017. His employment income for 2018 was \$66,163.

Issues

- [28] This case raises two primary issues: (i) was the Plaintiff wrongfully terminated? and ii) did the Defendant fail to pay the Plaintiff overtime pay while he was employed?

(i) Was Mr. McCarthy Terminated for Cause?

- [29] Bison Transport takes the position that Mr. McCarthy was terminated for cause because he failed the second drug test while in a safety sensitive position. The drug test was part of Bison Transport’s corporate policy because of the safety sensitive nature of employment.
- [30] Termination for breach of corporate policies require the employer to prove that the policy is well-known to the employee, consistently enforced, and the consequences proportionate to the implications of the breach: *Hampton Securities Limited v. Dean*, 2018 ONSC 101, at para. 92.

- [31] Employers are permitted to enact drug and alcohol policies, particularly in safety sensitive industries. In *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426, the Alberta Court of Appeal held, at para. 36:

We see this case as no different than that of a trucking or taxi company which has a policy requiring its employees to refrain from the use of alcohol for some time before the employee drives one of the employer's vehicles. Such a policy does not mean that the company perceives all its drivers to be alcoholics. Rather, assuming it is aimed at safety, the policy perceives that any level of alcohol in a driver's blood reduces his or her ability to operate the employer's vehicles safely. This is a legitimate presumption. Its goal is laudable since carnage on the highways is a leading, but often ignored, cause of death nearing epidemic proportions. Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic.

- [32] The Plaintiff acknowledges that the Canadian Human Rights Commission has concluded that subjecting employees engaged in automotive transport to pre-employment and random drug testing is a legitimate way to promote road safety: *Milazzo v. Autocar Connaissance* 2003 CHRT 37; at paras. 173 - 175. Accordingly, commercial trucking operators can subject their drivers to pre-employment and random alcohol and drug testing so long as they accommodate employees who are found to be drug or alcohol dependent.
- [33] In the present case, the evidence demonstrates that Bison Transport's drug and alcohol policy was communicated to the Plaintiff, was known to and understood by the Plaintiff, and was consistently enforced by the employer. The Plaintiff acknowledged that he understood, after his first failed drug test in 2014, that he could be terminated if he failed a second test.
- [34] Ms. Fensom's evidence was that, for an employee's first breach, once they are cleared to return to work by DriverCheck, they are allowed to return but given a warning that termination could occur in the event of a second breach. In the event of a second breach, if there is no indication of an addiction or dependency issue, Bison Transport will typically terminate the driver because Bison Transport cannot run the risk of having impaired drivers operating long-haul trucks on the road.
- [35] Random drug and alcohol testing is also required under U.S. law 159, which requires that no employee shall perform any "safety-sensitive functions, including driving a commercial motor vehicle", if they fail a random drug test, until they undergo evaluation, testing and reinstatement. Where a driver is taken out of commission by a positive drug test, it affects Bison Transport's ability to service its U.S. customers. As such, beyond the safety risks, there are also legitimate risks and disruptions to Bison's business in a case where an employee fails a random drug test: *Milazzo*, at paras. 174 - 175.
- [36] That is not the end of the matter. Bison Transport has an obligation to accommodate, to the point of undue hardship, an employee who tests positive for drugs and who suffers from a

drug-related disability. Indeed, the Bison Transport Drug and Alcohol Policy expressly provides that “Bison Transport will provide reasonable accommodation to an employee who is dependent upon alcohol or other drugs”. In the absence of a disability, there is no duty to accommodate.

- [37] The evidence in this case is that the Plaintiff does not have a drug dependency disability. After failing his first random drug test in November 2014, he attended counselling with the substance abuse professional, Ms. Ireland, who advised Bison Transport that the Plaintiff did not have a problem with substance abuse/addiction.
- [38] Ms. Fensom’s evidence was that following a second failed drug test, Bison Transport will speak with a driver and determine if there is an addiction or dependency issue that needs to be addressed by way of a referral to DriverCheck.
- [39] Following the second failed test in October 2017, Ms. Fensom met with the Plaintiff. He was asked to explain the failed drug test. The Plaintiff indicated that he was a casual user of marijuana. He gave no indication that he had an addiction that required accommodation.
- [40] Nor is there any evidence that Bison Transport management perceived the Plaintiff as having a drug related disability, or, as the Plaintiff argues, that management “perceived the possibility” that the Plaintiff might develop a drug dependency in the future. Management accepted his explanation that he was an occasional, recreational drug user, and terminated his employment on that basis.
- [41] When Mr. McCarthy was examined for discovery, his counsel advised that his claim would be amended and that “we’re not claiming that he has a disability anymore”. The Statement of Claim was subsequently amended to remove the allegation that the Plaintiff had a disability.
- [42] During the hearing, the Plaintiff confirmed that he does not think that he has or ever had a substance abuse problem, and that no professional has ever told him that he does.
- [43] Given this uncontradicted evidence, I find that the Plaintiff did not have a drug-related disability nor was he perceived to have a disability, and there was, therefore, no obligation on Bison Transport to accommodate the Plaintiff before terminating him in 2017.
- [44] In the present case, management of Bison Transport considered the facts that the Plaintiff was in a safety sensitive position, he had been advised of and clearly understood the employer’s Drug and Alcohol Policy, this was his second failed drug test for the same substance, he had gone through the DriverCheck counselling program in 2014, and there was no indication that there was an addiction or dependency issue.
- [45] In these circumstances I conclude that Bison Transport’s decision to terminate the Plaintiff for cause was in accordance with Bison Transport’s Drug and Alcohol Policy, and that this policy was a reasonable policy for employees, like the Plaintiff, in a safety sensitive position. The Plaintiff was not discriminated against on the basis of disability, and the consequences were proportionate to the breach.

ii) Damages for Wrongful Termination

- [46] If I am incorrect in my conclusion that the Plaintiff was not wrongfully dismissed, I will consider the damages that I would have awarded had he been wrongfully dismissed.
- [47] The Plaintiff claims damages for breach of contract in the amount of \$25,000, plus \$2,000 for unpaid benefits, plus expenses associated with the wrongful termination in the amount of \$1,500, for a total breach of contract claim in the amount of \$28,500.
- [48] The \$25,000 claimed represents approximately 4 months income based on his last full year's (2016) income of \$74,074 or pro-rated on the basis of his 10 months income in 2017.
- [49] While he began working for another employer in December 2017, he earned somewhat less than he did at Bison Transport, only \$66,163 in 2018.
- [50] The Plaintiff has provided no evidence to support his \$1,500 expenses claim, nor has he provided any calculation to explain how he came to \$2,000 for unpaid benefits. He has not identified what his benefits were, the value of those benefits, or what benefits he received from his new employer for whom he began working in December 2017.
- [51] With respect to pay in lieu of notice, Bison Transport argues that Mr. McCarthy fully mitigated his lost income by obtaining employment at another transport company where he started working in December 2017.
- [52] Based on the evidence provided, I am satisfied that if the Plaintiff had been wrongfully dismissed, he would have been entitled to 4 months notice as alleged. He successfully mitigated his damages by obtaining similar employment at a similar wage scale within a couple of months after his termination. I would have calculated his damages for wrongful dismissal in the amount of \$17,500, based on approximately two months lost wages and a somewhat lower salary for the next two months.
- [53] The Plaintiff also claims damages for breach of the *Canadian Human Rights Code* in the amount of \$35,000.
- [54] I would not award any damages for breach of the *Canadian Human Rights Code*, because there was no evidence that the Plaintiff was disabled or that he was discriminated against based on the perception of disability. The Bison Transport Drug and Alcohol Policy was a reasonable and bona fide occupational requirement and there was no duty to accommodate the Plaintiff in this case.

Aggravated and Punitive Damages

- [55] In his Factum, the Plaintiff also claims moral and aggravated damages in the amount of \$100,000, and punitive damages in the amount of \$500,000.
- [56] I note that the matter was brought as a Simplified Procedure action, and the Statement of Claim claims the maximum damages permitted under Rule 76, that is \$200,000. The

Statement of Claim expressly “waives any damages assessed to be owing over and above the limits of simplified procedure”. Having commenced this action under Rule 76, the Plaintiff cannot claim more than the maximum claim permitted by Rule 76.

- [57] In *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, the Court of Appeal described aggravated damages in wrongful dismissal cases, at para. 66, as follows:

Aggravated damages are compensatory damages. They are part of breach of contract damages. They compensate a plaintiff for the additional harm suffered because of the way the contract was breached. In a wrongful dismissal claim, aggravated damages may be awarded against the employer where “the employer engages in conduct during the course of dismissal that is ‘unfair or is in bad faith’”: see *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 57. However, “the normal distress and hurt feelings resulting from dismissal are not compensable.” see *Honda*, at para. 56.

- [58] In *Doyle v. Zochem Inc.*, [2017] O.J. No. 748, 2017 ONCA 130, the Court stated, at para. 12:

Beginning with *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, at para. 95, the Supreme Court of Canada recognized that there is an obligation of good faith in the manner of dismissal of an employee and, at paras. 88 and 98, specified that damages are available where an employer engages in conduct that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.” Initially the award, now known as moral damages, involved compensation through an addition to the period of notice. However, in *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 59, the Court essentially did away with the distinction between aggravated damages and moral damages and held that these damages should be recognized through a fixed monetary award rather than through an extension of the notice period[.]

- [59] Pre and post-termination conduct may be considered in an award for aggravated damages, so long as it is “a component of the manner of dismissal”: *Doyle*, at para. 13.

- [60] Punitive damages are an extraordinary remedy. The Supreme Court has held that they should receive “the most careful consideration” and their award “should be most cautiously exercised”. “Courts should only resort to punitive damages in exceptional cases”. Further, “conduct meriting punitive damages awards must be ‘harsh, vindictive, reprehensible and malicious’, as well as ‘extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment’”: *Honda Canada Inc. v. Keays*, 2008 SCC 39, at para. 68.

[61] In *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, supra, the Court of Appeal stated, at para. 59:

Punitive damage awards are not compensatory. They are meant to punish the defendant in exceptional cases where the defendant's conduct has been "malicious, oppressive and high-handed" and "represents a marked departure from the ordinary standards of decent behaviour", see *Whiten*, at para. 36.

[62] In *Boucher*, at paras. 79 - 80, the Court of Appeal held that the following three criteria must be established before an award of punitive damages will be made in a breach of contract case:

- a. the plaintiff must show the defendant's conduct was "reprehensible" "malicious, oppressive and high-handed" and "a marked departure from ordinary standards of decent behaviour.";
- b. the plaintiff must show that a punitive damage award, when added to any compensatory award, is rationally required to punish the defendant and meet the objectives of retribution, deterrence and denunciation; and
- c. the plaintiff must show that the defendant committed an independent actionable wrong. A breach of the duty of good faith and fair dealing can constitute such an actionable wrong: *Boucher*, at paras. 81 - 83.

[63] The Plaintiff's claim for aggravated and punitive damages is based on the premise that Bison Transport engaged in deliberate unlawful behaviour. This allegation is not supported by the evidence.

[64] In my view, even if the Plaintiff had been wrongfully dismissed, nothing in Bison Transport's handling of the dismissal met the requirements for aggravated or punitive damages. Bison Transport acted reasonably and responsibly, out of a legitimate concern for public safety. It did not act unfairly or in bad faith, and there was nothing reprehensible or malicious in its process or procedures. Bison Transport was honest and transparent with the Plaintiff throughout the dismissal process.

iii) Did the Defendant fail to pay the Plaintiff overtime pay while he was employed?

[65] The Plaintiff alleges that he was not paid for overtime work. He has calculated his overtime hours as follows:

- a. 2013: 262.6 hours overtime
- b. 2014: 1,405.40 hours overtime
- c. 2015 1,059.20 hours overtime

d. 2016: 743.80 hours overtime

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e. Total Overtime Hours, 2013 - 2016: 3,471

[66] The Plaintiff claims that he is entitled to an overtime rate of \$67.50, and on that basis calculates the overtime owing as \$234,292.50.

[67] The Defendant denies that the Plaintiff worked the overtime hours alleged, and challenges the methodology by which the Plaintiff calculated these overtime hours.

Limitation Period

[68] The Statement of Claim in this matter was issued on January 24, 2018. The Statement of Claim pleads that Ontario law governs the Plaintiff's employment with Bison Transport.

[69] The Defendant argues that the Plaintiff's claim for unpaid overtime from 2013 to 2015 is barred by the two year limitation period in the *Limitations Act, 2002*, SO 2002, c 24, Sch B (Limitations Act).¹

[70] Pursuant to section 4 of the *Limitations Act*, "a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered."

[71] Section 5(1) of the Act provides that a claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

¹ The Defendant also relies on s. 251.01(2) of the *Canada Labour Code*, R.S.C. 1985, c.L-2, which permits an employee to make a complaint of non-payment of wages in writing to the Head of Compliance and Enforcement designated under the Code, within six months of the day on which the employer was required to pay those wages. The Head of Compliance and Enforcement may issue a payment order requiring the employer to pay the unpaid wages. This process is not exclusive, and does not preclude the employee from bringing a civil action for breach of contract.

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

- [72] In *Longo v. MacLaren Art Centre*, 2014 ONCA 526, the Ontario Court of Appeal stated, at paras. 41 and 42:

The limitation period does not begin to run until the putative plaintiff is actually aware of all of those matters or until a reasonable person, with the abilities and in the circumstances of the plaintiff, first ought to have known of all of those matters.

A plaintiff is required to act with due diligence in determining if he has a claim. A limitation period will not be tolled while a plaintiff sits idle and takes no steps to investigate the matters referred to in s. 5(1)(a).

- [73] The Plaintiff argues that he is not subject to the two year limitation period in the *Limitations Act*, because Bison Transport is a federally regulated company. He argues that he is therefore subject to the six year limitation period in s. 39 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides:

Prescription and limitation on proceedings

39 (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

Prescription and limitation on proceedings in the Court, not in province

(2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

- [74] The limitation period set out in the *Federal Court Act* applies, by its terms, to “any proceedings in the Federal Court of Appeal or the Federal Court”. It has no application to the present proceeding in the Ontario Superior Court. In any event, s. 39(1) of the *Federal Court Act* referentially incorporates the applicable provincial limitation period in respect of a cause of action arising in the province.

- [75] I am satisfied that if the Plaintiff was not paid for overtime work, he would have discovered or ought to have discovered this shortfall when he received his pay cheque. The Plaintiff acknowledged that he saw on his pay stubs that he was not being paid overtime separate from his mileage rate. He had access to logs stating his hours worked and he could have downloaded the hours data at any time within a 6 month period of working those hours. At

that point he would have had all the information necessary to know whether he had been paid overtime.

- [76] The limitation period begins to run from each breach, and a new cause of action arises every time the defendant breaches the contract: *Nygård International Partnership v. Hudson's Bay Company*, 2018 ONSC 5143, at para. 81:

Where a breach of contract involves a failure to perform an obligation scheduled to be performed periodically; for example, a requirement to make quarterly deliveries or payments, a failure to perform any such gives rise to a breach and a claim as from the date of each individual breach. Where there is an obligation to make periodic payments or to perform an obligation periodically, the limitation period bars claims for breach of contract for damages incurred outside of the limitation period, but the limitations statute does not bar timely claims for damages that are suffered within the limitation period. Where there is a continuing breach of contract, the limitation period applies on a rolling basis and commences each day a fresh cause of action accrues and runs two years from that date. For example, if a tenant failed to pay rent for three years, and then the landlord commenced an action for the unpaid rent, the claim for the first year of the rent arrears would be statute barred. [Footnotes omitted.]

- [77] See also: *Marvelous Mario's Inc. v. St. Paul Fire and Marine Insurance Co.*, 2019 ONCA 635, at para. 36, and *Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179, at para. 24; *Samuel v. Benson Kearley IFG*, 2020 ONSC 1123, at para. 114.
- [78] Accordingly, the Plaintiff may bring a claim within two years of each pay cheque, and therefore may claim damages for breach of contract with respect to any claim within two years of the January 18, 2018 Statement of Claim. As such, the claim relating to the breach that occurred more than two years prior to commencement of the action is barred by the *Limitations Act*.
- [79] This finding reduces the Plaintiff's overtime claim to the hours he calculated for 2016: 743.80 hours. At the rate of \$67.50 alleged by the Plaintiff, this claim would equal \$50,206.50.

Calculation of Overtime

- [80] All of Bison Transport's trucks are equipped with electronic logging devices ("ELDs") which monitor, among other things, the amount of hours driven by drivers. Bison Transport kept records of the Plaintiff's hours for 6 months. Bison Transport argues that this retention period was consistent with Canadian and U.S. regulations governing retention of records.
- [81] The U.S. regulations governing retention of hours data provide that a motor carrier must retain their electronic logging device ("ELD") data showing a driver's driving time and hours of service for a 6 month period: U.S. Regulation 49 CFR Part 395, section 395.22(i) and Appendix A, section 4.9.2.

[82] The Canadian *Hours of Service Regulations* do not specifically prescribe a retention period for ELD data, but simply require motor carriers to “create and maintain a system of accounts for ELDs that is in compliance with the Technical Standard”. Section 4.9.2 of the Technical Standard stipulates that “An ELD shall retain copies of electronic ELD [records of driver service] for the prescribed retention period specified in subsection 85(3)(b) of the current HOS regulations.”²⁰³ Section 85(3)(b) of the Hours of Service regulations states:

(3) The motor carrier shall (a) deposit the records of duty status and the supporting documents relating to those records at its principal place of business within 30 days after receiving them; and (b) keep them in chronological order for each driver for a period of at least 6 months after the day on which they are received. [Emphasis added.]

- [83] Bison Transport’s hours logs were stored on their ELDs for the six month period required under U.S. and Canadian law. These ELDs “generate massive amounts of data”. As such, Bison’s policy during Mr. McCarthy’s employment was to only retain the data from the ELDs for the six month period required by law.
- [84] The Plaintiff’s pay was based on a pay scale based on a basic per mile rate. The rate per mile was \$0.38 from 2013 to 2015, and \$0.40 in 2016. Bison Transport takes the position that the Plaintiff was paid overtime by way of Bison’s “blended” rate of pay, which included overtime pay based on mileage. Ms. Fensom’s affidavit states: “The standard mileage rate that was paid to John from 2013-2016 encompassed overtime and was intended to provide compensation for any overtime that he worked”. It is not clear from the information provided by Bison Transport how this “blended rate” complied with the *Canada Labour Code’s* regulations² requirement to pay drivers 1.5 times the hourly rate of pay for working over 60 hours in a seven day period. As far as I can tell, it did not. The Plaintiff would be paid \$0.40 per mile whether he worked 55 hours per week or 65 hours per week.
- [85] Bison Transport has produced the Plaintiff’s mileage logs for 2013-2017, and his pay stubs for 2013-2017. Unfortunately, there is no accurate way to determine the precise number of hours driven by the Plaintiff using these documents, as they only show the miles driven and the amounts that were paid.
- [86] In his supporting affidavit, the Plaintiff has attempted to calculate his overtime by reviewing the mileage logs provided by Bison Transport, and dividing the miles logged by a fixed average speed of 43 miles per hour.
- [87] The Plaintiff’s calculations in this regard produced a seriously flawed document. The Plaintiff is not an independent expert qualified to make these calculations. The average

² *Motor Vehicle Operators Hours of Work Regulations*, CRC, c 990, s. 7(3)

speed of 43 miles per hour that he used was derived from “research done by an American company” that was neither appended to nor cited in his affidavit.

- [88] Moreover, overtime is based on working more than 60 hours in a 7 day period. While some of the Plaintiff’s calculations were based on a 7 day period, many of his calculations were based on working more than 60 hours in a longer period. On cross-examination, the Plaintiff acknowledged that he did not limit his calculations to working over 60 hours in a 7 day period, but based many of his overtime calculations on working more than 60 hours in any 10 to 14 day period. He explained that he did the calculations that way because he thought that he deserved overtime for that period.
- [89] In addition, the Plaintiff acknowledged on cross-examination that he made several arithmetic mistakes in his calculations.
- [90] Finally, it is unclear to me the source of the Plaintiff’s proposed overtime rate of \$67.50 per hour. This appears to be based on the premise that he was paid nothing for his overtime work. We know, however, that he was paid \$0.40 per mile. His overtime would be 1.5 times that amount, and his damages would be limited to the difference between his base rate and his overtime rate.
- [91] In conclusion, while it is possible that the Plaintiff did work overtime in 2016, the Plaintiff’s affidavit evidence appears to seriously exaggerate the number of overtime hours worked and his damages for any such hours. It is not a reliable basis upon which to calculate damages.
- [92] Based on the foregoing, the Plaintiff has not proven his claim for damages for unpaid overtime.

Conclusion

- [93] The Plaintiff’s claim is dismissed.
- [94] If the parties cannot agree on costs, the Defendant may file costs submissions of no more than 3 pages, plus costs outline and any offers to settle, within 20 days of the release of this Decision. The Plaintiff may file responding submissions on the same terms within a further 15 days. Costs submissions should be uploaded to Case Center and forwarded to my Judicial Assistant at Robyn.Pope@Ontario.ca.

Justice R.E. Charney

Released: June 25, 2026

CITATION: McCarthy v. Bison Transport Inc., 2026 ONSC 3729

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOHN MCCARTHY

Plaintiff

– and –

BISON TRANSPORT INC.

Defendant

REASONS FOR DECISION

Justice R.E. Charney

Released: June 25, 2026