

CITATION: Brian Allan Cutajar v. Automobile Specialities Inc. et al, 2026 ONSC 3956
COURT FILE NO.: CV-25-00746011-0000
DATE:20260707

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Brial Allan Cutajar, Plaintiff

AND:

Automobile Specialities Inc. and 11049780 Canada LTD. DBA Automotive Specialities Group and TonyXynox, Defendants

BEFORE: Justice Grant R. Dow

COUNSEL: Colin Cuttress, for the Plaintiff

HEARD: July 7, 2026

ENDORSEMENT

- [1] This default judgment motion was scheduled by Justice Callaghan on March 11, 2026 to proceed, in writing, the week of April 27, 2026 if the defendants failed to respond to personal service of his Endorsement, the plaintiff's Motion Record (including the noting in default), Factum, Bill of Costs and form of judgment sought. It was assigned to me on June 26, 2026.
- [2] The material uploaded to Case Center included the affidavit of personal service on all defendants on March 19, 2026 by providing a copy of the material on the defendant, Tony Xynos. Tony Xynos is the controlling mind of the corporate defendants.
- [3] The plaintiff seeks damages for his constructive, wrongful dismissal having commenced employment with the defendants in June or July of 2004 as an automotive service technician. The material detail repeated delayed or nonpayment of his agreed upon wages when due. This resulted in his (finally) asserting constructive wrongful dismissal, in writing, on April 26, 2025 (Exhibit J to the plaintiff's affidavit sworn February 19, 2026). The plaintiff began alternative employment June 9, 2025 or six weeks later.
- [4] Upon service of the Statement of Claim in June, 2025, Tony Xynos acknowledged receipt to plaintiff's counsel and requested additional time to retain counsel and respond. Despite granting same, there has been no subsequent contact from Tony Xynos or counsel indicating they have been retained on the defendant's behalf.
- [5] The plaintiff's Factum details at the time the plaintiff ceased working for the defendants, \$40,500 in net unpaid wages had accrued. No Record of Employment was ever provided

as required by regulations issued under the *Employment Standards Act*, 2000, S.O.2000, c.41.

- [6] The plaintiff, age 41 as of his termination, was being paid \$55,600 per year.
- [7] Further, the plaintiff was not paid the eight weeks statutory termination notice pay provided for under section 56(1)(b) of the *Employment Standards Act*, *supra*, which the plaintiff has calculated to be \$8,553.85 less deductions.

Analysis

- [8] The plaintiff submitted seven issues needed to be addressed.
- [9] First, whether the case was appropriate for summary judgment. Wrongful dismissal matters, particularly those where cause is not in dispute, are particularly appropriate for summary judgment and I so find.
- [10] Second, are all defendants liable to the plaintiff based on the “common employer” doctrine. I agree with the authorities provided and the defendants having blurred the line between themselves to apply this doctrine. The plaintiff performed work as an automotive service technician working for Tony Xynos at a location on Shephard Avenue East under a sign that said “Automotive Specialties”.
- [11] Third, whether the plaintiff was entitled to his unpaid wages up to his April 26, 2025 constructive dismissal. I agree with the plaintiff’s submission and calculation as set out in the material. The plaintiff is entitled to and I award the \$40,500 sought.
- [12] Fourth, whether the plaintiff was constructively dismissed. I agree with the authority relied on, *Colistro v. Tbaytel*, 2019 ONCA 197 that a repeated pattern of not paying the plaintiff’s agreed upon wages amounts to a breach by the defendants, as the employer, of the most fundamental term of employment relationship. That is, payment of wages as they fall due.
- [13] Fifth, whether the plaintiff mitigated his damages but remained entitled to his *Employment Standards Act*, *supra*, mandated termination pay of eight weeks or \$8,553.85 less statutory deductions. I agree this amount is not subject to any deduction arising from the plaintiff having mitigated his claim by finding and commencing alternative employment as of June 9, 2025.
- [14] Sixth, whether the plaintiff was entitled to any extraordinary or additional damages which the plaintiff categorized to be:
 - (a) general damages for bad faith;
 - (b) bad faith damages by virtue of not being regularly paid his wages in a timely fashion;
 - (c) punitive damages for the defendant’s high-handed conduct.

The plaintiff sought in total an additional \$60,000 in this regard. In my view, this is an appropriate amount given the circumstances and I award same.

- [15] Seventh, whether the plaintiff appropriately mitigated his damages. As stated in the plaintiff's Factum, the onus for this issue falls to the employer. The defendants have taken no steps or proffered any evidence to support a failure to mitigate. In this regard, had the plaintiff been dismissed without cause, his claim for an adequate notice period would have been in the range of 15 to 18 months. Instead, the evidence is the plaintiff found and began alternate employment in six weeks. I find no basis to reduce the assessment of damages in this regard.
- [16] Regarding costs, I was provided with a Bill of Costs setting out partial indemnity fees of \$11,408.38, rising to \$17,112.57 if fixed at substantial indemnity fees plus disbursement of \$1327.21. The hourly rate claimed for \$325 an hour for counsel with seven years of experience and the total time docketed is not unreasonable.
- [17] No submissions or Offer to Settle were included in the plaintiff's Factum in support of a claim for elevated costs.
- [18] I find any submissions that the defendants conduct leading up to the litigation should attract a higher level of costs is offset by the defendants choosing not to oppose or defend the litigation. This resulted in the plaintiff being able to obtain summary judgment.
- [19] As a result, I award partial indemnity fees of \$11,408.38 plus HST of \$1,483.09 and disbursements as claimed, being \$1327.21 for a total of \$14,218.68.
- [20] Judgment to issue as signed by me.

Mr. Justice G. Dow

Date: July 7, 2026