

# ONTARIO COURT OF APPEAL REVIEWS NECESSARY ELEMENTS TO CLAIM AGAINST CORPORATE DIRECTORS IN THE CONTEXT OF A WRONGFUL TERMINATION ACTION

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In the recent decision of *Abbasbayli v Fiera Foods Company*,<sup>[1]</sup> the Ontario Court of Appeal provides helpful guidance on the various circumstances in which corporate directors can become personally liable for unpaid wages and vacation pay in wrongful dismissal cases.

## Background

The Appellant (“**Mr. Abbasbayli**” or the “**Plaintiff**”) was employed by the Respondents, Fiera Foods Company, Bakery Deluxe Company and 2168587 Ontario Ltd (collectively, “**Fiera Foods**”) from 2002 to March 26, 2018, when he was terminated for cause upon being accused of punching a colleague’s time card. Mr. Abbasbayli claimed his termination was a reprisal and brought an action against Fiera Foods and two directors, claiming damages for wrongful dismissal, unpaid vacation pay under both section 81 of the *Employment Standards Act*, 2000 (the “**ESA**”) and section 131 of the *Ontario Business Corporations Act* (the “**OBCA**”), as well as relief from oppression under section 248 of the OBCA.

The Respondents brought a motion to strike certain portions of Mr. Abbasbayli’s Statement of Claim, arguing that they failed to disclose a reasonable cause of action, pleaded evidence, and were irrelevant and inflammatory.

## The Motion Judge’s Decision

The motion judge struck certain pleadings, making the following key findings:

- Mr. Abbasbayli failed to plead the material facts necessary to establish a reasonable cause of action under section 131 of the OBCA and section 81 of the ESA;
- Mr. Abbasbayli failed to plead the material facts necessary to support his oppression claim under section 248 of the OBCA, as he failed to address his reasonable expectations in regard of the directors’ conduct and the manner in which those expectations were violated by oppressive corporate conduct. Mr. Abbasbayli was, however, granted leave to amend this pleading.

## The Court of Appeal Decision

While the Court of Appeal upheld the motion judge's decision relating to section 81 of the ESA, it overturned the motion judge's decision relating to section 131 of the OBCA. The Court of Appeal also agreed that Mr. Abbasbayli should have leave to amend his Statement of Claim to continue the oppression claim under section 248 of the OBCA.

### *S. 81 of the ESA*

The Court of Appeal agreed that a director can only be jointly and severally liable for wages if certain preconditions are met. Given that the Appellant failed to plead any material facts to satisfy the statutory preconditions under section 81 of the ESA, his claim had no reasonable prospect of success. Specifically, under s. 81 of the ESA, a director is only liable for an employee's outstanding unpaid wages if the employee has filed a claim in the employer's receivership or bankruptcy (under ss. 81(1)(a)); if an employment standards officer has made an order that the employer or a director is liable for the wages (under ss. 81(1)(b) and (c)); or if the Ontario Labour Relations Board has issued, amended or affirmed such an order (under ss. 81(1)(d)).

### *Relief under the OBCA*

Unlike with s. 81 of the ESA, the Court of Appeal found that the Plaintiff had pleaded a reasonable cause of action under s. 131 of the OBCA. Section 131 provides that the directors are liable for up to six months' wages and up to one year's accrued vacation pay if: (a) the corporation is sued and execution is returned unsatisfied; or (b) the corporation is involved in certain insolvency proceedings and the employee's claim has been proved.

In *Abbasbayli*, the Plaintiff sought three weeks' vacation pay, making it possible that corporate directors could become liable. However, the Court of Appeal emphasized that liability under s. 131 would not exist until it was shown that the corporation did not satisfy a judgment in that regard.

Lastly, the Court of Appeal upheld the motion judge's decision to permit the Plaintiff to amend his pleading to allege oppression. While the Court did not opine on the merits of his case, it provided helpful guidance on when a non-shareholding former employee might have leave to bring an oppression claim. After identifying several cases in which a non-shareholder employee was found to have standing to bring an oppression claim, such as when a director's conduct prevents payment of wages or payment of wrongful dismissal damages, the Court of Appeal emphasized that wrongful dismissal, on its own, will not often provide standing to bring an oppression claim.

In order to establish a reasonable cause of action for oppression, a party must specify their reasonable expectations of directors (as a stakeholder) and articulate the material facts explaining how those expectations were violated by oppressive corporate conduct. It is not enough that a corporate director "directed" the

company to wrongfully dismiss a party.

### **Takeaways for Employers**

The Court of Appeal's decision in *Abbasbayli* helpfully reiterates some of the fundamental considerations related to directors' potential personal liability for unpaid wages, unpaid vacation pay, or wrongful dismissal. The Court left open the door for joint claims against both companies and their directors for unpaid wages or vacation pay under s. 131 of the OBCA, while also making clear that similar claims under s. 81 of the ESA are permitted in only very limited circumstances.

Finally, the decision in *Abbasbayli* reiterates that mere wrongful dismissal will not likely ground an oppression claim. Nevertheless, the Court of Appeal left room for non-shareholding employees to allege oppression in limited circumstances.

While many claims against corporate directors by former employees will be without merit, directors should nevertheless remain wise to their risks under the OBCA and ESA.

[1] 2021 ONCA 95.[ps2id id='1' target=""]

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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