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Abbasbayli v. Fiera Foods Company, 2025 ONSC 3240

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CITATION: Abbasbayli v. Fiera Foods Company, 2025 ONSC 3240
COURT FILE NO.: CV-18-00603277-000
DATE: 20250530

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
	)	
ISMAYIL ABBASBAYLI	)	Ismayil Abbasbayli, self-represented Plaintiff
	)	
Plaintiff	)	
– and –	)	
	)	
FIERA FOODS COMPANY, BAKERY DELUXE COMPANY, 2168587 ONTARIO LTD., DAVID GELBLOOM and BORIS SEREBRYANY	)	*Bonnie Greenaway and Y. Liza Leshchynska,* for the Defendants
Defendants	)	
	)	
	)	**HEARD:** February 24–28, March 3-7, written submissions March 21, April 4 and April 11, 2025

L. BROWNSTONE J.

Introduction

[1] The plaintiff, Mr. Abbasbayli, worked in the large factory at 50 Marmora Street, a facility that manufactures frozen dough and fully baked products for several affiliated companies including the corporate defendants. In 2018, his employment was terminated.

[2] The defendants claim to have terminated Mr. Abbasbayli's employment for cause. They claim that Mr. Abbasbayli and one of his colleagues engaged in "time theft" and punched each other's timecards to cover up the theft. When asked for an explanation, Mr. Abbasbayli offered none.

[3] Mr. Abbasbayli claims that his employment was terminated as reprisal for bringing health violations in the factory's production methods to the attention of management, and for being involved in employee attempts to unionize. He denies that he and the other employee, Hashi Yusofi, swiped each other's cards and denies that they engaged in time theft.

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[4] Mr. Abbasbayli claims damages in lieu of reasonable notice, moral damages, and punitive damages. His statement of clam also claims damages against the personal defendants, as directors of the corporate defendants, for unpaid vacation pay under s. 131 of the *Business Corporations Act*, R.S.O. 1990, c. B.16.

[5] For the reasons that follow, I dismiss Mr. Abbasbayli's claim.

Issue One: Did Fiera have cause to terminate Mr. Abbasbayli's employment?

The conduct at issue

[6] The factory at 50 Marmora Street employed over one thousand people who were engaged in shift work. Different related companies, including the three corporate defendants, employed the workers, and some employees, including Mr. Abbasbayli, worked for more than one of these companies. The defendants acknowledge that Fiera is the common employer. For ease of reference I will refer to the corporate defendants as Fiera.

[7] Employees were required to punch timecards upon entering and leaving the facility for their shifts. There were several stations at which employees could punch their timecards. There were video cameras above the stations. The video cameras and the punch clock software operated on two different systems. Their time stamps differed by a few minutes.

[8] The employees were told, and Mr. Abbasbayli agrees he knew, that timecards were personal to each employee. Employees were not to have anyone else punch their timecard, nor were they to punch anyone else's timecard.

[9] Ms. Vargola, then the manager and now the director of human resources, testified that Fiera has had a Business Values and Ethics Policy in place since at least 2007. The policy provided that all employees are responsible to ensure their timecards are accurate, complete, and truthful. Ms. Vargola testified that the policy was available in various places, including being posted on bulletin boards throughout the plant. Mr. Abbasbayli stated that the policy was not distributed to employees. He could not confirm he had seen it, although he testified that when he became lead hand in 2010 he studied all the company policies.

[10] I find that whether this specific policy was brought to Mr. Abbasbayli's attention is immaterial. Mr. Abbasbayli acknowledged that he knew that the timecard was personal to him and was not to be shared or used by anyone else. He knew that he had to punch his own timecard, that it would be wrong to have someone else punch his timecard, and that it would be wrong of him to punch someone else's timecard. Mr. Abbasbayli readily acknowledged that he had an obligation to make sure his timecard was accurate, complete, and truthful. He knew it was not acceptable to record time that he had not worked.

[11] He also knew he had to be honest and forthright with his employer. In any event, an employee does not need to be given a policy to know that he must be honest and forthright with his employer. These are duties every employee owes to an employer.

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[12] Fiera sometimes conducted investigations into whether its employees were engaging in misconduct. In early March of 2018, it received an anonymous tip that caused it to start an investigation into whether Mr. Abbasbayli and Mr. Hashi Yusofi, another employee who worked the same shift in the same department as Mr. Abbasbayli, were engaged in time theft by punching one another's timecards.

[13] Mr. Abbasbayli was concerned, both at the time of the investigation and at the time of trial, about the identity of the anonymous tipster. The exact genesis of the investigation was never clearly revealed. There is some evidence that concerns about Mr. Abbasbayli and Mr. Yusofi arose during the course of a separate investigation. However, the origin of the investigation is immaterial. It is what the investigation revealed that is relevant.

[14] Abhishek Khosla, the chief technology officer of Rian Consulting, the company that provided IT services to the Fiera group of companies, explained what the punch clocks captured and the records that were able to be generated from the timecard punches. On each successful punch of a timecard, the punch clock instantaneously recorded the date, time, employee ID (captured by a barcode on the employee timecard that was punched), and punch clock location.

[15] Data is retrieved from the punch clock and stored in a database. Rian Consulting provided the Fiera companies with software that allows human resources and management staff to review the punch clock data. Mr. Khosla also had access to the software and to the underlying database that stored the punch clock information. Mr. Khosla testified that any attempt to change the data would be captured in a log and any manual entries, which might be made by payroll staff if a card was not working, would show in a different colour.

[16] There was evidence from various witnesses that the punch clocks did not always work. However, when there were unsuccessful punches, the clock showed the employee that the punch was unsuccessful. Employees would then try again at the same or a different punch clock.

[17] The punch clocks registered each successful punch.

[18] Mr. Ochakovsky, then the director of manufacturing (now the senior director of manufacturing) at Fiera, and Ms. Vargola conducted the investigation regarding Mr. Abbasbayli's timecard use. They retrieved the timecard punch times captured by the software and compared that data with the video camera footage of the punch clocks, taking into account that the clocks on the camera footage and the clocks on the punch clocks differed by a few minutes.

[19] The camera revealed that on February 20 and 22, 2018, Mr. Abbasbayli was seen at the punch clock at the two times each of his and Mr. Yusofi's timecards were punched in, and Mr. Yusofi was seen at the punch clock at the two times each man's timecard was punched out.

[20] On February 21, 2018, the camera footage showed both Mr. Abbasbayli and Mr. Yusofi punching in at the start of their shift when their timecards were punched, but Mr. Yusofi punched out at each of the two times the men's timecards were punched out.

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[21] On February 23, 2018, the camera footage captured Mr. Abbasbayli punching in and out at the time each man's timecard was punched.

[22] Mr. Khosla identified reports that showed the punch clock data from these four dates as detailed above. He confirmed that the findings of the investigation were accurate.

[23] Once the results were received and reviewed, various employees of Fiera met with Mr. Abbasbayli and requested an explanation. Mr. Finkel, the assistant director of manufacturing, met with Mr. Abbasbayli and Mr. Yusofi together on March 13, 2018. The two men denied they had done anything wrong. They stated that it would have been "impossible" for both of them not to have been at work at the same time because they worked in different places preparing boxes.

[24] The next day, Mr. Ochakovsky met with Mr. Abbasbayli and showed him the camera footage and timecard data. Mr. Ochakovsky said that Mr. Abbasbayli became very angry, said he could not work under this stress, and said the evidence was fake and that he was going home. In cross-examination, Mr. Abbasbayli ultimately conceded that he told Mr. Ochakovsky the evidence presented was fake. He said that he meant that it was unclear and did not prove he was punching someone else's card.

[25] On about March 21, 2018, Mr. Abbasbayli met with Ms. Vargola and Mr. Zakharyan, the production manager at the time and now the assistant director of operations. They asked Mr. Abbasbayli for an explanation. Mr. Abbasbayli denied any wrongdoing, and suggested he was being framed because he was involved in discussions with other employees about starting a union. Mr. Zakharyan, Mr. Ochakovsky, Mr. Finkel, and Ms. Vargola all testified that Fiera knew nothing about that.

[26] After that third meeting, Ms. Vargola and Mr. Ochakovsky concluded that the relationship was damaged beyond repair, that the time theft, and Mr. Abbasbayli's dishonesty during the investigation, rendered termination of his employment the appropriate step to take. Mr. Abbasbayli's employment was terminated on March 23, 2018.

[27] Mr. Abbasbayli acknowledged his presence on the video footage. However, he argues that the camera does not show which cards he was swiping. He also argues that because the video cameras and the punch clock data were not linked in the same system, they were not reliable. I reject these arguments. An investigation can, and in this case did, collate information from more than one source.

[28] Mr. Abbasbayli questions the reliability of the video evidence as there are "jumps" in some video footage. There are, however, no jumps in the footage that form the crux of the investigation.

[29] Both Mr. Abbasbayli and Mr. Yusofi, who Mr. Abbasbayli called to testify, continued at trial to deny any wrongdoing. They denied sharing or swiping one another's timecards. Mr. Abbasbayli testified that he had no reason to punch anyone else's card, that they were each working during their entire shifts. Mr. Abbasbayli testified that it would have been impossible to run both his and Mr. Yusofi's lines if they were not both present at all times.

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[30] I find that Mr. Abbasbayli improperly swiped Mr. Yusofi's timecard, and improperly gave his timecard to Mr. Yusofi for him to swipe. I draw the inference that this was done to cover for one another when they were not working.

[31] In reaching this conclusion, I accept the evidence of Mr. Khosla and the Fiera employee witnesses. Where their evidence conflicts with Mr. Abbasbayli's, I prefer their evidence for the following reasons.

[32] I accept the evidence of Mr. Khosla, which was clear and straightforward.

[33] Mr. Khosla carefully explained how the bar codes on each employee's timecard were captured by the system. He did not stray beyond his area of knowledge, freely stating that he knew nothing about the video camera system. In preparation for testifying, he reviewed the records again to ensure they were accurate. There was no significant challenge to his evidence.

[34] The barcodes, captured in the punch clocks and the software, show that the two men's timecards were swiped at the times I have outlined in paragraphs 19-21 above. Neither Mr. Abbasbayli nor Mr. Yusofi provided any explanation for why this would be so, other than general allegations that the system did not always work properly. Mr. Khosla's evidence accounted for and explained how repeated punching was sometimes required and how it was captured by the system. That evidence in no way detracts from the accuracy of the records provided about whose cards were punched in and out, at what times.

[35] Mr. Ochakovsky confirmed that surveillance camera footage reviewed during the investigation accurately showed the punch clock stations at the plant. He explained that the footage was recorded contemporaneously and was maintained by a third-party company. It was stored on a secure computer at the plant and accessed only by Mr. Ochakovsky and Ms. Vargola. His evidence was clear and straightforward. It accords with the evidence of Mr. Khosla and the software and video records. I accept it.

[36] I also accept Mr. Zakharyan's evidence that it was possible for one employee to cover two lines at the same time. Mr. Zakharyan as production manager was very familiar with the plant's physical layout; he testified that he walked the plant up to three times a day.

[37] In contrast, I found Mr. Abbasbayli was not straightforward in his answers when confronted with evidence that might not help his position.

[38] For example, in his evidence in chief he stated that he started working in the factory at Fiera in 2003. When confronted with his discovery evidence where he said it was 2005, he stated that he remembered more details later, and he gave his answer at discovery not realizing the depth of the question. He stated that his memory could have improved since he gave his discovery evidence in 2022. When confronted with the transcript from the investigation interview, he acknowledged saying five times in the 2018 interview that he had worked for Fiera for 13 years, which would mean his start date was 2005. This accords with his evidence at discovery. At trial,

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he said he could not understand why he said this, and that he must have been confused from the stress.

[39] Mr. Abbasbayli also testified that his memory was "perfect" about the events of termination because they registered in his head. He then said he could not remember whether he said the footage was fake, but eventually conceded the point when confronted with the transcript.

[40] Mr. Abbasbayli did not mention working for Mr. Aliyev's company before 2023, a clearly relevant fact, even in his evidence in chief.

[41] In short, Mr. Abbasbayli did not concede when he was wrong or mistaken. He omitted relevant facts that would not help his position. He often did not respond directly to questions asked to him.

The adequacy of the investigation

[42] I am satisfied that Fiera performed an adequate investigation that was sufficient to provide a full and fair understanding of the events that occurred: *Park v. Costco Wholesale Canada Ltd.*, 2023 ONSC 1013 at para. 92. Fiera's witnesses described seeking pertinent information in the form of video footage and timecard stamp records. They took care to verify the accuracy of the information. They then sought an explanation from the affected employees. Mr. Abbasbayli offered no plausible explanation, despite being given several opportunities to do so.

[43] Mr. Abbasbayli complains that the investigation contained no written statements from his immediate supervisors, the production manager, or his colleagues. With respect, these statements were not necessary in the face of the evidence Fiera did have. If Mr. Abbasbayli thought particular people had relevant evidence, he was free to tell Ms. Vargola, Mr. Ochakovsky or Mr. Zakharyan about these witnesses. He was also, of course, free to provide his own explanation, something that was never forthcoming.

[44] I reject Mr. Abbasbayli's suggestion that he could have been punching the time clock with his card more than once. First, Mr. Khosla explained that subsequent timeclock punches would be captured by the system. Second, this explanation does not account for the fact that it was not his timecard being punched twice, it was his being punched once and that of Mr. Yusofi being punched once.

[45] Mr. Abbasbayli also states that Fiera should have reviewed more records, including the entry and exit records from the facilities on the days in question. In the absence of any explanation from Mr. Abbasbayli, Fiera did not need to go on a hunt for footage that, no matter what it revealed, would have provided no explanation as to why the men were swiping each other's timecards.

[46] I accept that in the circumstances, based on its investigation and the absence of any explanation from Mr. Abbasbayli, Fiera drew the only logical inference: Mr. Abbasbayli and Mr. Yusofi used each other's timecards so that they could arrive to work late or leave work early, so that their timecards would reflect they were present for their entire shift. This is time theft. There

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is no other plausible reason they would have done this, and no alternate explanation has been offered.

Is dismissal warranted?

[47] Just cause is permissible when an employee's misconduct is sufficiently serious that it gives rise to a breakdown in the employment relationship: *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 (ON CA) at para. 56. If the dishonesty at issue "violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer", just cause for dismissal exists: *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 SCR 161 at para. 48.

[48] Just cause termination under the *Employment Standards Act*, 2000, S.O. 2000, c. 41, requires "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer".

[49] Mr. Abbasbayli had no history of problems in the workplace. He had never been disciplined. Mr. Ochakovsky testified that Mr. Abbasbayli was a good employee, and that Fiera wanted to keep him. Fiera's witnesses were quite clear that, had Mr. Abbasbayli engaged with them in the investigation and provided some sort of explanation, his employment may well not have been terminated. However, given his expressed views that their evidence was fake, and his refusal to provide any explanation, they felt they had no choice but to terminate his employment.

[50] Mr. Abbasbayli argues that Fiera should have specified the quantum of time that was stolen, because the punishment would be different depending on that amount. However, Fiera was entitled to conclude that it could not trust Mr. Abbasbayli; it was about the quality of his actions and the lack of explanation for them, not the quantity.

[51] I accept that Fiera was willing to discipline Mr. Abbasbayli in a manner that fell short of dismissal if he appropriately provided a reasonable explanation. The evidence of the interviews between Fiera employees and Mr. Abbasbayli shows that they gave him this opportunity. I accept Ms. Vargola's evidence that Fiera had proceeded in such a way in another case.

[52] I also accept that once Mr. Abbasbayli refused to provide any explanation for what was, on its face, dishonest conduct, it was reasonable for Fiera to conclude the employment relationship had irremediably broken down. The performance of one's work during the hours an employee claims to be working is a basic requirement. Providing forthright answers to an employer's questions about one's conduct is another.

[53] Although Mr. Abbasbayli was not in a senior position, he was a longtime and trusted employee. He was one of over one thousand employees who were using the timecard system at the time. Fiera had to be able to rely on its staff to comply with basic obligations. It had to be able to expect an honest, forthright explanation when it noticed discrepancies.

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[54] I find that Mr. Abbasbayli's conduct goes to the heart of the employment relationship. Fiera could not be expected to continue its relationship with him in these circumstances. I find that his conduct meets both the common law and the *Employment Standards Act* definitions of misconduct. He knew the conduct was wrong. He knew how important the timecards were to Fiera's operations. He knew he was not to share his timecard. He knew he had a duty to be honest and forthright with his employer, and that includes during the investigation. He breached each of these obligations.

[55] I turn to another argument raised by Mr. Abbasbayli. He argued that because there is no document setting out his job description and duties, he could not be terminated.

[56] I reject that argument for the following three reasons.

[57] First, the documents he complained were incomplete were not documents that required a job description. The blank portions in those forms related to his work history and were presumably for him to complete.

[58] Second, the absence of written duties does not mean there were no duties, nor does it mean that his employment could not be terminated for failing to perform such duties.

[59] Third, there is no allegation that Mr. Abbasbayli's employment was terminated for failure to perform his duties as required. His employment was terminated for dishonesty and time theft-swiping another employee's timecard, and having the other employee swipe his card, and offering no explanation for this when asked for one.

[60] I concluded that Fiera had just cause to terminate Mr. Abbasbayli's employment.

Issue two: Was the termination a reprisal?

[61] I further reject Mr. Abbasbayli's argument that his employment was terminated as a reprisal. That is, even if I am incorrect in the just cause analysis, I find that Mr. Abbasbayli's employment was not terminated because he was a "whistleblower".

[62] Mr. Abbasbayli's evidence was that in 2010, about five months after he started working as a lead hand, he started to have concerns about health violations at the plant. Mr. Abbasbayli testified that when he worked on the packing line, he did not wish to package products that were made in violation of health protocols.

[63] He testified that when he told management about the violations, he was told to mind his own business. By 2015 or 2016, he stopped reporting his concerns. Mr. Abbasbayli acknowledged that he did not report violations to authorities when they came for inspections, or at any other time. He did not tell the owners. He did not provide any anonymous tips.

[64] In 2017 he started filming the violations. In cross-examination, he said he was filming them in order to show the violations to Fiera's two owners, but he did not have time to do so before his

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employment was terminated. At his examination for discovery, he testified that he filmed the violations because it was his civic duty to bring the violations to the public's attention.

[65] In his evidence in chief, Mr. Abbasbayli introduced 11 videos that he said support his contention that there were numerous health violations at the factory. I will briefly review that evidence.

[66] Mr. Abbasbayli testified that the cold chain was broken in many ways. He said that products that had thawed and were on the floor were gathered and repackaged, and then re-refrigerated. He testified that the first video showed that previously frozen bread was thawed, then repackaged and refrozen, not in accordance with the technical procedure required by the company.

[67] The video shows boxes and stickers and people, but it is impossible to tell what is happening in the video without Mr. Abbasbayli's explanation. Objectively speaking, the video does not show any thawing, repackaging, or re-refrigeration.

[68] The second video shows a box with the word "repack" which Mr. Abbasbayli acknowledged in cross-examination he had written on the box. It does not show what is in the box, or where it came from. Mr. Abbasbayli says the box contained dough that was picked up from the floor at the end of a shift and was to be repackaged. He did acknowledge in cross examination that bread that is misshapen is repackaged. He also acknowledged that part of the reason he wrote "repack" was to get footage for his video.

[69] Mr. Ochakovsky testified that sometimes product gets burned and good product comes out of the oven mixed with bad product. The product is separated and reviewed by quality assurance operators, and if any of it is suitable, it gets repackaged. Mr. Finkel added that if the product does not correspond to quality standards, it gets thrown out.

[70] The third video shows a group of people on the factory floor, and some boxes. Mr. Abbasbayli says the people are repackagers who are sorting bread that is not in suitable condition for repackaging but is nonetheless repackaged. There is no video footage of the product that is being repackaged.

[71] The fourth and fifth videos show dough being stored in large containers, one of which is overflowing onto the floor and another of which is uncovered.

[72] Mr. Abbasbayli says the sixth video shows bread in boxes on pallets being thawed, after which the bread would be repackaged and sent for resale. Objectively, the video shows boxes on pallets and some machinery.

[73] The seventh video shows some people working with product and some people loading them into boxes. Although Mr. Abbasbayli says that one can see that the bread did not come out of the oven, that is not in fact visible on the video. He says, again, that the freezing process is interrupted. This, too, is unseen on the video.

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[74] The eighth video is said to show bread being repackaged from one package to another.

[75] In the ninth video, the managers are visible. Mr. Abbasbayli indicates that the video shows that the thawing and re-freezing is going on in the presence of management, who knows the bread should not be in a warm place. Again, the bread and its state are not visible on the video.

[76] The tenth video shows two kinds of product coming down together on the same line. Mr. Abbasbayli says this shows the mixing of some products that contain allergens and some that do not. While the video shows two products coming down the same line, it contains no information about allergens.

[77] The eleventh video is said to show mixing of allergens as well, including bread product with seeds. Mr. Abbasbayli says this again shows the mixing of allergen and non-allergen material.

[78] Mr. Abbasbayli also testified that expiry dates on products would be changed.

[79] Mr. Abbasbayli testified that he reported these violations more than once until he understood that these processes went on under management's control and supervision. He stated that he last complained to management in 2015 or 2016, some two to three years before his employment was terminated.

[80] Mr. Finkel testified that bread was never out long enough to be thawed before being repackaged. He denied there were any violations. He stated that if the company did not work to required specifications, it would receive endless complaints from customers, which it did not.

[81] Moreover, Mr. Finkel denied that Mr. Abbasbayli ever brought these purported violations to his attention, nor was he aware of them being brought to anyone else's attention.

[82] I find that even if Mr. Abbasbayli had concerns, he did not raise them with management or anyone else at Fiera. I accept the evidence of Mr. Finkel in this regard. The videos do not objectively demonstrate safety concerns. Moreover, they were taken years after Mr. Abbasbayli last says he raised any concerns with management. He did not tell anyone about the videos at the time he was taking them. I do not know why he made the videos, but I find it was not for the purpose of documenting and raising concerns with management or the owners.

[83] He did not raise any concerns with food safety inspectors when they came to visit, or with anyone else.

[84] As Fiera was unaware that Mr. Abbasbayli had concerns, it could not have terminated his employment as reprisal.

[85] Further, I reject Mr. Abbasbayli's contention that his employment was terminated because he was encouraging employees to form a union. First, he provided no details of such discussions. There was simply no evidence that he was engaged in any discussions about forming a union - not

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the parties involved in discussions, not where and when the discussions took place, not the number of discussions, and not even a general time frame for the discussions.

[86] All the Fiera employees testified that they were unaware that Mr. Abbasbayli was involved in discussions to form a union. I accept this evidence, as there is no detail of any such discussions occurring, let alone being brought to the attention of management.

[87] I note that neither party addressed this court's jurisdiction to deal with the allegation that Mr. Abbasbayli's employment was terminated as reprisal for his efforts to unionize. Because I have found that the facts do not support the allegation, I do not need to deal with the jurisdiction issue.

[88] I find that Fiera terminated Mr. Abbasbayli's employment because of the results of its investigation into time theft, and his responses to the results of that investigation. I find no evidence of reprisal.

Issue three: In the alternative, what are Mr. Abbasbayli's damages?

[89] I will start by considering Mr. Abbasbayli's age, length of service, and the character of his employment: *Bardal v Globe & Mail Ltd*., 1960 CanLII 294, 24 D.L.R. (2d) 140 at 145.

Age and length of service

[90] Mr. Abbasbayli first worked as a security guard on the premises of 50 Marmora. In that position, he was employed by an outside security company, unrelated to the defendants. In his evidence in chief, he testified that in 2003, after a year of being a security guard, he started working for Fiera. In discovery he had testified that he started working at Fiera in 2005. The documentary evidence is minimal. There were a number of related companies at the factory, and Mr. Abbasbayli was sometimes working for Fiera and sometime for Upper Crust (the defendant 2168587 Ontario Ltd.). Some employees, including Mr. Abbasbayli for a time, were paid by an outside agency.

[91] The defendants acknowledge that Fiera was Mr. Abbasbayli's employer throughout his time at the factory.

[92] In the meetings between Mr. Abbasbayli and Fiera management during the investigation in March 2018, he said several times that he had worked for Fiera for 13 years. This accords with his discovery evidence.

[93] I find the weight of the evidence supports that Mr. Abbasbayli began working for Fiera in 2005, and I so find. He had thirteen years of service at the time he was terminated, and he was 55 years old.

Character of employment

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[94] Until 2010, he worked for Fiera as a line operator on the sweet line. In 2010 he was promoted to lead hand in bakery production. Mr. Abbasbayli described that he and Mr. Finkel had conflicts, and he was asked to train other people to be lead hand. He was returned to his role as box machine operator but preserved the wages of lead hand. There were times between 2010 and 2014 that he filled in as a lead hand.

[95] Mr. Abbasbayli did not hold a managerial position or a position that required use of a specialized skill. For part of his 13 years of service, he worked as a temporary employee, working both as a security guard and in various production-related roles.

Presumptive notice period

[96] Fiera argues that in these circumstances, if Mr. Abbasbayli were entitled to damages in lieu of notice, he would be entitled to ten months of damages. This is similar to the notice period granted in similar circumstances in *Drinkwater v Norampac Inc*., 2002 CarswellOnt 2643, [2002] O.J. No. 3116 and *Dawson v. FAG Bearings Ltd*., 2008 CanLII 55459.

[97] I agree that the notice period should take into account that part of Mr. Abbasbayli's tenure was temporary: *Jakubcak v. Dr. R.A. Melnyk Inc.*, 2011 BCCA 31 at para. 19, citing *Hedeluis v. Ian Martin Associates Ltd.*, [1984] O.J. No. 861, 4 C.C.E.L. 9 (Ont. High Ct. Jus.).

[98] In the circumstances, I agree that ten months' notice is the appropriate notice period.

[99] However, Fiera argues that Mr. Abbasbayli has failed to prove his damages, and that an adverse inference that he has mitigated his damages should be drawn from his failure to produce documents. In the alternative, Fiera argues that that Mr. Abbasbayli has failed to mitigate his damages.

Proof of damages

[100] Mr. Abbasbayli must prove the loss resulting from wrongful termination. The level of proof required is not onerous, but he does have to demonstrate that he was not employed or that he was employed for a lesser salary during the notice period*: Garcia v. 1162540 Ontario Inc*., 2013 ONSC 6574 at paras. 29-31, citing *Michaels* v. *Red Deer College*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324, at para. 11.

[101] Mr. Abbasbayli refused to produce any of his tax returns or T4 slips, including for the years 2018-2020, despite being repeatedly asked to do so. He took this position when represented by counsel and maintained it when representing himself.

[102] Mr. Abbasbayli acknowledged earning some income as a blogger during the notice period time, but said it was insignificant and did not disclose the amount. He failed to tell the defendants' counsel about any further employment he engaged in– the first time he mentioned the painting job in 2018-2019 was in his cross-examination at trial.

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[103] I agree with Fiera that it is impossible to tell how much income Mr. Abbasbayli earned during the notice period. He testified that he did not work in any meaningful way during this period.

[104] Mr. Abbasbayli and Mr. Aliyev were asked about statements made to or contained in the files of Dr. Bradbury, a psychologist who was engaged in Mr. Abbasbayli's accident benefits claim in 2024. Dr. Bradbury testified that Mr. Abbasbayli told her in 2024 that he had worked for six years for a window and door company. That is a company owned by his friend Mr. Aliyev. Dr. Bradbury also had a proof of employment form in her file that contained the same information.

[105] This would mean Mr. Abbasbayli started working for Mr. Aliyev's company in 2018.

[106] Mr. Abbasbayli denied telling Dr. Bradbury he had worked for Mr. Aliyev for six years. Mr. Abbasbayli first testified that his English was inadequate, and there may have been a language problem between him and Dr. Bradbury. When it was pointed out there was an interpreter present, he stated that she had made a mistake. However, Dr. Bradbury had an employment confirmation form completed by Mr. Aliyev.

[107] I permitted Mr. Aliyev to testify in reply, even though he had observed the proceedings and there had been a witness exclusion order.

[108] Mr. Aliyev also testified that Dr. Bradbury's statement was not accurate.

[109] Mr. Aliyev testified that Mr. Abbasbayli did some temporary work for his company part-time for somewhere between one and three months starting in about December 2018. He testified that Mr. Abbasbayli earned $18 or $19 per hour, slightly more than he was earning at Fiera, for four to five hours a day.

[110] Mr. Aliyev's evidence was vague and generated more questions than answers. He testified, without providing any detail, that at some point after Mr. Abbasbayli's termination from Fiera, the two men incorporated a company and planned to open a business together, but it did not materialize.

[111] Both men testified that Mr. Abbasbayli spent several years in Russia, between about 2020 and 2022 or 2023. I conclude Mr. Abbasbayli was not working for Mr. Aliyev during this period.

[112] I find that Mr. Abbasbayli told Dr. Bradbury, in the context of his accident benefits claim in 2024, that he had worked for Mr. Aliyev's company for six years. I accept that this statement may be admitted as an admission. However, I find that it was not a truthful statement. There was evidence that I accept that Mr. Abbasbayli was in Russia for several years during that period.

[113] However, I do find that Mr. Abbasbayli worked for Mr. Aliyev's company in 2018-2019, during the notice period, for an uncertain amount of time, and that he earned an undisclosed amount of money.

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[114] Fiera argues that an adverse inference should be drawn, and the court should find that Mr. Abbasbayli has fully mitigated his damages.

[115] In these circumstances, where Mr. Abbasbayli claimed not to work at all during the notice period, then claimed to work as a blogger earning minimal amounts, where Mr. Aliyev confirmed that Mr. Abbasbayli worked for him for at least part of 2018-2019, where Mr. Abbasbayli told Dr. Bradbury in early 2024 that he had worked for Mr. Aliyev for 6 years, and where Mr. Abbasbayli refused to produce basic, objective tax information to support his claim, I find an adverse inference is appropriate.

[116] I infer that Mr. Abbasbayli's T4s and tax returns would not have supported his position that he did not work for the entire notice period.

[117] I find that Mr. Abbasbayli has proven he did not work for five months of the notice period, until August 2018. However, I find that for five months of the notice period he fully mitigated his loss.

[118] I consider below his mitigation efforts during those first five months.

Mitigation

[119] Fiera argues that Mr. Abbasbayli failed to mitigate his damages. The burden is on Fiera to prove that Mr. Abbasbayli failed to take reasonable steps to mitigate his damages, and that if he had done so, he could have secured comparable alternative employment: *Krmpotic v. Thunder Bay Electronics Limited*, 2024 ONCA 332 at para. 20.

[120] Mr. Abbasbayli testified that until late February or early March 2020 when he went to Russia, he did not look for a job as he was not in a condition that would allow him to work.

[121] Mr. Abbasbayli filed medical records from 2018. He was first confronted about the time theft allegations on March 13, 2018. On March 20, 2018, he went to the hospital with high blood pressure, and states he was undergoing treatment and tests until he stabilized in about August. He had never had high blood pressure before. He attributed this to having voices raised and being treated badly by Fiera in the investigation interviews and termination process.

[122] However, the documents show that he soon started to feel better. Mr. Abbasbayli explained the note in his medical records of March 2018 that his symptoms quickly improved by saying he did not like to complain. I do not accept this explanation. I find that he was providing his medical treatment providers with accurate information.

[123] He also testified that he was feeling better by about August 2018 - well enough to launch this litigation – but he did not look for work.

[124] Mr. Abbasbayli testified on discovery that he could not get past being fired, presumably meaning on job applications this was an impediment.

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[125] In 2020 Mr. Abbasbayli went to Russia to marry. He arrived shortly before the COVID-19 pandemic was declared and had to stay for a period of time that was sometimes said to be months, sometimes years. He opened two enterprises while there, but they did not succeed.

[126] Mr. Abbasbayli testified that within a month of returning to Canada, he got a job working for Mr. Aliyev, painting windows and doors. He worked there for about a year until February 2024, when he got into an accident.

[127] I do not accept that Mr. Abbasbayli was unable to work throughout 2018 and 2019. I find that the records do not support his contention that he was unable to work during this period. Even on his own evidence, he was feeling better by August 2018, but did not look for work.

[128] Mr. Abbasbayli described a car accident he had in 2024 and some medical attention he received as a result. The parties agreed to file his medical records from 2024, although given the length of time after the termination, I find they have no connection to his termination and no relevance to this litigation.

[129] I find that Fiera has proven that Mr. Abbasbayli failed to take reasonable steps to mitigate his damages in the first five months after his dismissal. He acknowledged not looking for work at all during this time, and the medical records do not support that he was unable to do so. However, Fiera has not proven that he could have secured comparable alternative employment had he taken reasonable steps. I therefore maintain his notice period as five months in accordance with my analysis above.

Moral and punitive damages

[130] Moral damages may be awarded if an employer engages in a breach of the duty of good faith and fair dealing at the time of termination. If an employee can prove that the way in which he was dismissed caused mental distress that was in the reasonable contemplation of the parties, the court may award moral damages: *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 SCR 362 at paras. 54-56.

[131] Mr. Abbasbayli maintains the manner in which Fiera treated him was high-handed. He was falsely accused of theft, something he would never do. He had been a good and loyal employee for years. The stress of how he was treated caused his health to suffer for months. It started after the first meeting, when he went to the hospital suffering from high blood pressure. He acknowledged telling the physician on March 27, 2018, that his symptoms had quickly improved.

[132] Mr. Abbasbayli has adduced no evidence to demonstrate that he suffered more than the usual mental distress that accompanies having one’s employment terminated.

[133] I have no doubt that the events of March 2018 were distressing to him. I accept that he found all those events to be painful, stressful, and difficult.

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[134] However, there was nothing that Fiera did at the time of termination that it should have contemplated would cause Mr. Abbasbayli mental distress. There is no evidence that Fiera acted in bad faith. It handled the termination fairly, giving Mr. Abbasbayli adequate time and opportunity to explain his conduct before proceeding with the termination.

[135] Nor is Mr. Abbasbayli entitled to punitive damages. He cannot point to any conduct of Fiera that was "malicious, oppressive, high-handed," or that "offends the court's sense of decency": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36.

[136] There is no independent actionable wrong. Fiera presented Mr. Abbasbayli with the results of its investigation and requested an explanation. In the absence of receiving any explanation other than that its evidence was fake, it concluded it could not trust Mr. Abbasbayli anymore and terminated the employment relationship. There is nothing high-handed or indecent about its conduct.

[137] Mr. Abbasbayli's claim for moral and punitive damages is dismissed.

Issue four: OBCA claim against the personal defendants

[138] Mr. Abbasbayli did not pursue this claim and it is dismissed.

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Disposition

[139] Mr. Abbasbayli's claim is dismissed. The parties are encouraged to agree on costs. If they are unable to do so, the defendants may send costs submissions of no more than five double-spaced pages, along with offers to settle and a bill of costs, by June 10, 2025. Mr. Abbasbayli may respond with the same page limits by June 20, 2025. Submissions may be sent to my judicial assistant at Linda.Bunoza@ontario.ca

L. Brownstone J.

Released: May 30, 2025

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CITATION: Abbasbayli v. Fiera Foods Company, 2025 ONSC 3240
COURT FILE NO.: CV-18-00603277-000
DATE: 20250530

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ISMAYIL ABBASBAYLI

Plaintiff

– and –

FIERA FOODS COMPANY, BAKERY DELUXE COMPANY, 2168587 ONTARIO LTD., DAVID GELBLOOM and BORIS SEREBRYANY

Defendants

REASONS FOR JUDGMENT

L. Brownstone J.

Released: May 30, 2025