

CITATION: Turner v. York University, 2010 ONSC 4388

COURT FILE NO.: CV-09-370928CP

DATE: 2010-09-07

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JONATHAN TURNER

Plaintiff

) *Henry Juroviesky and Kevin G. Caspersz, for*
) *the Plaintiff*

- and -

YORK UNIVERSITY

Defendant

) *Ronald G. Slaght, Q.C. and Kristian Borg-*
) *Olivier, for the Defendant*

Proceeding under the *Class Proceedings*
Act, 1992

) **HEARD:** July 21 and 22, 2010

CULLITY J.

[1] In this motion to certify an action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”) there was evidence of the following facts that do not appear to have been materially in dispute:

1. The plaintiff was enrolled in courses at York University for the fall and winter semesters in the academic year 2008 - 2009. He has now completed the academic requirements for a degree and was due to graduate in the winter of 2010.
2. On or about November 6, 2008, approximately 3340 contract faculty, consisting of teaching, graduate and research assistants at York University, who were members of the Canadian Union of Public Employees Local 3903 (“CUPE”) were called out on strike. CUPE has stated that these individuals conducted more than 50 per cent of the teaching at the University.
3. York’s full-time faculty members who were not members of CUPE were not prevented by the strike from teaching their courses.

4. Upon the commencement of the strike - and with limited exceptions - York suspended all academic activities, including classes and examinations, in each of its faculties.
5. York's decision to suspend classes was based on the York Senate's class cancellation policy set out in the University Calendar.
6. As a result of York's decision and the strike, the great majority of York's approximately 50,000 students were unable to attend classes while the strike continued.
7. In the statement of claim - issued on January 23, 2009 - the plaintiff sought an order certifying the proceeding under the CPA and appointing him to represent a class consisting of all students enrolled at York for the fall semester of 2008 to the date of the cessation of the strike and the commencement of classes for all class members.
8. On behalf of the class, the plaintiff claimed damages for breach of contract, breach of statutory obligations under the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, and a disgorgement by way of a constructive trust of all tuition and other fees paid by class members to York for the fall semester of 2008. These claims were advanced on behalf of students taught by CUPE faculty as well as those taught by non-CUPE faculty members.
9. The strike ended on January 29, 2009 and all classes resumed on February 2, 2009 as a result of provincial back-to-work legislation.
10. Following the termination of the strike, York's Senate rescheduled the 2008 fall semester to run from February 2 - 19, 2009 with exams to be held from February 20 - March 3, 2009. The fall semester that was interrupted on November 6, 2008 was originally scheduled to end on December 2, 2008 with examinations to be held from December 8 - 22, 2008.
11. The 2009 winter semester that had been originally scheduled to run from January 5, 2009 to end on April 3, 2009 (with a reading week from February 16 - 20, 2009) and an examination period from April 6 - 27, 2009 was similarly rescheduled to run from March 4 - May 21, 2009 with exams held from May 22 - June 2, 2009.
12. The plaintiff alleges that, as a result of the strike and York's response to it, the students suffered:
 - (a) a loss of one week (five teaching days) of instruction from both the fall and winter term;
 - (b) loss of one to one-and-a-half weeks from the exam period in each terms;

- (c) interruption for twelve weeks after completing nine of thirteen weeks of instruction in the fall term;
- (d) loss of a reading week;
- (e) delay in the conclusion of the fall term by ten weeks; and
- (f) delay in the conclusion of the winter term by five weeks.

13. In addition to the decision with respect to the rescheduling of classes, York adopted a number of other remedial measures, including:

- (a) authorizing course instructors to assess the need for additional remedial steps for students in their courses - including amending curricula and varying the weight to be given to assignments and examinations;
- (b) administrative measures designed to alleviate financial damages suffered by students as a result of the strike;
- (c) permitting students to reside rent-free in university housing during the new extended periods of the winter semester;
- (d) increasing bursaries and awards for students who had maintained a "B" average and demonstrated financial need; and
- (e) petitioning the Ontario government to extend financial provision under the Ontario Student Assistance Program to cover additional expenses resulting from the extended academic year.

14. On May 17, 2010, the plaintiff filed an amended statement of claim that refers to the rescheduling and compression of the fall and winter semesters of the 2008 - 2009 academic year. It also, in various places, refers expressly or impliedly to the inadequacy of York's remedial measures and the inferiority of the educational services provided relative to those that would have been available if York had performed its common law and statutory obligations.

[2] In addition to the above, the defendant delivered affidavits that referred to the policies adopted by the Senate with respect to disruptions of academic programs and the contents and importance of the Calendar to which students were referred but - according to the plaintiff's deponents - not at the time of enrolment when a contractual relationship between York and the class members was allegedly effected.

[3] Each of the requirements for certification in section 5 (1) of the CPA must be satisfied. Although counsel for the defendant challenged the case for certification on the basis of the requirements in sections 5 (1) (a) through (d), the principal focus of their objections was directed at that in section 5 (1) (a) with respect to the disclosure of a cause of action.

Section 5 (1) (a) – A Cause of Action

[4] It is well established that, for this purpose, evidence is inadmissible and the question has to be decided solely on the basis of the pleading on the assumption that the facts pleaded can be proven.

[5] It follows that, although the undisputed facts set out above may have some bearing on the requirements relating to the existence of a class adequately described, the existence of common issues and the preferable procedure, only those that were pleaded can be considered for the purpose of section 5 (1) (a).

[6] It will be convenient to consider, first, the claims based on breach of contract.

1. Breach of Contract

[7] The pleading of the contractual claims is, in my opinion, deficient in a number of respects.

[8] The sole description of the terms of the contract is contained in paragraph 46 of the amended statement of claim as follows:

At the time of their enrolment into classes, each of the Plaintiff and Class Members entered into a contract with the Defendant, who, in exchange for the aforementioned, is to provide each of the Plaintiff and Class Members with access to resources, class instruction and higher education.

[9] The pleading does not state that the contract was in standard form for all students, whether it was entirely, or in part, written or oral, or whether the term or terms that were breached were express or implied.

[10] It is pleaded that York breached the contract by cancelling all classes; providing compressed academic periods instead of those "originally bargained for 13 weeks"; compromising the quality of the plaintiff's education by providing inferior educational services relative to those originally bargained for; compromising the worth of the plaintiffs education by causing damage to the defendant's standing as a reputable institution; and "proximately" causing mental stress, general emotional discomfort, inconvenience, and undue disruption to the plaintiff and class members.

[11] The first defect is that the allegation that York breached its contractual and statutory duties owed to students whose classes were directly affected by the strike of their instructors is not supported by any allegations of fact from which it could be inferred that any conduct of York breached a duty owed to such persons or, in any way, caused them to suffer damages. While this point has obvious relevance to the issue of an over-inclusive class that may arise under section 5 (1) (b), it affects also the question whether causes of action owed to the plaintiff had been disclosed as it is nowhere pleaded that his courses were taught by non-CUPE members. As from his cross-examination it appears that he may have had two courses conducted by CUPE members

and two conducted by full-time non-CUPE faculty, this omission in the material facts in his pleading could possibly have been rectified if leave to amend was requested.

[12] A second but, I believe, more serious pleading deficiency that was criticized by York's counsel was the failure to identify with sufficient clarity the term of the contract that York is alleged to have breached. In response, in a reply factum - at para 36 - plaintiff's counsel stated:

If the Plaintiff claims that the Defendant breached a contract by some action it undertook, then in the Plaintiff's respectful submission, it is apparent that the plaintiff is claiming that a term of the contract ran contrary to such action.

[13] In my judgment, this response is not good enough. The plaintiff does not sufficiently plead a breach of contract by stating that certain actions in particular circumstances constituted a breach of an otherwise unspecified term that forbade them. A plea that the defendant's conduct was a breach of contract without specifying the term that was breached is nothing more than a bald assertion of liability that does not sufficiently indicate the case the defendant has to meet.

[14] While some parts of the pleading suggest that any cancellation or interruption of classes -whatever the reason - would be a breach of contract, it is stated in other places that the plaintiff and the class members were promised thirteen weeks of "relatively" uninterrupted instruction. If that is the contractual term that is alleged to have been breached, the material facts - namely the source of the term in writing or by implication and the factual basis for the assertion that it was a contractual term - are nowhere pleaded; and the description of the term itself as requiring relatively uninterrupted instruction is hardly described with sufficient particularity.

[15] If the breach consisted of the "relative" interruption of classes, the term breached might be that cancellation was never permitted in any circumstances, was permitted only in reasonable circumstances, or was permitted only if educational and academic standards were maintained by remedial action. Reading the pleading generously albeit with some difficulty - and in view of the repeated references to the inadequacy of the remedial measures implemented by York - the last of the possibilities mentioned seems likely to be what was intended. That, however, would involve pursuing the kind of inquiry that Winkler J. declined to enter into in *Ciano v. York University*, [2000] O.J. No. 183 (S.C.J.) - a case involving an earlier strike at York.

[16] Unlike this case, *Ciano* involved a motion for summary judgment so that the issue was whether a triable issue of breach of contract had been raised on the evidence in the light of the pleading. In finding that there was no triable issue on the question whether the plaintiff had suffered damages, the learned judge considered a submission that damages could be presumed from the evidence that classes had been disrupted and that York's evidence that its remedial measures were sufficient to maintain academic standards should be rejected. Winkler J. declined to take this approach on the ground - among others - that it would involve a qualitative assessment of the education provided by York and that this was not a matter for the court to decide. In paras 20 - 22 of his reasons, the learned judge stated, in part, as follows:

In rejecting the accommodation program [*i.e.*, remedial measures] and asking the court to do likewise, the plaintiff is seeking a determination from the court on the quality of education received; that is something our courts cannot entertain.

It is clearly established in Canadian jurisprudence that the court should not impede on an educational body's decisions regarding the nature and quality of education ... While it may seem as though the request for return of a portion of tuition fees is "quantitative" in nature, the plaintiff is attacking the educational adequacy of the proffered alternative in the form of the accommodation program.

It is not appropriate for the courts to engage in an analysis of the qualitative aspects of an educational program with the result that I am not in a position to reject the accommodation program out of hand.

[17] Counsel for the plaintiff argued that *Ciano* is distinguishable from this case because - as Winkler J. had indicated - the plaintiff had provided no evidence that he had suffered damages other than the loss of instructional time *per se*. By way of contrast, the plaintiff has delivered an affidavit of a chartered accountant that discusses the methods by which damages might be assessed under various heads if York is found to be liable at trial.

[18] The question at present under consideration is not concerned with the proof of damages and evidence is not admissible. The first question is whether the plaintiff has sufficiently identified the term of the contract with York that York has allegedly breached. If, as I believe is the most reasonable interpretation of the pleading, the term consisted of an obligation not to cancel classes without providing adequate remedial academic relief, the question whether it was breached involves precisely the kind of inquiry that was rejected in *Ciano*.

[19] Defendant's counsel framed their objection of the pleading more generally than I have just done. The nub of their submissions on section 5 (1) (a) was their reliance on numerous authorities in which courts have declined to grant civil or administrative law remedies in respect of the academic and educational decisions of universities and other educational facilities. In paragraph 4 of their factum, defendant's counsel encapsulated their case that it is plain and obvious that the plaintiff could not succeed on the causes of action it has attempted to assert:

In short, it is well settled that students are subject to a university's discretion with respect to academic decisions made by the university, such as a decision to suspend classes in the midst of a campus-wide, legal labour disruption. A claim attacking a decision like this must fail, whether the claim is styled as breach of contract, breach of statute, unjust enrichment, or otherwise.

[20] While the ground for the general rule of non-intervention has sometimes been described in terms of the exclusive jurisdiction of the educational body - and a corresponding absence of jurisdiction of the courts - the Court of Appeal, in the most recent decision cited by counsel, preferred an analysis in terms of the court's refusal to exercise jurisdiction to interfere with the legitimate exercise of discretion by the body rather than an absence of jurisdiction: *Gauthier v. Saint-Germain*, 2010 ONCA 309. As the correct interpretation of the reasoning of Rouleau J.A.

in *Gauthier* was very much in issue between counsel, I will set out the passages from the judgment of the court that were central to counsel's submissions:

[46] In my opinion, to determine whether the court has jurisdiction it is more useful to look at the compensation claimed by the plaintiff. When a party is seeking to have the internal academic decision of a university reversed, the proper procedure is judicial review. However, if the plaintiff is alleging the basis for a cause of action in tort or breach of contract and claiming damages, the court will have jurisdiction even if the dispute arises out of the scholastic or academic activities of the university in question.

[47] On the other hand, by enrolling at the university it is understood that the student becomes subject to the institution's discretion in resolving academic matters, namely the assessment of the quality of the student's work, the organization and carrying out of university programs and identification of the skills required to act as a professor or a thesis supervisor. This discretion is very broad. Thus, simply arguing that a scholastic result is wrong or a professor is incompetent will usually not suffice to make out a cause of action in breach of contract or the law of delict.

[48] To make out a cause of action for breach of contract, a student will have to show that the university has failed to perform an express or implied duty assumed by the institution in approving the students enrolment. ...

[50] Accordingly, even if the court proves to have jurisdiction, [previous cases] nevertheless established that it is inclined to strike out the cause of action under rule 21.01 (1), or in exceptional circumstances rule 25.11, when it appears that the cause of action is untenable or unlikely to succeed. The circumstances in which the court will exercise its discretion to strike out a cause of action fall into two categories. Second, if the pleading does not contain the particulars necessary to show that the university or its employees exceeded the broad discretion enjoyed by them, the court may strike out the cause of action.

[21] In the submission of plaintiff's counsel, the correct interpretation of the above reasoning is that the question whether the court will exercise jurisdiction depends simply on whether the constituent elements of a civil cause of action have been pleaded. Having, in their submission, pleaded the material facts necessary to establish a breach of contract in cases that did not involve educational institutions, it was irrelevant whether the university's conduct concerned a matter that could be characterized as academic in nature.

[22] Counsel for the defendant did not accept that the necessary material facts had been pleaded but submitted that, in any event, the interpretation advanced by plaintiff's counsel ignored the deference that the court indicated should be shown to academic matters that fall within the very broad discretion of the university. This case, in their submission, fell squarely within the "organization and carrying out of university programs" and the terms of the contract that impose the duty alleged to have been breached have not been pleaded with sufficient

particularity. Even if the relevant term can be reframed as suggested above, defendant's counsel submitted that there is nothing in the pleading to suggest that the university, or its employees, exceeded the broad discretion enjoyed by them to maintain the quality of academic instruction in the institution. In these circumstances, they submitted, the claims for breach of contract could properly be struck out pursuant to rule 21.01 (1) (b) and, as the test is the same for the purposes of section 5 (1) (a) of the CPA, the first of the requirements for certification is not satisfied in respect of such claims.

[23] I believe the submissions of York's counsel are correct. Even on the most generous interpretation of the pleading, the plaintiff is seeking to have the court make qualitative assessments of the effect on educational standards of York's response to the strike and of the remedial measures introduced. These are matters that fall within the discretion of the University and - without a plea of facts that if proven could establish that York exceeded or abused its discretion - bald assertions that they constituted breaches of contract are not enough.

[24] I am also in agreement with the submission of defendant's counsel that the facts as pleaded stand in stark contrast to those in *Ramdath v. The George Brown College of Applied Arts and Technology*, [2010] O.J. No. 1411 (S.C.J.) where the plaintiffs alleged that the same negligent misrepresentations of fact were made to them and relied on to their detriment when deciding to enrol in a particular course of studies at the college. No challenge to the institution's discretion in academic matters was involved in these circumstances.

2. Consumer Protection Act

[25] The amended statement of claim contains allegations of a number of breaches of the *Consumer Protection Act* and claims for damages and restitution pursuant to its terms. Remarkably, the plaintiff also seeks rescission of the agreements between York and the plaintiff and the class members. The possible effect this would have on rights to graduation is not mentioned.

[26] The claims under the *Consumer Protection Act* are generally premised on the existence of a "consumer agreement". This is defined as:

... an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment".

[27] In summary, the alleged breaches of the statute, and other consequences of the university's cancellation and compression of semesters and examination period were identified as follows:

- (a) a breach of a warranty that services supplied under a consumer agreement are of reasonably acceptable quality: section 9 (1);
- (b) the university's conduct was a material change in the services it was to provide and, as such, the services were deemed to be unsolicited and gave rise to no legal obligation in respect of the use or disposal: section 13 (1) and (4);

- (c) York's failure to disclose its disruption policy was an unconscionable representation and, in consequence, an unfair practice. As such, it entitled the plaintiff and the class members to rescind their agreements with the University: section 15, 17 and 18 and;
- (d) York's consumer agreements with its students were "remote agreements" and "internet agreements" within the meaning of section 20(1) of the Act and, York having failed to disclose prescribed information required by section 45 for remote agreements, the plaintiff and the class members are entitled to cancel the agreement and receive a refund of their tuition fees.

[28] Like the pleading of breach of contract, the claims based on the *Consumer Protection Act* are premised on the existence of an agreement by York to provide uninterrupted – or "relatively uninterrupted" – tuition for thirteen weeks and particular examination periods. In these respects, the pleading is equally deficient in its statement of the material facts that support the existence of such an agreement. In addition, defendant's counsel raised, again, the more fundamental objection that the claims could not withstand the court's deference to the university's academic decisions.

[29] On this basis, defendant's counsel submitted that the statutory rights conferred on consumers - like those under the common law of contract - would be operative only if facts from which an excess or abuse of the university's discretion with respect to the organization and carrying out of its academic programs could be inferred.

[30] I accept this submission. The *Consumer Protection Act*, like its predecessor, the *Business Practices Act*, R.S.O. 1990, c. B-18, introduced important modifications in an area that was previously occupied by the principles of common law and equity that governed other contractual relationships.

[31] In *Blasser v. Royal Institution for the Advancement of Learning* (1985), 24 D.L.R. (4th) 507 (Que. C.A.), at page 515, the considerations of policy that justify judicial deference to academic decisions of universities were described as follows:

In any university ... there are certain internal matters and disputes that are best decided within the academic community rather than by the courts. This is so, not only because the courts are not as well-equipped as the universities to decide matters such as academic qualifications, grades, the conferring of degrees and so on, but also because the matters ought to be able to be decided more conveniently, more quickly, more economically and at least as accurately by those who are specialized in educational questions of that kind. In addition, of course, there is very good reason not to risk compromising the essential independence of universities by undue interference in their academic affairs.

[32] Absent any legislative indication to the contrary, the same considerations should, in my opinion, apply to the claims based on the *Consumer Protection Act*.

[33] In passing, I note that the question whether the academic services provided by York in response to the strike were of "reasonably acceptable quality", or a "material change" in the services previously provided, within the meaning of sections 9 (1) and 13 of the Act would require precisely the kind of inquiry that was rejected by Winkler J. in *Ciano*. Nor do I accept that the plaintiff has adequately pleaded a representation by York - let alone an "unconscionable" representation.

[34] I note, also, that as the circumstances and manner in which the contracts with York were effected are not disclosed in the pleading, no factual basis for the alleged characterization of the contract with York as a remote or internet agreement has been pleaded.

[35] It follows that, in my judgment, the submission of plaintiff's counsel that causes of action based on the *Consumer Protection Act* have been disclosed in the pleading must be rejected.

3. Unjust enrichment

[36] The claim that tuition fees paid by class members are held on a constructive trust based on unjust enrichment is, in my opinion, precluded by the findings I have made. If, as I believe, the court is not to assess the quality of the educational response of York to the strike, it must follow that an inquiry into the presence of an adequate juristic reason for its enrichment is also foreclosed.

[37] It follows from the above that, in my judgment, the requirement in section 5 (1) (a) of the CPA is not satisfied and, in consequence, the motion for certification must be dismissed.

[38] I will, however, add that, in my opinion, plaintiff's counsel were wide of the mark when they criticized as merits-based York's reliance on the deference to be shown to its discretion in academic matters. In any class proceeding the question whether a cause of action has been disclosed in the pleading could be described as concerned with the merits of the proceeding in the broad sense that the pleading could be struck and the action dismissed if the question is answered in the negative. A finding, for example, that a pleading of a claim in negligence does not disclose a duty of care could be described as a decision on the merits in this sense. There is obviously no prohibition on such merits-based arguments for the purpose of section 5(1)(a). When it is said that certification is not a test of the merits of a proceeding, and that, for example, merits-based class definitions are not permitted, the reference is to a decision on the facts and not just on the pleading.

[39] In deference to the submissions of counsel, and because the case may travel further up the judicial hierarchy, I will comment briefly on the requirements in sections 5 (1) (b) through (d) on which counsel were not in agreement.

Section 5 (1) (b) – A Class

[40] Even if the pleading deficiencies I have identified did not exist, I would, for the reasons already given, find that the class is objectionably over-inclusive. Unless the subtlety of the submissions of plaintiff's counsel has escaped me, I see no basis in the pleading, and the evidence, on which it could be held that the students whose instructors were on strike suffered damages as a result of the university's conduct. Moreover, and quite apart from the fact that a limited number of students did not have their classes cancelled, the necessary basis in fact for breaches of duty owed to those whose classes could not be held because of the strike of their instructors is not apparent to me.

[41] I am in agreement with defendant's counsel that, in this respect, the case for certification is deficient for essentially the same reason as that given by Winkler J. in *Mouhteros v. De Vry Canada Inc.* (1998), 41 O.R. (3d) 63 (G.D.) where it was alleged that an educational institution had made actionable misrepresentations to students. The learned judge rejected a class consisting of all the students at the institution on the ground that as there was no evidence that the misrepresentations were made to all of the students, the class included many who "may have no claim for any of the relief pleaded, let alone a claim which raises a common issue": at page 68.

Section 5 (1) (c) - Common Issues

[42] Plaintiff's counsel provided an elaborate set of proposed common issues for trial. Apart from one issue relating to the possibility of an aggregate assessment, these address the constituent elements of the causes of action for breach of contract, the claims under the *Consumer Protection Act*, and the claim for unjust enrichment on which the plaintiff sought to rely. Issues are framed relating to the existence of a standard contract between York and its students, the existence of certain express or implied terms relating, for example, to the number of weeks of academic instruction, and whether York's conduct was in breach of those terms.

[43] Numerous issues are similarly provided relating to the interpretation of the *Consumer Protection Act* and the application of its provisions to York's conduct.

[44] If the deference to be shown to York's discretion and the deficiencies in the pleading did not exist, these issues would possibly pass muster were it not for the absence of any evidence, or basis in fact, for the existence of a standard contract between York and its students. As this is, to a very large extent, a factual premise on which the commonality of the other issues depends, the attempt to formulate it as a common issue is tantamount to an invitation to the trial judge to make a finding of commonality that is properly to be made at this stage of the proceeding.

[45] The absence of evidence that each of the students at York University entered into a standard form contract has the effect of converting virtually all of the common issues into individual issues: see *Matoni v. CBS Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.), at paras 105 and 119. I am in agreement with defendant's counsel that, unlike the position in that case, this conclusion applies equally to the issues proposed in respect of the *Consumer Protection Act*.

[46] The absence of such evidence opens up a necessary inquiry into the documents signed, representations made and facts disclosed to each of the students at the time of enrolment.

Similarly, the questions whether the educational services received as a consequence of York's remedial measures were of "acceptable quality" within the meaning of section 9 of *Consumer Protection Act* and whether York's conduct was "an unsolicited material change" for the purposes of section 13 (4) would likewise have to be determined separately for each student.

[47] Finally, the question whether there was an absence of a juristic reason for York's receipt of tuition fees for the period covered by the strike is sufficiently dependent on the commonality of the issues relating to York's alleged breach of common law and statutory duties to prevent the issue of unjust enrichment to be acceptable as a common issue.

Section 5 (1) (d) - The Preferable Procedure

[48] If I am correct in finding that this action raises internal academic issues that are properly to be considered to lie within the discretion of York, it must follow that a class proceeding is not the preferable method of resolving the issues that arose as a consequence of the strike. Neither access to justice, judicial economy or behavioural modification is engaged in these circumstances.

[49] If, contrary to my view, this is not a case in which the court should defer to York's discretion, the lack of commonality in the issues proposed for trial would, in my opinion, still deprive a class proceeding of any benefit to be obtained in respect of the three advantages and legislative objectives of the procedure under the CPA: see *Mouhteros*, at para 33.

Conclusion

[50] For the above reasons the motion for certification is dismissed.

[51] At the conclusion of the hearing I invited counsel's submissions on costs in the event of a decision granting, or denying certification. As the defendant has been successful - and as I see no basis in section 31 (1) of the CPA, or otherwise, to depart from the normal rule - I would ordinarily award costs to the defendant on the basis of a partial indemnity. While I understood counsel for York to agree that such an order would be appropriate, they also indicated that they had received no instructions from their client on the question of costs. Counsel said that they would provide written submissions. As I have not received these - and as counsel were aware that I would retire nine days after the hearing - I am presuming that the defendant is not seeking costs. If I am mistaken in that regard, and if written submissions are forthcoming, there may be a question whether I am *functus* with respect to the issue and, if so, whether I can nonetheless refer it for an assessment.


Cullity J.

CITATION: Turner v. York University, 2010 ONSC 4388

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JONATHAN TURNER

Plaintiff

- and -

YORK UNIVERSITY

Defendant

REASONS FOR JUDGMENT

Cullity J.

Released: September 7, 2010