See paras. 43, 45, 52

Indexed as:

French v. Trimel Corp.

Between
Dr. Ian W. French, Plaintiff, and
Trimel Corporation, Biovail Corporation International, and
Biovail Research Corporation, Defendants
And Between
Trimel Corporation and Biovail Research Corporation,
Defendants (Plaintiffs by Counterclaim), and
Dr. Ian W. French, Plaintiff (Defendant by Counterclaim), and
Dimethaid Research Inc., Daniel W. Sooley, and Rebecca E.
Keeler, Defendants added to Counterclaim)

[**1994**] **O.J. No. 1568**

Action No. 93-CU-66550CM

Ontario Court of Justice - General Division
Toronto, Ontario

B. Wright J.

Heard: June 10 and 14, 1994.
Judgment: July 15, 1994.

(29 pp.)

Master and Servant -- Breach of contract -- General -- Fundamental breach, what constitutes -- Remedies of employee -- General -- Dismissal of employees -- General principles -- Constructive dismissal -- Grounds -- Failure to devote full time and attention to employment -- Practice -- Judgments and orders -- Summary judgments -- Conditions precedent, absence of genuine issue to be tried.

Motion and cross-motion for summary judgment. In November, 1989, the plaintiff, a pharmaceutical expert having unique knowledge and experience, entered into a five-year employment agreement with the defendant. That agreement provided that the plaintiff was to be

paid $150,000 per annum subject to annual increases based on the Consumer Price Index in addition to receiving $300,000 worth of the defendant's shares to be purchased for him within 60 days of the date of the employment agreement, to be held by a third party in escrow, and to be released to him in five equal annual blocks commencing on November 22, 1989. Instead of purchasing the shares outright and placing them in escrow, the defendant acquired the shares by paying $150,000, borrowing another $150,000 from a stockbroker, and placing the shares in a margin account opened in the plaintiff's name. The broker held the shares as security for repayment of the amount borrowed. The agreement also provided that the defendant could terminate the plaintiff's employment for cause at anytime and without notice and without payment of any remuneration to him whatsoever. Over the next two years, the plaintiff consistently complained about the defendant's failure to effect the agreed salary increases and bring the share arrangements into conformity with the agreement. However, his complaints were ignored. The plaintiff's employment was terminated on January 15, 1993 for the reason, inter alia, of failure to devote his full time and attention to his duties as an employee. None of the defendant's allegation of breaches of the agreement were supported by the evidence adduced. The plaintiff now claimed in respect of the salary increases owing and for an amount representing the value of the defendant's shares owing to him.

HELD: Motion allowed. Cross-motion dismissed. Even if cause for dismissal existed, the claim for salary increases and the value of the defendant's shares were amounts owing to the plaintiff which he had earned up to that date. The defendant had no defence to that requirement to pay and, therefore, there was no genuine issue for trial on the issue of the amounts claimed by the plaintiff. More generally, a change in an employee's compensation structure or a refusal to pay an employee the compensation he was entitled to receive under the provisions of an employment agreement was a fundamental breach of that agreement. Here, the plaintiff was constructively dismissed two months into the term of the employment agreement when the defendant failed to make the required arrangement for the holding of the shares and to transfer one-fifth of those shares to the plaintiff.

Robert J. Morris and Joan M. Evans, for the Plaintiff.
K.C. Cancellara and S. John Page, for the Defendants.

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1 **B. WRIGHT J.**:-- On November 22, 1989, the plaintiff, Dr. French, entered into a five-year Employment Agreement with the defendant, Biovail Research Corporation (BRC). BRC was a subsidiary of Trimel Corporation and the two companies were amalgamated and now operate as Biovail Corporation International.

2 Both parties allege breaches of the Employment Agreement. Dr. French commenced this action against the defendants who have counterclaimed against Dr. French. Dr. French brings this

summary judgment motion for part of his claim in respect of salary increases owing in the amount of $19,566.33, and for an amount of $135,029.44 which represents the value of Trimel shares owing to him. The defendants claim summary judgment for amounts which they allege Dr. French earned in breach of the Employment Agreement, and request that those amounts be set-off against Dr. French's summary judgment claim. Dr. French also seeks a declaration that the restrictive covenants contained in Article 4 of the Employment Agreement are not binding on him and not enforceable by the defendants. He further requests that the interlocutory injunction now in force prohibiting the defendants from interfering in his current employment opportunities be made permanent.

Criteria for Summary Judgment

3 The moving party must satisfy the court that there is no genuine issue for trial. The evidence must show that there is no issue of fact which requires a trial for its resolution. If there is a real issue of credibility, a trial is required. (Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 at 551 (C.A.).

4 In determining whether there is a genuine issue for trial the court should take a good, hard look at the merits of the parties' positions. The merits of a party's position include consideration of the motivation for a party maintaining that there is no genuine issue for trial or the responding party's motivation for contending that there is a genuine issue for trial. In this case, the motivation of the defendants is relevant to the determination of this summary judgment motion.

5 Consideration of the motivation for a party's case parallels the spirit of the criteria to be considered on a summary judgment motion as summarized by Henry J., at p. 238, in Pizza Pizza Ltd. v. Gillespie (1991), 75 O.R. (2d) 225. In particular, I refer to two of the criteria, interchanging "defendant" for "plaintiff":

. The court may, on a common sense basis, draw inferences from the evidence.

. The court may look at the overall credibility of the defendant's action, i.e., does the defendant's case have the ring of truth about it such that it would justify consideration by the trier of fact?

Provisions of the Employment Agreement re Salary and Shares

6 Article 2 and Exhibit C of the Employment Agreement provided, among other things, that Dr. French was to be paid $150,000 per annum, subject to annual increase or decrease based on the Consumer Price Index applicable to the City of Toronto.

7 Dr. French was to receive $300,000 worth of shares of Trimel Corporation, to be purchased for him within 60 days of the date of the Employment Agreement, to be held by a third party in escrow, and to be released to him in five equal annual blocs, commencing November 22, 1989.

8 The defendants agreed to purchase the shares, "In consideration of the Executive agreeing to this five-year employment agreement and the non-competition and non-solicitation provisions of this employment agreement". The defendants' solicitor, who drafted this Agreement, acknowledged that this provision was a "signing bonus", that the plaintiff was entitled to receive these shares, unencumbered, simply by virtue of signing the Agreement, and that the paragraph, as he drafted it, contained no tie-in to continued employment or covenant non-breaches. This "signing bonus" provision was a real benefit to the plaintiff, as it assured him of receipt of the shares even if Biovail Research Corporation subsequently went bankrupt or fell under outside control, or simply changed its mind.

9 Although the parties conducted negotiations with respect to the salary and share provisions, there was no agreement changing the provisions of the Employment Agreement. Dr. French did not receive any salary increases or the release of any of the shares. There is no dispute on the amounts alleged to be owing to Dr. French.

10 Instead of purchasing the shares outright and placing them in escrow, BRC acquired the shares by paying $150,000, borrowing $150,000 from a stockbroker, and placing the shares in a margin account opened in Dr. French's name. The stockbroker held the shares to secure repayment of the amount borrowed.

Chronology of Events

11 From time to time Dr. French verbally expressed to the defendants his dissatisfaction with the unpaid salary increases and the Trimel shares arrangements, but neither issue was resolved. Commencing in February, 1992, Dr. French began writing a series of memoranda to the defendants pointing out his dissatisfaction with the non-resolution of the two issues.

12 Not having received any response to memoranda of February 24, June 3, July 23, and August 17, 1992, all listing complaints that the defendants were not living up to the provisions of the Employment Agreement, Dr. French wrote a September 5, 1992, letter to Eugene Melnyk, chairman of the board of Trimel Corporation. In that letter he referred to the breach of the Employment Agreement, and since he had received no response to his concerns he stated, "I feel that I have no other alternative at this time, but to give you notice of termination of the Employment Agreement". To quote counsel for Dr. French, "That letter produced the fireworks".

13 Counsel for the defendants wrote a September 11, 1992, letter to Dr. French's counsel implying that Dr. French had purported to resign. That letter is unbelievably caustic. The terminology used is totally contrary to any interest an employer might have in maintaining a relationship with an employee. It is obvious from the letter that Mr. Melnyk's counsel knew very

little about the facts, but what was lacking in knowledge was replaced by unnecessary rhetoric. The distasteful flavour of the letter comes through in the following passages:

> ... I wish to reiterate that Mr. French is, respectfully, on a slippery slope. In the event that this unfortunate positioning results in an abortion of the present negotiations (a reference to private financing being sought by Trimel) Trimel will hold Mr. French directly responsible and will mercilessly make him accountable for the irreparable harm which may result to the Company. ...
>
> My clients regard the breaches alleged by Mr. French in his memorandum of September 5, 1992 merely as a camouflage designed to extract himself from stringent contractual and common law obligations. The matters to which Mr. French refers are relatively insignificant and carry relatively nominal values. They can easily be resolved. ...

14 If, according to the defendants' counsel, Dr. French's concerns, "can easily be resolved", I wonder why they were not. Instead, the defendants "mercilessly" pursued Dr. French, with little or no foundation to their allegations, not only in this litigation but in an action commenced in Barbados by the defendants against Dr. French.

15 It would appear that at the time the parties signed the Employment Agreement and BRC purchased the assets of Ian W. French and Associates Limited, and of IWF Research Laboratories Inc., in which Dr. French was a minority shareholder, the defendants took the view that they also purchased Dr. French. With respect to his complaints of breaches of the Employment Agreement the defendants felt he had no business making those complaints because they owned him and controlled his future. In their minds, Dr. French should be patient and in due time the defendants would get around to resolving the issues. When Dr. French was unwilling to wait any longer and referred to termination of the Employment Agreement, the attitude of the defendants could be expressed this way, "The audacity of Dr. French to even consider termination, after all, we paid a lot of money to purchase his companies". The defendants failed to realize that they did not purchase Dr. French's companies and they did not purchase Dr. French. They purchased companies in which Dr. French was a minority shareholder and they entered into an employment agreement. The defendants forgot that Dr. French is a human being who deserved proper treatment as an employee.

16 In response to the defendants' counsel's letter, Dr. French's counsel referred to the "vitriolic" tone of the letter and conveyed on Dr. French's behalf an ameliorating attitude. His September 15, 1992, letter stated:

> ... Dr. French has not resigned from Trimel; on the contrary, given his substantial financial stake in the viability of those companies, Dr. French remains determined to do whatever he can to promote the best interests of Trimel and Biovail, particularly insofar as they pertain to the proposed corporate

> restructuring and the proposed private placement. ...
>
> ... Inasmuch as it is apparent to me and my client that it is in the best interests of everyone to defer the resolution of their respective allegations until the vital matters of corporate reorganization and private placement are completed, there appears to be no purpose in using words such as "mercilessly", "camouflage" and "aggressively", unless they are intended to intimidate my client.

17 The next blow to Dr. French was a November 21, 1992, letter from Mr. Melnyk in which Dr. French is accused of breaching both the Asset Purchase Agreement and the Employment Agreement. With respect to the Employment Agreement, the letter alleges that Dr. French refused to fulfil his mandate to generate European business which was to result in approximately $500,000 of revenue. The letter also makes allegations that Dr. French was secretly providing consultant services to Medizone and Galephar. He was accused of defaming Trimel and its senior executors. He was further accused of breaching his confidentiality covenant with respect to providing Galephar with confidential information about products Verapamil SR and Nifedipine. One paragraph sums up the allegations levelled against Dr. French:

> The above are key examples of the types of breaches you have undertaken. Some are especially heinous because they were accomplished through secretive conduct. Never the less, they are all serious and demonstrate the continuing course of aggravated conduct.
>
> ...
>
> As soon as the private placements are completed we plan to meet with you to discuss your conduct and performance, both in the context of this letter and otherwise, in order to see precisely how we may be able to resolve some of the substantial concerns. ...

18 It is noteworthy that on this motion, in which the defendants allege breaches of the Employment Agreement, no evidence was presented by the defendants to substantiate a single allegation contained in Mr. Melnyk's letter of November 21, 1992. There are now new allegations which leads me to conclude that the defendants have no real evidence of a breach by Dr. French of the Employment Agreement, but have been desperately searching for some facts to indicate some breach by Dr. French in order that the defendants would not have to honour the Employment Agreement.

19 The private placement of financing was completed on November 23, 1992. Notwithstanding the receipt of two scurrilous letters, Dr. French stood ready to try to resolve the issues. His counsel's

letter of December 3, 1992, records:

> Today, Dr. French informed me that Mr. Melnyk has yet to find the time to meet with Dr. French to discuss these matters, notwithstanding that both gentlemen have been in the offices of Trimel/Biovail in Barbados daily since November 25, 1992. Dr. French has continued to perform his employment duties in good faith and he continues to be ready to meet with Mr. Melnyk to resolve the issues in question as soon as possible.

20 Mr. Melnyk failed to meet with Dr. French to resolve the issues. Finally, on January 15, 1993, the plaintiff withdrew his services, complaining that he had been constructively dismissed. On January 21, 1993, Dr. French wrote a letter to Mr. Melnyk denying the allegations made against him in Mr. Melnyk's November 21, 1992 letter, outlining again his own complaints, demanding the immediate retirement of the margin debt, offering to enter into a new consulting relationship with the defendants, and offering to provide whatever assistance he could in ensuring the success of another public offering to which Mr. Melnyk was then devoting most of his time and attention.

21 Mr. Melnyk's response to this letter did not address the specifics of the plaintiff's letter but proposed, yet again, a meeting. Such a meeting was set up for February 8, 1993, but was then cancelled by the defendants. In proposing that the meeting be re-scheduled for early March, 1993, the defendants' lawyer attributed the reason for the requested delay to the defendants' desire to complete the public offering first, but acknowledged that the defendants were aware that they might be sued as a result of this delay and were prepared to accept the consequences.

22 In the meantime, the margin debt was not paid by the defendants. On January 25, 1993, the plaintiff caused somewhat less than 80% of the Trimel Corporation shares in his account to be sold and paid off the margin debt himself, suffering a loss of $135,029.44.

23 Dr. French commenced this action on March 12, 1993. I have been the case management judge on this file and, in discussions with counsel, I have continued to express my dismay at the lengths to which the parties are pursuing the litigation without coming to a resolution, with the resultant high costs.

24 It would appear that in the pharmaceutical industry Dr. French is a one-of-a-kind expert. I quote from the defendants' factum on this motion: "In 1989, the company recognized that French possessed unique experience, knowledge and expertise which could be invaluable to the continued operations of the company."

25 If Dr. French was "invaluable" to the defendants, why have the defendants failed to deal with their obligations to Dr. French under the Employment Agreement? The salary and shares amounts owing, in the whole scheme of the defendants' operations, must be fairly minor in comparison to the overall thrust of the defendant companies' activities. I was so perplexed at the continuance of this senseless litigation that I offered to meet with Dr. French and Mr. Melnyk to assist in resolving their

differences. My offer was not accepted and I now understand why. Apparently, throughout this litigation the parties themselves have never met to discuss resolution but have communicated only through their counsel. I believe the stumbling block in getting the parties to meet is Mr. Melnyk, the principle and moving force behind the defendants. For whatever his personal reasons may be, he does not seem willing to directly confront the dispute between him and Dr. French and try to resolve it.

26 I asked counsel to tell me what it is that is fuelling this litigation. Counsel for Dr. French submits that this litigation is fuelled by "unjustifiable ill will" against Dr. French. I agree. I believe the only purpose of the defendants' defence and counterclaim in this action and the defendants' action against Dr. French in Barbados is vindictive. The defendants believe they own Dr. French's services. In their view, as an employee, he should do what he is told to do for the defendants and not raise any complaints as to his treatment as an employee. Since Dr. French has complained and considers that he has been constructively dismissed and is no longer an employee, the defendants' aim in this litigation is to ensure that Dr. French's expert services are not available to any other companies in similar business to the defendants. Basically, the defendants' position is, "If Dr. French is not working for us, we won't let him work for anyone else."

27 Before proceeding with the allegations by the defendants of breaches of the Employment Agreement by Dr. French, which they allege constitute cause for Dr. French's dismissal, it is important to note that cause for dismissal usually relates to poor performance on the part of an employee. I have been given no outline of Dr. French's duties as an employee of the defendants. Since I do not know what his duties were it is very difficult to determine any breach of those duties. The defendants have not placed before me one tittle of evidence complaining about the performance by Dr. French of his duties and responsibilities as an employee of the defendants.

Alleged Breaches of Employment Agreement by Dr. French

28 The defendants' main allegation against Dr. French, in the examples given, focus on his failure to devote his full time and attention to his duties as an employee. They claim he has breached Article 1.3(b) of the Employment Agreement which reads:

1.3 The Executive:

...

(b) acknowledges that his employment by the Corporation shall, unless otherwise mutually agreed, be his only occupation and that he will devote his full time and all his efforts, skills and energies to the

> performance of his duties and the fulfilling of his obligations as herein set out, observing all reasonable instructions given to the Executive by the Corporation. During the continuance of his employment the Executive shall not, without the written approval of the Corporation, directly or indirectly, either individually or in partnership or in conjunction with any person or persons, firm, association, syndicate, company or corporation as principal, agent, director, manager, servant, shareholder or in any other manner whatsoever, carry on or be engaged in or be concerned with or interested in any business or vocation whatsoever other than the business or business now or hereafter conducted by the Corporation.

29 If taken literally, this stringent provision prohibits an employee from doing virtually anything in his spare time. Such a stricture would be against public policy. The meaning of this provision is best understood by reference to Trimel Corporation's Standards of Business Conduct which are the rules and principles which employees must observe and which were applicable to Dr. French. Pertinent parts of that document under title, "Personal Financial Interest" and "Outside Activities" are:

> Personal Financial Interest
>
> 1. Employees should avoid any outside financial interests which might influence their corporate decisions or actions. An employee performing his duties in conformity with this policy shall not have a financial interest in, ... or a personal contract ... with any concern with which he does business on behalf of the Corporation. ...
> 2. An employee may not perform work or services, outside the course of his normal employment by the Corporation, for an organization doing or seeking to do business with the Corporation .... An employee may not be a director, officer, partner or consultant of an organization doing or seeking to do business with the Corporation, ...
> 3. An employee shall not accept ... any payments, ... from any organization doing or seeking to do business with the Corporation.
>
> ...
>
> Outside Activities
>
> Employees should avoid outside employment or activities which would impair the effective performances of their responsibilities to the Corporation, either because of excessive demands on their time, or because the outside commitments can be contrary to their obligations to the Corporation.

30 I find that the Standards of Business Practice modifies and gives true meaning to Article 1.3(b) of the Employment Agreement.

31 The defendants claim that Dr. French was in breach of the Employment Agreement in the following instances.

Davstar Industries Ltd.

32 Davstar is a Canadian public company which carries on business in California. It manufactures plastic office equipment and has developed diagnostic and incontinence devices. It is not a pharmaceutical company nor a contract research house, and it does no work in the pharmaceutical industry. None of the defendants has ever had a business relationship with Davstar. Therefore, Davstar was neither a customer nor a competitor of any of the defendants. On December 28, 1989, the plaintiff was appointed a director of Davstar. As a director, he attended board meetings (usually via conference telephone call) from time to time, often missing meetings because they conflicted with his time commitments to the defendants. The plaintiff provided no consulting services to Davstar. The plaintiff estimated that his work as a Davstar director consumed about five hours per year. He received nominal directors' fees but, like all other Davstar directors, did receive certain options for Davstar shares. He had not exercised any of these options by the time he left the defendants' employ. The defendants' summary judgment motion claims that the defendants should be reimbursed for the value of the share options to Dr. French, allegedly because Dr. French earned that value at a time when he was employed by the defendants.

33 In 1992, while residing in Barbados, the plaintiff received from a prior acquaintance in Italy an inquiry about the defendants distributing a device called a "needle melter". Neither Trimel Corporation nor Biovail Research Corporation were in the business of marketing devices of any sort. Considering it part of his mandate as Vice-President of Research and Development to evaluate the inquiry he received, the plaintiff rejected this device as unsuitable to the defendants' business interests without notifying Mr. Melnyk or other senior management of the defendants. During cross-examination, the plaintiff recalled that he may have subsequently brought this device to the attention of Davstar, which also did not pursue it. Mr. Melnyk testified that the plaintiff had no authority to make such decisions on his own, and the defendants now intimate that there was something untoward about this incident. The plaintiff obtained no personal benefit whatsoever.

34 Davstar was not a customer nor was it doing or seeking to do business with the defendants. Being a director of Davstar neither constituted an excessive demand on Dr. French's time, nor required commitments contrary to his obligations to the defendants. The defendants have proffered no evidence that Dr. French's position as a director with Davstar interfered with any of his time commitments to the defendants or caused loss or damage of any sort to them.

35 I find that Dr. French, by being a director of Davstar, did not breach the Employment Agreement.

Department of National Defence

36 In or about March, 1991, the plaintiff was approached on behalf of the Department of National Defence to provide his interpretation of chitosan toxicity data regarding the Department's exclusive burn-dressing project. Trimel Corporation did not do that type of work. The Department representative contacted the plaintiff, not in his capacity as a Trimel Corporation Vice-President but, rather, as "the only recognized authority in Canada on the subject of chitosan toxicity". The plaintiff responded that this work could be done by Biovail Research Corporation and that he was not doing consulting work any more, but the Department representative requested that it be done quickly, without tenders, confidentially, and by the plaintiff personally. The plaintiff finally agreed to this request, reviewed the data, and provided his comments, for which he expended 15 hours in the evenings and was paid the sum of $3,210 in October, 1991. The plaintiff retained this money personally and did not disclose the incident to Mr. Melnyk or to the defendants. The defendants claim that this money should be paid to them, allegedly because Dr. French earned the money while employed with the defendants.

37 The defendants have provided no evidence that the work done by Dr. French in his spare time for the Department of National Defence interfered in any way with this obligations as an employee of the defendants, nor have the defendants shown that they suffered any damages as a result of this incident.

38 I find that Dr. French's work for the Department of National Defence was not a breach of the Employment Agreement.

F.W. Buckley Ltd.

39 In 1990 and 1991, Dr. French performed certain work for Buckley's president, a long-time friend, which was a carry-over of work Dr. French performed prior to the defendants purchasing the two companies of which Dr. French had been a minority shareholder. For this work Dr. French was paid $5,983.55 for which the defendants claim reimbursement alleging the work was done while Dr. French was employed by the defendants.

40 The defendants have presented no evidence to show that the work done for Buckley interfered in any way with Dr. French's obligations to the defendants, nor have the defendants shown that they suffered any loss or damages as a result of the work done for Buckley. I find that the work done for Buckley did not constitute a breach of the Employment Agreement.

Confidentiality

41 The defendants claim that Dr. French breached the confidentiality provision of the Employment Agreement by divulging confidential information to third parties. Article 4.1 sets out the prohibition against the release of any confidential information.

42 Dr. French has many years' experience in the pharmaceutical business and understands the meaning of confidential information. Dr. French has maintained throughout this litigation that he has not provided any third party with confidential information of the defendants.

43 This litigation has been in progress since March, 1993. The defendants have not produced any evidence that Dr. French has breached the confidentiality provision.

44 Through the Barbados action, the defendants obtained an Anton Pillar order and seized documents at Dr. French's home in Barbados. The Barbados court subsequently set aside the order deciding that the Anton Pillar order was obtained on flawed material. But, the documents had been obtained by the defendants, apparently revealing information which they thought implicated Dr. French in a breach of confidentiality provision. As a result, the defendants moved to add Dimethaid Research Inc., Daniel W. Sooley and Rebecca E. Keeler, as defendants to the counterclaim for damages against those added parties and Dr. French in the amount of $40 million. The defendants have recently settled the claim against Dimethaid and Rebecca Keeler.

Dimethaid Research Inc.

45 The defendants have failed to provide any concrete evidence that Dr. French gave to Dimethaid confidential information of the defendants. In their factum the defendants proffer the following incidents, presumably as inferences that Dr. French has breached the confidences of the defendants.

46 In the middle of 1989, prior to the Employment Agreement, French was contacted by Rebecca Keeler ("Keeler"), then an insolvency lawyer, who was acting on the insolvency of Clark Laboratories for a product known as Dimethaid-D. This product was to be applied to the same clinical applications as the defendants' Diclofenac gel cream. Keeler requested a meeting with Dr. French to discuss the requirements to get the Dimethaid-D lotion to a development stage where the product could be sold to another company.

47 Dr. French stated that he prepared copies of clinical protocols for irritation and sensitization studies for the Dimethaid-D lotion at the request of Keeler. He also completed literature searches and gave advice regarding the costs which would be incurred if clinical trials were run. The arrangement was that if Keeler obtained financing for the drug, she would pay Dr. French. Dr. French was paid for the work done in 1989 by Keeler in 1991, in the amount of approximately $4,000.

48 On November 15, 1990, Dr. French was attending a meeting at the Health Protection Branch in Ottawa and "ran into Keeler" in a cafeteria and asked what she was doing there. Keeler said she had a meeting and was getting an update on the current requirements for the registration of the Dimethaid-D product, a product which was competitive with the defendants' Diclofenac gel cream. Keeler asked if Dr. French would like to join her at the meeting and he attended the meeting with Keeler.

49 Dr. French stated that he was next contacted by Keeler in July or August, 1992. Keeler was seeking advice relating to the registration of some ophthalmic drug products. Dr. French testified that he advised that he could not assist her and referred her to another person. Dr. French next met with Keeler on September 5, 1993, because he was concerned about the legal problems between himself and Trimel and sought Keeler's advice not as "formal legal advice" but as a friend.

50 From mid-September, 1992, to his departure from the Company on January 15, 1993, Dr. French continued to consult Keeler on a solicitor and client basis and took the position on cross-examination that, that communication was privileged. All such legal advice given by Keeler to Dr. French was without charge. As well, Keeler gave free legal advice to Dr. French's son relating to an insolvency problem that he had become involved in.

51 During the time that Dr. French sought legal advice from Keeler, he admitted that he disclosed to her information relating to the financial affairs of Trimel. At that time she was acting as president of Dimethaid Research Inc., a competitor of Trimel. In late 1992, while employed by the defendants, Dr. French was provided with a fax machine by Keeler, free of charge.

52 From the evidence provided by the defendants, I am unable to infer that Dr. French breached the confidentiality provision in any way with reference to Dimethaid.

53 On this point, the minutes of settlement with Dimethaid are revealing. I refer to the draft copy. I was advised by counsel that the minutes of settlement were accepted by the parties with only minor amendments. Paragraph 3 says, "Trimel agrees not to use any information derived from any of the Documents for any purpose." Surprisingly, there is no comparable provision that Dimethaid agrees not to use any information which may have been given to it by Dr. French. I find it astonishing that the defendants make allegations that Dr. French has breached confidences of the defendants but, in the settlement with Dimethaid, no mention is made of any protection for the defendants by prohibiting Dimethaid from using any information it may have received from Dr. French. If the defendants are really concerned about Dr. French's alleged breaches of confidences, the most important provision in a settlement agreement with Dimethaid would be a provision prohibiting any use for any purpose of information which may have been provided to Dimethaid by Dr. French. The minutes of settlement are strangely silent on that matter.

54 But, the minutes of settlement speak loudly on another matter. In paragraph 1, Dimethaid agrees not to use the services of Dr. French in these terms:

> Neither Dimethaid nor any affiliate, as defined in the Business Corporations Act (Ontario), (an "Affiliate") or company of which Dimethaid owns in excess of 30% of the voting securities (a "Related Company") shall in any way use the services of Dr. Ian French ("French"), directly or indirectly, in respect of any service within the business undertakings of Dimethaid and/or any Affiliate or Related Company, from the date action 93-CU-66550 CM (the "Action") has been dismissed or discontinued as against Dimethaid and Keeler

> until the date upon which the Action is finally determined as between all remaining parties, including the exhaustion of all appeals.

55 That paragraph focuses on the true purpose of the claim against Dimethaid. The purpose of adding Dimethaid as defendants to a counterclaim for $40 million was to pressure Dimethaid into discontinuing to employ Dr. French's services. Paragraph 1 is the fulfilment of the defendants' purpose to deny Dr. French employment opportunities. The defendants have in fact acted out my earlier conclusion that they have no defence to Dr. French's claim for monies owing, but their resolve is to ensure that if Dr. French is no longer their employee, they will make it difficult for him to be employed by competitors.

56 If the defendants were so concerned that Dr. French would breach the confidentiality provision of the Employment Agreement or had any evidence of a breach after he left his employment with the defendants, the defendants, having attorned to the jurisdiction of this court, could have sought an injunction to prohibit Dr. French from any breaches of confidentiality. Instead, the defendants resorted to questionable tactics by commencing the Barbados action alleging breaches of the Employment Agreement by Dr. French, knowing that the Employment Agreement and the Asset Purchase Agreement were to be governed by and construed in accordance with the laws of the Province of Ontario.

Termination for Cause

57 The defendants argue that the alleged breaches by Dr. French of the Employment Agreement constitute grounds for dismissal for cause. Therefore, the defendants say that Dr. French is either owed no money or, the monies that he has earned on his own time should be considered as earned as an employee of the defendants and set off against any monies owed to him by the defendants.

58 However, Article 3 of the Employment Agreement states:

> The Corporation may terminate the employment of the Executive for cause at any time and without notice and without any payment of any remuneration to him whatsoever save and except remuneration actually earned to the date of such termination.

59 The defendants took no steps to terminate Dr. French's employment for cause. The evidence shows that the defendants had no complaints about Dr. French's performance as an employee until he indicated that he had no choice but to consider termination because the defendants were not living up to their obligations under the Employment Agreement.

60 Even if there had been cause for the defendants to terminate Dr. French's employment, Article 3 requires the defendants to pay him the remuneration he earned to the date of termination. Dr. French left the employment of the defendants on January 15, 1993. His claim for salary increases and the value of Trimel shares are amounts owing to him which he earned up to that date. The

Employment Agreement requires those amounts to be paid. The defendants have no defence to that requirement to pay; therefore, there is no genuine issue for trial on the issue of the amounts claimed by Dr. French.

61 Article 3.1(e) of the Employment Agreement includes, as a deemed cause for dismissal, "if the Executive has failed to comply in any material way with any of the provisions of this agreement." I find that the defendants' allegations of breaches of the Employment Agreement by Dr. French do not constitute failure to comply in any material way with any of the provisions of the Employment Agreement.

62 The defendants' allegations of breaches by Dr. French are flimsy excuses for breaches of the Employment Agreement. Any company of renown would not focus on such minor incidents by which to condemn a valued employee, and certainly would not use such incidents as cause for dismissal of a pharmaceutical expert with Dr. French's unique knowledge and experience.

Breach of Employment Agreement by the Defendants

63 A change in an employee's compensation structure or a refusal to pay an employee the compensation he is entitled to receive under the provisions of an employment agreement, is a fundamental breach of the employment agreement. (Alpert v. Les Carreaux Ramca Ltee. (1992), 9 O.R. (3d) 212 (O.C.J.G.D.) at p. 215).

64 I find that Dr. French was constructively dismissed on January 22, 1990, when BRC failed to place in an escrow account $300,000 worth of Trimel Corporation shares free and clear, and to release to Dr. French one-fifth of those shares. The defendants repudiated the Employment Agreement by their failure to compensate Dr. French according to the Agreement. As a consequence, the restrictive covenants were no longer binding upon Dr. French.

Conclusion

65 The following orders and judgments will issue:

1. Order to go in terms of paragraph 1 of the Case Management Motion Form (Form 3) dated April 15, 1994.
2. Judgment for the plaintiff in the amount of $19,566.33 for salary increases owing, plus applicable prejudgment interest.
3. Judgment for the plaintiff in the amount of $135,029.44, representing the amount paid by the plaintiff to retire the debt on the margin account respecting the shares of Trimel Corporation, plus applicable prejudgment interest.
4. The judgment amounts in paragraphs 2 and 3 are to be paid into court within 15 days of this judgment, pending the trial of the remaining issues or until further order of the court.

5. Order to go declaring that the restrictive covenants contained in Article 4 of the Employment Agreement made between the plaintiff and the defendant Biovail Research Corporation, and dated November 22, 1989, are not binding on the plaintiff and have not been since January 22, 1990, and are not enforceable at the suit of the defendants or otherwise.
6. My April 22, 1994, interim injunction order is made permanent.
7. The defendants' cross-motion for summary judgment is dismissed without costs.
8. The defendants' motion to amend the Statement of Defence and Counterclaim to include allegations of breach of the Employment Agreement subsequent to January 15, 1993, is, in view of my decision, moot, and therefore is dismissed without costs.
9. The plaintiff's motion for an anti-suit injunction with reference to the Barbados action is adjourned sine die.
10. Solicitor and client costs of this motion to the plaintiff.

66 Rather than dealing with the plaintiff's claims when they first arose, the defendants ignored Dr. French's complaints. By ignoring these complaints which should have been rectified at an early stage, the defendants caused Dr. French to resort to the court for a remedy. There was no justification for the defendants refusing to pay the amounts owed to Dr. French.

67 The defendants have no defence to the claims of Dr. French for the amounts owed to him. Instead of paying all that was owed, they escalated the litigation from a simple debt case to a complex case of unfounded allegations against Dr. French, with the sole purpose of denying Dr. French the rights of an employee and the right to earn a living by being employed by others after he left the defendants' employ.

68 In my view, Dr. French should not have been required to commence litigation to obtain what was rightfully his. Further, he should not be required to pay the increased costs of this litigation which were caused by the unwarranted manner in which the defendants have escalated the litigation. Dr. French is to be reimbursed his costs forthwith, on a solicitor and client basis after assessment.

69 I urge the parties to settle any remaining issues in this litigation rather than incurring additional unnecessary costs.

70 If there remain matters for resolution as a result of this judgment I may be contacted by conference call.

B. WRIGHT J.