

CITATION: Koshman v. Controlex Corporation, 2023 ONSC 7045
COURT FILE NO.: CV-20-85205
DATE: December 13, 2023

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Martin Koshman, Plaintiff

AND

Controlex Corporation, Defendant

COUNSEL: Tracy Lyle and Rhian Foley, for the Plaintiff

No one appearing for the Defendant

HEARD: December 4, 2023 (Ottawa)

REASONS FOR JUDGMENT

JUSTICE CHARLES T. HACKLAND

Background

[1] This is a wrongful dismissal action which proceeded on a default basis when the defendant employer Controlex Corporation failed to attend the commencement of trial on December 4, 2023. The action had been ordered to proceed on this date on a peremptory basis to the defendant by several previous orders of this court.

[2] On March 6, 2023 Gomery J. adjourned the trial which had been set to start on March 6, 2023 to a later date, peremptory to the defendant. This adjournment was caused by the defendant retaining new counsel. On November 14, 2023 this court heard a motion by the defendant's then lawyer to be permitted to withdraw as counsel on record due to an inability to obtain instructions from the defendant. No representative of the defendant attended this motion.

[3] This court ordered "the trial date of December 4, 2023 is confirmed and remains peremptory to the Defendant". The defendant was further ordered to serve a notice under r. 15.04(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, appointing a new solicitor of record before commencement of trial. No such notice has been served, no communications by the defendant to plaintiff's counsel or to the court administration have occurred and no representative of the defendant attended the commencement of trial. Plaintiff's counsel also served notice to the defendant that an order would be sought striking the defendant's pleadings in the event of failure to deliver a notice of appointment of a new solicitor of record or non-attendance at trial. No response has been received.

[4] Under these circumstances I have ordered under r. 15.04(7)(a) that the defendant's Statement of Defence and Counterclaim are struck. Pursuant to r. 19.02(1)(a) the allegations in the Statement of Claim are deemed to be true. In addition, the plaintiff testified about the nature and the terms and conditions of his employment with the defendant and the circumstances surrounding his dismissal and several exhibits were entered into evidence.

[5] I have no hesitation in accepting the plaintiff's evidence which was given in a fair, balanced and understated manner. His testimony and the supporting exhibits, described below, fully support the allegations in the Statement of Claim.

The Facts

[6] The plaintiff Martin Koshman (Mr. Koshman) was summarily dismissed from his employment with the defendant Controlex Corporation, on September 11, 2020. He received a letter by courier advising him of his immediate termination, with no explanation provided. He was given his base salary for eight weeks and benefit continuation for that period. The defendant did not purport to dismiss Mr. Koshman for cause, although at a later point in this litigation the defendant amended its pleadings to allege cause for dismissal.

[7] I find this to have been a termination without cause. There was no written contract of employment between the parties and Mr. Koshman has never waived his entitlement to common law notice. He is therefore entitled to damages representing the amount which he was entitled to be paid on a common law notice basis.

[8] For the reasons outlined below, I also find that Mr. Koshman was treated in a highly disrespectful and offensive manner by the defendant's President and controlling shareholder Susan Dent in the two months leading to his summary dismissal and I find this to be a case in which an award of aggravated and punitive damages is manifestly justified.

[9] I will therefore address the plaintiff's entitlement to damages in lieu of common law notice as well as aggravated and punitive damages.

[10] At the date of his termination Mr. Koshman was 69 years of age and had been employed by the defendant for 18 and a half years with the title of Vice President. His salary was \$228,000 per year plus benefits and a car allowance of \$300 per month. Mr. Koshman is a professional engineer by training and was recruited to the defendant by its founder, the late Peter Dent. During his tenure with the defendant Mr. Koshman directed the operational and property management functions of the business and reported directly to Mr. Dent. He worked with significant autonomy and independence and was only required to report to Mr. Dent on certain major decisions. Mr. Koshman oversaw the development and leasing of the Ottawa Train Yards, a major shopping centre in Ottawa and a principal asset of the defendant. During the plaintiff's tenure as Vice President the land holding assets under the defendant's control increased from those of a small land holding company to a current value in the range of \$700 million.

[11] Mr. Koshman's evidence is that he and Mr. Dent had informally discussed Mr. Koshman retiring at age 75. Mr. Koshman and Mr. Dent had a good working relationship. He enjoyed his work and intended to work for the defendant until age 75.

[12] Unfortunately, Mr. Dent died suddenly and accidentally on July 17, 2020. Mr. Dent's wife Susan Dent, who had not previously been directly involved in the business in any substantial way, took over the business and, eight weeks after Mr. Dent's death, summarily terminated the plaintiff on a not for cause basis. Mr. Koshman was initially unaware of Susan Dent's intention to terminate his employment and was not provided the opportunity to meet with her in person subsequent to her husband's death.

[13] In the days following Mr. Dent's death Susan Dent phoned the plaintiff to advise that she would be running the business and that she would be the only person with signing authority for the company. She informed him that his signing authority was removed effective immediately and that he could no longer sign anything on the defendant's behalf. Mr. Koshman could not send documents to Mrs. Dent for instruction or signature in a timely fashion because she had no email address, she did not come into the office and would only review documents if Controlex's lawyer and accountant attended at her home to review them with her privately. She also began to instruct Mr. Koshman's direct reports without his knowledge or involvement.

[14] During the eight week period following Mr. Dent's death, it was reported to Mr. Koshman by clients of the defendant that he knew and worked with that Mrs. Dent was visiting them and making bizarre and defamatory statements about Mr. Koshman, including that he was "a nobody" and was "no good" and not to speak to him and to deal only with her. She suggested it was possible her husband had been murdered and Mr. Koshman may have been involved, that he had been taking kickbacks, and that she had fired him. Mr. Koshman found out that Mrs. Dent had offered his job to one of Mr. Koshman's direct reports before Mr. Koshman was actually terminated. He learned of his termination from office staff well before he received the termination letter by courier. Mrs. Dent openly told employees that she did not wish to speak to Mr. Koshman.

[15] The owner of a construction company that did business with the defendant filed an affidavit at trial deposing that a few weeks after Mr. Dent's death, Mrs. Dent called him and expressed that she believed her husband had been murdered and she had instructed the plaintiff to tell others of this. She went on to say the plaintiff was not an honest man and was "on the take". She asserted that the plaintiff no longer had authority with the company and she was taking over.

[16] At the time of his termination the defendant failed to pay Mr. Koshman his accrued vacation entitlements under the *Employment Standards Act, 2000*, S.O. 2000, c. 41, in the amount of \$151,506.89. This obligation was eventually paid out on May 21, 2021.

[17] Notwithstanding what I find to be Mr. Koshman's reasonable efforts to obtain similar executive employment following his dismissal, he has remained unemployed to date, over three years following his termination. He earned \$8,842 from several part time assignments which were not reasonably comparable to his senior management role with the defendant. In the circumstances this sum will not be set off against the damages for unpaid severance awarded in this judgement: see *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402, 135 O.R. (3d) 561.

Common Law Notice

[18] It is well settled law that common law notice periods are fixed in reference to the “*Bardal* factors”, identified in *Bardal v. The Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.). Mr. Koshman’s responsibilities as Vice President of the defendant Corporation, his age (69), his 18 and one half years of responsible leadership in his job and his contribution to the corporation’s growth, all point to a notice period in the upper range recognized by our courts. To this I would add the obstruction of his relocation opportunities by defamatory allegations against him by the Corporation’s President and a baseless counterclaim for breach of fiduciary duty. I find the period of common law notice to which Mr. Koshman is entitled is 24 months. Plaintiff’s counsel has cited seven cases which I consider reasonably comparable to the facts of the present case in which long service senior employees have been found to be entitled to 24 months’ notice of termination of their employment.¹

[19] I accept the accuracy of the amounts calculated by the plaintiff representing his lost compensation accruing over 24 months from his summary dismissal, less amounts received, as set out in the following chart (exhibit 4):

Summary of Damages	
Description	Amount
24 months of lost base salary	\$456,000
22 months of lost benefits (estimated at 10% of base salary)	\$41,800
24 months of lost car allowance	\$9,600
LESS 8 weeks’ base salary paid on termination	(\$35,938.32)
TOTAL NOTICE PERIOD DAMAGES	\$471,461.68

Aggravated Damages

[20] The plaintiff seeks aggravated damages for the manner of his dismissal. It has been held that aggravated damages can be awarded in wrongful dismissal cases where an employer engages in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 98; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 57. In the court’s view, the defendant exhibited bad faith toward the plaintiff in the conduct of Mrs. Susan Dent, following the

¹ *Ziten v. Sadie Moranis Realty Corporation*, 2015 ONSC 7987, 28 C.C.E.L. (4th) 93; *Simmons v. Webb* (2008), 84 C.C.E.L. (3d) 196 (Ont. S.C.); *Valle Torres v. Vancouver Native Health Society*, 2019 BCSC 523, 2019 C.L.L.C. 210-048; *O’Reilly v. Imax Corporation*, 2019 ONSC 342, 52 C.C.E.L. (4th) 50, aff’d 2019 ONCA 991, 59 C.C.E.L. (4th) 175; *Saikaly v. Akman Construction Ltd.*, 2019 ONSC 799, 52 C.C.E.L. (4th) 224; *Bovin et al v. Over the Rainbow Packaging Services Inc.*, 2017 ONSC 1143; and *Chen v. Purdue Pharma Inc.*, 2015 ONSC 1967.

death of the late Mr. Peter Dent, leading up to the plaintiff's dismissal and in carrying out the dismissal itself.

[21] As noted previously, Mrs. Dent advised Mr. Koshman within days of assuming control of the defendant that he no longer has signing authority on the company bank accounts, which had been a key component of his administrative functions. She then personally visited customers of the defendant, telling them not to deal with the plaintiff, criticizing his character and his honesty and telling some that the plaintiff had been terminated. She offered his job to a subordinate prior to his termination, failed to meet the plaintiff even once to discuss her concerns, ostracized him from his management duties, terminated his employment by way of a letter sent by courier and providing two weeks termination pay and refusing to pay his accrued vacation pay. She suggested to clients of the firm that her husband had been murdered and suggested the plaintiff was involved. She made repeated defamatory allegations that the plaintiff was dishonest and "on the take."

[22] It is apparent, for reasons perhaps only understood by the defendant's new President Susan Dent, Mr. Koshman was to be terminated from the company and rather than taking appropriate steps to that end such as providing reasonable advance notice of her intentions or severance in lieu of notice, she set out to destroy his reputation. Later, in the course of this proceeding, she upgraded her attack on Mr. Koshman by advancing groundless allegations of breach of fiduciary duty, retained and then ended her relationship with four different law firms and ultimately abandoned the defence of this proceeding. The appropriate aggravated damages award in these circumstances is \$50,000.

Punitive Damages

[23] The criteria for the award of punitive damages were recently summarized by the Ontario Court of Appeal in *Humphrey v. Mene Inc.*, 2022 ONCA 531, 475 D.L.R. (4th) 68, where van Rensburg J.A. stated the following at para. 79:

Punitive damages in breach of contract or tort cases are exceptional: their purpose is to punish a defendant for conduct that is reprehensible, and a "marked departure from ordinary standards of decent behaviour". Whereas damages for conduct in the manner of dismissal are compensatory, punitive damages are "restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own": *Honda*, at para. 62. They should be awarded, in addition to the compensatory damages already awarded, when rationally required to punish a defendant to meet the objectives of retribution, deterrence and denunciation, in an amount no greater than necessary to satisfy these objectives: *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, 120 O.R. (3d) 481, at para. 79.

[24] I find that the defendant's President Susan Dent, having taken over management of the defendant corporation following her husband's death, embarked on a malicious campaign to undermine the plaintiff's ability to carry out his job functions and attempted to destroy his

reputation with customers and clients of the defendant by making bizarre and defamatory statements about the plaintiff, accusing him of criminality and dishonesty, without a shred of justification. She then pursued a baseless counterclaim in this action and maintained her position that the plaintiff was dismissed for cause and sought repayment of the eight weeks severance the defendant paid out at the time of termination. She then caused the defendant to default on the order of this court to appoint new counsel and caused the defendant to abandon the defence of this proceeding and simply chose not to attend the trial with no communication to the court or to plaintiff's counsel of any kind.

[25] I award the plaintiff punitive damages in the sum of \$50,000.

Disposition

[26] In summary, the plaintiff Mr. Koshman will be awarded damages in the sum of \$471,461.68 for the defendant's breach of its contractual obligation to provide the plaintiff with reasonable notice of termination, together with aggravated damages in the sum of \$50,000 and punitive damages in the sum of \$50,000 for a total amount of \$571,461.68, plus prejudgment interest under the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Costs

[27] The plaintiff made a Rule 49 offer to settle on December 8, 2020 which was virtually identical to the amount awarded herein. The defendant has made no offers to settle and has not responded to the plaintiff's request to admit. As noted previously the defendant has declined to communicate with plaintiff's counsel or with the court, thereby causing the plaintiff's counsel to undertake full trial preparation.

[28] In the court's discretion, I award the plaintiff his costs on a partial indemnity scale up to December 8, 2020 and on a substantial indemnity scale from December 9, 2020 onwards, inclusive of HST, in the amount of \$184,434.31, and disbursements, inclusive of HST, in the amount of \$7,677.88 for a total of \$192,112.19.

Justice Charles T. Hackland

Date: December 13, 2023

CITATION: Koshman v. Controlex Corporation, 2023 ONSC 7045
COURT FILE NO.: CV-20-85205
DATE: December 13, 2023

ONTARIO
SUPERIOR COURT OF JUSTICE

RE: Martin Koshman, Plaintiff

AND

Controlex Corporation, Defendant

COUNSEL: Tracy Lyle and Rhian Foley, for the
Plaintiff

No one appearing for the Defendant

REASONS FOR JUDGMENT

Justice Charles T. Hackland

Released: December 13, 2023