

## Member's Quarterly

## Spring 2025 Edition

### Feature

# Broader Considerations for Aggravated and Punitive Damages

*Employers will always be under the microscope - be prepared*

### Introduction

The Ontario Superior Court provides new guidance on the timing of conduct which can draw aggravated and punitive damages in *Koshman v Controlex Corporation*, 2023 ONSC 7045 ("Koshman"). The Court ruled the Defendant employer's actions during the eight-week period prior to the Plaintiff's termination justified compensation for the common law notice period, aggravated damages and punitive damages.

### Background

The Plaintiff, Mr. Koshman, was employed as Vice-President of Controlex Corporation, the Defendant. Mr. Koshman was dismissed at age 69 after 18.5 years in his role. His dismissal came eight weeks after the sudden death of the late Peter Dent, Controlex's founder, in July 2020. Mr. Dent's wife, Susan Dent, took over the business. On September 11, 2020, Mr. Koshman received a letter by courier advising of his immediate termination, with no explanation.

Upon termination, Mr. Koshman was provided his base salary for eight weeks and benefits continuation for the same period. His annual base salary was \$228,000, plus benefits and a \$300 monthly car allowance. The Defendant initially refused to pay Mr. Koshman's accrued vacation entitlements, totalling \$151,506.89, but later paid these entitlements on May 21, 2021.

Mr. Koshman had been unaware that Ms. Dent intended to terminate his employment and did not have an opportunity to meet with her after Mr. Dent's death. In the days after Mr. Dent's death, Ms. Dent revoked Mr. Koshman's signing authority and began to instruct his direct reports, without his knowledge or involvement. In the eight-week period after Mr. Dent's death (and leading up to the termination of Mr. Koshman's employment), Ms. Dent told clients Mr. Koshman was "a nobody," was "no good," and that he had been receiving improper payoffs from Controlex jobs. Clients were also directed to deal with Ms. Dent only. She also suggested her husband had been murdered and Mr. Koshman may have been involved.

Mr. Koshman attempted to obtain similar employment after his termination but has remained unemployed for a period of three years following his dismissal. He has earned \$8,842 from part-time assignments.

### The Decision

The Court addressed three issues related to Mr. Koshman's termination: (1) the appropriate common law notice period, (2) aggravated damages, and (3) punitive damages.

#### **(1) Common Law Notice**

Applying the "Bardal factors," identified in *Bardal v The Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), the Court found several factors present which favoured a higher notice period in this case, including Mr. Koshman's responsibilities as Vice-President, his age, his previous 18.5 years of responsible



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leadership and his contribution to the Defendant corporation's growth. The Court also acknowledged Mr. Koshman's opportunities to relocate were obstructed by Ms. Dent's defamatory allegations and a baseless counterclaim alleging Mr. Koshman had breached his fiduciary duty to the corporation. The Court concluded Mr. Koshman was entitled to 24 months notice. This notice period totalled \$471,461.68 in damages.

#### **(2) Aggravated Damages**

The Court also considered whether the Defendant employer's actions were unfair or in bad faith to justify aggravated damages. The Court found the Defendant exhibited bad faith towards Mr. Koshman after Mr. Dent's death, leading up to his dismissal, and in the dismissal itself. Considering Ms. Dent's actions, the Court concluded she intended to terminate Mr. Koshman, without taking the appropriate steps for termination, and set out to destroy his reputation. The Court awarded Mr. Koshman \$50,000 in aggravated damages.

#### **(3) Punitive Damages**

The Court also found Ms. Dent embarked on a malicious campaign to undermine Mr. Koshman's ability to perform his job and ruin his reputation with clients, without any justification. Once this proceeding began, Ms. Dent also pursued a baseless counterclaim, caused Controlex to default on a court order to appoint new counsel and abandon defending this proceeding, and chose not to attend the trial. The Court awarded \$50,000 in punitive damages.

#### **Takeaways for Employers**

*Koshman* reiterates the high thresholds for aggravated and punitive damages. However, it also demonstrates that the courts will look at conduct more broadly. Prior to *Koshman*, the courts generally assessed aggravated and punitive damages as they related to conduct in the course of termination. In *Koshman*, the court not only considered the employer's conduct at termination, but also Ms. Dent's conduct in the eight weeks prior, as well as her conduct after dismissal (including during the legal proceedings) in its assessment.

This decision serves as an important reminder that employers are increasingly under the microscope in wrongful dismissal cases, and that careful consideration should be given not only to the circumstances in which a termination of employment arises, but also to events prior to, and even following, such a termination.

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