



# Judge overrules jury on award of punitive damages

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An Ontario court has recently upheld the termination of an employee and limited the employee's notice entitlements to those provided in his contract of employment. As well, the judge overturned an award of \$60,000 in punitive damages made by a jury.

The case, *Ilie v. S<sup>2</sup>10 Technologies Corp.* (November 12, 2003), concerned Adrian Ilie, an electrical engineer who was laid off after ten months of employment. Ilie was given two weeks' salary in lieu of notice in accordance with the following provision:

"S<sup>2</sup>10 is free to terminate your employment at any time by providing you with (i) 2 weeks prior written notice (or such greater minimum notice as may be required under the *Employment Standards Act* (Ontario), or with equivalent pay in lieu of notice calculated in accordance with the requirements of the *Employment Standards Act* (Ontario); plus (ii) such other amounts or entitlements which are required to be provided to you in accordance with, and are limited to, the minimum requirements of the *Employment Standards Act* (Ontario)."

## **PROVISION ENFORCEABLE**

Ilie argued that the provision was unenforceable because it was ambiguous and that, therefore, he was entitled to common law reasonable notice damages. The judge held that, although the provision lacked clarity, it did not offend the *Employment Standards Act* but, rather, relied on the statute to set the minimum notice entitlement.

The judge also rejected Ilie's argument that the employment contract was unconscionable and, therefore, void. He noted that the high tech industry was volatile and that the employer was highly dependent on venture capital funding. In view of the funding problems faced by the employer, it was reasonable that it would seek to limit its liability to terminated employees. Accordingly, the judge held that there was no power imbalance between employee and employer that would render the employment contract unenforceable.

## **NO WALLACE OR PUNITIVE DAMAGES**

Ilie's case was split into two parts, with the judge ruling on the contractual and reasonable notice issues, and a jury determining the claim for punitive damages. Despite his decision in favour of



enforcing the contract, the judge went on to consider what Ilie's damages would have been if the contract had been unenforceable. He ruled that, apart from any *Wallace* (see "["Fairly, reasonably and decently": Employers obliged to deal in good faith with dismissed employees, Supreme Court rules"](#)" on our Publications page) or punitive damages, Ilie's common law notice period would have been ten weeks.

Ilie's claim for *Wallace* and punitive damages related to the manner in which he had been terminated. The termination had occurred immediately after Ilie had undergone minor surgery for removal of varicose veins. However, Ilie and the employer provided differing accounts of the termination. Ilie stated that he had received an angry and curt call from the employer on the day after his surgery, advising him that he must meet with the employer early the next morning. The employer denied that it had required Ilie to report to the office and stated that the purpose of the call had been to ensure that Ilie call in before reporting to work, so that a meeting could be arranged with him off-site. The judge accepted the employer's evidence, stating:

"In my view [the employer] did everything possible to carry out the termination without creating any problems or embarrassment for [Ilie]. As has been said many times, there is no easy way to terminate an employee. ...The call to the home the day after the surgery may have been an unfortunate incident but, in my view, it doesn't justify the extension of the notice period as required in *Wallace*. ... In this case there was no termination for cause. No false allegations were made. They attempted to terminate him off site. It may not have been the most appropriate time for termination, however, there was no malice or blatant disregard for the employee."

Before the judge issued his ruling on *Wallace* damages, the jury, based on the same evidence, had awarded Ilie \$60,000 in punitive damages – \$40,000 more than Ilie himself had asked for. Employer's counsel had argued that, even if all the facts alleged by Ilie were accepted by the jury as true, there could be no basis for an award of punitive damages. In his written decision, the judge agreed, noting that punitive damages in cases of breach of contract require proof of an "independent actionable wrong", which had not been shown in this case.

In contrast, the judge pointed to the 2002 decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Company*, in which the Court had held that punitive damages were available in exceptional cases of breach of contract. *Whiten* had involved particularly bad faith and egregious conduct by an insurer against a family whose home had been destroyed by fire. After providing the family with rent for a small winterized cottage for six months, the insurer had cut them off, alleging that the house had been torched, against the opinion of the local fire chief and its own expert investigator. The plaintiff in *Whiten* had had to spend \$320,000 pursuing a \$345,000 claim. In that case, the jury's award of \$1,000,000 in punitive damages was held to be justifiable.



In concluding that the jury's award in the *Ilie* case was made in error, Chadwick J. concluded:

“Notwithstanding the jury in this case was given the facts in *Whiten* and also told in detail that punitive damages are the exception to the rule and provided with the language from *Whiten* as to what must be found before punitive damages can be awarded, the jury allowed an award of punitive damages. Even if the jury accepts all of the facts as put forth by [Ilie], which they must have in order to come to this conclusion, in my view there are no facts on which a properly charged jury could justify a finding of punitive damages.”

### **In Our View**

It should be noted that, in addition to requiring an independent actionable wrong as a precondition for an award of punitive damages in a case of breach of contract, courts have stated that the conduct at issue must be harsh, vindictive, reprehensible and malicious. (For wrongful dismissal actions in which punitive damages have been awarded, see, for example, [“Long-serving employee on serial short-term contracts wins record notice and punitive damages”](#) on our Publications page.)

For further information, please contact [Jock Climie](#), who argued the *Ilie* case, at (613) 940-2742.