

Employer obtains punitive damages and constructive trust over employee's property as a result of kickback scheme

Fraud | Kickbacks | Litigation | Litigation & Dispute Resolution

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Dishonest employees who are responsible for misappropriating funds from their employer may face civil judgment for the amount of the money they have received and punitive damages, in addition to loss of their employment. A recent decision of the Ontario Superior Court of Justice demonstrates how an employer may be able to trace the misappropriated funds into assets of the employee: *Sunwing Airlines Inc. v. Mora*, 2021 ONSC 1376 (CanLII).

The plaintiff was in the business of offering and scheduling commercial airline flights and other related services to consumers in North America and Europe to Cuba and other destinations. The employee worked for the plaintiff from October 2007 until he was terminated on 15 May 2017.

The employer claimed that the termination was for cause as the employee received over \$500,000 in kickbacks from one of its contractors in Cuba from 2012-2017. The employee asserts that the kickback scheme was a figment of the contractor's imagination and counterclaimed for wrongful dismissal.

The evidence at trial was that the plaintiff first entered into an independent contractor agreement with the Cuban contractor in 2010, under which the contractor would provide services for the plaintiff's flights to Cuba. Under the contract, the contractor was paid \$45 or \$50 USD per flight to destinations in Cuba.

In 2011, after the first contract ended, the plaintiff sought to pay the contractor on a salaried basis rather than per flight. They settled on a per annum salary of \$52,000 USD, under a contract that ended on 30 April 2012. The contractor was unhappy with the salary payment and sought to return to a per-flight contract.

In May 2012, the parties renegotiated a contract for \$80 CAD per flight. The contractor's evidence was that she told the plaintiff's employee that she wanted to return to a \$50 per flight contract. The employee told her that she should ask for \$80 per flight contract instead and pay him the \$30 overage between the \$50 she wanted and the \$80 she would receive.

Without knowing about this kickback scheme, the plaintiff approved the \$80 per flight contract amount, which was increased to \$92 per flight in 2015. The defendant was paid the kickback amount by the contractor in cash multiple times per year. The arrangement went undiscovered by the plaintiff until 2017.

In 2017, the plaintiff reviewed its operations in Cuba and threatened to cancel the contract with the contractor in Cuba due to a drop in service levels. The plaintiff demanded that the contractor attend a meeting in Canada to discuss their concerns.

In response, the contractor disclosed the kickback scheme to the plaintiff in an email that set out the details in writing. The plaintiff arranged for a private investigator and recorded a meeting between the employee and the contractor where she paid him cash.

The employee eventually admitted the nature of the scheme and entered into a promissory note to repay the amount of \$535,180 to the plaintiff. In exchange, the plaintiff agreed to withdraw any civil or criminal claims against the employee upon full payment of the funds owed.

The employee failed to pay any of the amount owing and the plaintiff sued him for the funds. The case did not involve criminal charges.

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The civil trial in 2021 hinged on whether the plaintiff established that the employee was involved in the kickback scheme as alleged.

The employee claimed that he only signed the promissory note under duress, that he did not read it, and that he did not in fact receive \$535,180 in kickbacks from the contractor. However, he acknowledged that he did not keep his own records of the payments. He did not challenge the amounts owing at the time he signed the promissory note. The trial judge rejected the employee's claim of duress and found the employee's evidence not to be credible.

The court found that the employee had repaid the mortgage on his residential property with the kickbacks, as he was able to discharge a \$262,000 mortgage in just three years notwithstanding that his pre-tax income over 2.5 years was less than the principal amount of the mortgage.

In the circumstances, the court found that the plaintiff had just cause to terminate the employee's position due to his deceitful conduct. Kickbacks and misappropriation of an employer's funds justify termination for cause.

As a result, the plaintiff obtained judgment for \$537,885 and the employee's wrongful dismissal claim was dismissed.

In a supplementary decision, the court ordered a constructive trust and punitive damages against the employee: [2021 ONSC 6179 \(CanLII\)](#).

The court was satisfied that a constructive trust order over the employee's property was appropriate due to the tracing of the funds from the kickback scheme into the mortgage payments. The court allowed the employee 30 days to repay the judgment amount and secured the property with a certificate of pending litigation to prevent the employee from mortgaging or selling the property.

The court further determined that punitive damages were appropriate since the employee was "a thief" who stole \$537,885.00. In the court's words, "To not award punitive damages would send a message that if you steal from your employer you only have to pay it back. If this was in the criminal system, he would go to jail."

The court awarded punitive damages to the plaintiff employer in the amount of \$200,000, and a further \$210,000.00 in costs for the action.

The case demonstrates some of the remedies available to an employer in cases of dishonest conduct by an employee. A constructive trust over real estate or similar remedies may be available if the employer can trace misappropriated funds into assets purchased or paid for by the employee. A PDF version is available to download [here](#).

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