

BONUS PLANS: BEING "ACTIVELY EMPLOYED" MAY INCLUDE BEING FIRED

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When does a bonus form part of compensation owed during a terminated employee's notice period? According to a very recent decision from the Court of Appeal for Ontario, notional bonus entitlements will be part of compensation in lieu of reasonable notice unless a contract unambiguously says otherwise.

In *Paquette v. TeraGo Networks Inc.* (2016 ONCA 618), the Court of Appeal closely scrutinized a bonus provision which required participants to be "actively employed on the date of the bonus payout."

Trevor Paquette was awarded 17 months' reasonable notice at trial, but was not granted damages for lost bonus payments. The trial judge found that while Paquette was "notionally" an employee during the reasonable notice period, he was not "actively employed" at that time. The Court of Appeal found for Paquette and held that the "active employment" obligation did not exclude compensation for bonuses to which the employee would have been entitled during the reasonable notice period.

In allowing the appeal, the Court of Appeal reiterated the basic principle in awarding damages for wrongful dismissal, which is that the terminated employee is entitled to compensation for all losses arising from the employer's breach of contract in failing to provide notice. As a result, damages will likely include an amount for a bonus that would have been received during the reasonable notice period where the bonus is an integral part of the employee's compensation package.

Instead of focusing on an examination of whether or not the terminated employee was "actively employed" at the time of the bonus payment, the Court of Appeal found that the key issue was what compensation Paquette would have been entitled to but for the wrongful termination. Had the employee received reasonable notice of 17 months, he would have been "actively employed" when the company's bonuses were paid. This means that in many ways the model for assessing damages is based on what would have been paid or provided during a 17 month working notice period.

The Court of Appeal found that the motion judge erred by examining the bonus provision on its own, instead of commencing the analysis from the premise that the employee was entitled to his full compensation package during the notice period. Rather than examining whether or not the bonus plan was ambiguous, the question

is whether the bonus plan's wording unambiguously altered or removed the employee's common law rights.

Takeaways for Employers

In *Paquette*, the Court of Appeal found that a term that requires active employment when the bonus is paid, without more, is not sufficient to deprive a terminated employee compensation for lost bonus during the notice period.

Employers should be aware of *Paquette* and the likelihood that reasonable notice compensation may include any bonus payment to which a termination employee would have been entitled during the notice period. To prevent this kind of added post-termination obligation, employers will need to draft bonus policies and clauses carefully and use firm, unambiguous language when limiting an employee's common law entitlements. This decision also reminds employers of the importance of regularly reviewing bonus plan documents and employment agreements.

by George Waggott and Kyle Lambert

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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