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ARTICLE

Ontario Court of Appeal Holds “Active Employment” Requirements Insufficient to Displace Entitlements to a Bonus

In 2015, the Ontario Superior Court considered whether an employee who was awarded a 17-month notice period was eligible for a bonus payment under the employer’s bonus policy, which required “active employment” at the time of payout. In *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189 (“*Paquette*”), the Superior Court decided that, even though the plaintiff’s bonus was an integral part of his compensation package, he was not considered an “active employee” during the notice period, and as such, he was not eligible for a bonus payment under the policy during the notice period.

Many employers have been relying on *Paquette* since its release to argue that employees are not entitled to bonuses during the applicable notice period where their policies require an employee to be “actively employed” at the time of bonus payout.

Mr. Paquette recently appealed the Superior Court’s decision, arguing that the judge erred in finding he was not entitled to bonus payments under TeraGo Networks Inc.’s policy. The Court of Appeal released its decision on August 9, 2016, reversing the Superior Court’s judgment, finding that Mr. Paquette was entitled to bonus payments during the 17-month notice period under the employer’s policy.

As the first step in its analysis the Court of Appeal considered Mr. Paquette’s right under the common law to be kept whole through the notice period, including his entitlements to bonuses that he would have otherwise received had his employment not been wrongfully terminated. The Court commented that the bonus was integral to his compensation, and that, had he remained employed during the 17-month notice period, he would have been eligible to receive bonus payments under TeraGo’s policy.

As a second step in its analysis, the Court of Appeal considered whether there was “something in the bonus plan that would specifically remove the appellant’s common law entitlement”. In other words, is policy language sufficiently clear to displace an employee’s entitlement to bonus payments during the notice period, and if it is not sufficiently clear, the employee is entitled to bonus payments that would have otherwise been received during the applicable notice period.

The Court decided that, in the case of TeraGo’s bonus policy, the language was insufficient and did not prevent Mr. Paquette from receiving compensation for bonuses he would have otherwise received during the notice period, had his employment not been wrongfully terminated. The Court further stated, “A term that requires active employment when the bonus is paid, without more, is not sufficient to deprive an employee terminated without reasonable notice of a claim for compensation for the bonus he or she would have received during the notice period, as part of his or her wrongful dismissal damages.”

For all of these reasons, the Court of Appeal awarded Mr. Paquette a bonus payment for 2014 and compensation for the lost opportunity to earn a bonus in 2015.

It is clear from the Court of Appeal’s decision that simply indicating an employee must be actively employed at the time of bonus payout in order to be eligible for a bonus is not sufficient to displace an employee’s right to be kept whole during the applicable notice period.

In light of the Court of Appeal’s decision, employers will want to review their bonus policies to ensure the language goes beyond merely stating that active employment is required to be eligible for bonus payments. Specifically, employers will want to ensure their policy language sufficiently removes or limits an employee’s common law right to bonus compensation during any notice period, particularly where the employer’s bonus program makes up an integral part of its employees’ compensation package.

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