

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

September 01, 2016

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.

By

[Stephanie Young](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.