

Terminated Employees Are Likely Eligible for Their Full Bonus During the Notice Period

Many employers believe that language in their employment agreement or bonus/incentive plans requiring “active employment” protects them from having to pay out terminated employees. However, recent case law from the Ontario Court of Appeal has stated unequivocally that language simply requiring “active employment” is not enough. The Court stated that even in the event that there is language stating that an entitlement to bonus ceases upon termination of active service, the employee was rightly entitled to that benefit (amongst others) throughout the statutory and common law notice period.

In *Paquette v TeraGo Networks Inc.* (2016), the Ontario Court of Appeal held that damages for wrongful dismissal may include an amount for a bonus the employee would have received had he continued his employment during the notice period. Further, at para 47, the judge concluded: “a term that requires active employment when 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.” [emphasis added] Mr. Paquette was awarded his bonus throughout the 16-month notice period, including the loss of his bonus for 2014 as well as the lost opportunity to earn a bonus in 2015 (that would have been paid in 2016).

In *Lin v Ontario Teachers’ Pension Plan* (2016) (Ontario Court of Appeal) Mr. Lin was awarded his full bonuses from LTIP and AIP throughout the notice period despite language in the plans stating that no payment would be made where employment was terminated by the employer prior to the payout of the bonus. Van Rensburg J.A. stated in this decision that this language was similar to the requirement of “active employment” at the date of bonus payout, and did not sufficiently limit Mr. Lin’s common law entitlements. The Court also made determinations on issues relating to enforcement of new terms of the bonus and long term incentive plan, and issues with consideration when they were introduced.

Both cases are likely to be appealed to the Supreme Court of Canada. However, what is critical is that both cases suggested appropriate language could limit an employee’s entitlement to bonus and/or incentive upon termination. Employers must critically evaluate (a) the language in their bonus and long term incentive grants to ensure their intended effects occur; and (b) that any changes to these plans is entered in a way to increase the possibility of enforcement. Without these, the terms of your bonus or incentive plan may be invalid.

Please contact us if you have any questions about the language in your policies and your potential legal exposure.

Employers take note!

The changes to the *Occupational Health and Safety Act* implemented by Bill 132 took effect on September 8, 2016.

Please contact us A.S.A.P. if you have not yet updated your policies

