

## Member's Quarterly

Summer 2018 Edition

### Feature

# Terminating Employees: Don't Forget Bonus Payments

*Ontario Court of Appeal rejects "active employment term"*

**W**e are often asked to assess an employee's pay in lieu of reasonable notice package with employers who are planning on terminating an employee on a without cause basis. We ask the employer if they have an employment agreement or contract that limits the employee's entitlement to a statutory minimum or some other fixed amount.

If the employer does not have such an agreement or has one that would likely be deemed unenforceable following analysis, we then advise the employer of our assessment of that employee's notice period entitlement based on factors such as the employee's age, salary, length of employment and the character of their employment (their position).

We also get asked if the employee's pay in lieu of notice would include their bonus entitlements, especially in situations where an employee receives a substantial amount of annual remuneration by way of bonus or incentive payouts. These payments are usually determined through a formula based on either the employee's performance or perhaps the company's overall performance. More often than not, the formula for such payments is a combination of these two factors.

We must know whether the employer had a written bonus plan that limited an employee's entitlement to bonuses by having the payment tied to active employment. Simply put, is there a document, agreement, employment contract or plan that confirms that an employee must be actively employed at the time that the bonus payment would be made?

This was one of the issues addressed in a 2015 Ontario Court of Justice matter, *Paquette v TeraGo Networks Inc.*, 2015 ONSC 4189. This case dealt with an employee, Mr. Paquette, who was a 14 year employee at TeraGo Networks Inc. ("TeraGo") and held a fairly significant level of responsibility within the company at the time of his termination, which was effected without cause. Mr. Paquette subsequently brought a motion for summary judgment to assess his entitlement to a severance package.

The Court determined that Mr. Paquette was entitled to 17 months' pay in lieu of reasonable notice but rejected his claim for his lost bonus during the assessed notice period. The Court's rejection of his bonus entitlement was premised on the fact that TeraGo's Bonus Program unequivocally stipulated that an employee had to be "actively employed" in order to receive their bonus and that Mr. Paquette was not actively employed when receiving income following his termination.

This conclusion appeared to be in line with what most employment law lawyers would advise, which is that an employee would be precluded from a possible entitlement to bonuses if there was wording in a company's bonus plan or incentive payment program that stipulated that an employee would have to be actively employed in order to avail themselves of such payments.



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However, in 2016 this matter was appealed to the Ontario Court of Appeal in *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 (CanLII). In the appeal, the Ontario Court of Appeal determined that an employee would in fact still be entitled to his bonus payment regardless of an "active employment term" in the company's bonus program plan.

The reasoning applied by the Court of Appeal was that there was nothing limiting Mr. Paquette to his common law entitlement, either in TeraGo's bonus program or with respect to an employment contract.

As such, once it was determined that Mr. Paquette was entitled to a common law notice period which was calculated at 17 months, then Mr. Paquette would be entitled to all forms of remuneration he would have earned during his notice period, including his bonus payments.

In simple terms, the Court of Appeal determined that there was nothing in Mr. Paquette's contract or bonus plan that "unambiguously alters or removes" his common law entitlement regardless of whether there is wording that stipulates that one must be actively employed in order to be entitled to one's bonus.

The take away from this Court of Appeal decision again reinforces the necessity to have carefully drafted employment contracts that clearly and "unambiguously" confirm what payments would form part of one's entitlement upon termination and more importantly, that the wording clearly articulates an employee's **disentitlement** to common law damages upon termination.

Therefore, if the Court finds that an employee is in fact entitled to common law damages, then it is likely that the Court will then award the employee any and all forms of remuneration for the period that the Court assesses as being that employee's period of pay in lieu of reasonable notice.

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