

# **The latest on employee entitlements to stock options and bonuses over the notice period**

## **Recent Case Law Highlights**

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## Basic Principle of Wrongful Dismissal Law

**“The basic principle in awarding damages for wrongful dismissal is that the terminated employee should be placed in the same financial position that they would have been in had such notice been given.”**

- *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 at para. 26.

# Overview

- A dismissed employee's entitlement to discretionary bonus payments or stock option entitlements can be a contentious issue.
- Employers often include language in employment agreements and bonus plans that requires employees to be “actively employed” at the time a bonus is paid, in order to receive the bonus.

# Overview

- Recently, the courts have considered whether terminated employees are entitled to receive bonuses that they would have otherwise received during the notice period *even when* they have entered into employment agreements or bonus plans which require them to be “actively employed” to receive a bonus.
- There is a trend of increasing scrutiny of employment agreements and bonus plans that seek to limit terminated employees’ bonus entitlements during the notice period.

# The meaning of “actively employed” - *Paquette v TeraGo Networks Inc.* (ONCA, 2016)

- Mr. Paquette’s employment was terminated without cause in 2014.
- His bonus plan provided that an employee “actively employed by TeraGo Networks Inc. on the date of the bonus payout” was eligible for a bonus.
- Mr. Paquette claimed damages for lost bonus payments during the notice period.
- At trial, the ONSC rejected Paquette’s claim for damages for lost bonus payments, holding that he was not an “active employee” during the notice period.

# The meaning of “actively employed” - *Paquette v TeraGo Networks Inc.* (ONCA, 2016)

- On appeal, the ONCA articulated a two part test:
  1. Consider the employee’s common law bonus entitlement; and
  2. Determine whether there is something in the bonus plan that would **specifically remove** the entitlement.
- *“The question...was not whether the bonus plan was ambiguous, but whether the wording of the plan...was effective to limit his right to receive compensation for lost salary and bonus during the period of reasonable notice.”*
- The ONCA awarded Mr. Paquette damages for the loss of his bonus in 2014 and the lost opportunity to earn a bonus in 2015.

## Enforceable Or Not?

*“For example, if your employment is terminated, with or without cause, on the day or before the day on which a bonus would otherwise have been paid, you hereby waive any claim to that bonus or any portion thereof. In the event that your employment is terminated without cause, and a bonus would ordinarily be paid after the expiration of the statutory notice period, you hereby waive any claim to that bonus or any portion thereof.”*

# ENFORCEABLE!

- At trial, the ONSC dismissed the employee's claim, holding that the language in the bonus plan clearly stated that, if the bonus pay-out day occurred during the notice period, the employee would not be entitled to a bonus.
- On appeal, the ONCA affirmed the trial judge's decision, holding that it was "open to the parties to agree how and when any bonus was declared, earned, accrued and would be payable" and that the bonus limitation provision was drafted "in clear and unambiguous language".

## Enforceable Or Not?

*“... Awardee’s Continuous Status as a Participant will be considered terminated as of the date Awardee no longer is actively providing services to the Company or a Subsidiary (regardless of the reason for such termination and whether or not later to be found invalid or in breach of employment laws in the jurisdiction where Awardee is employed by the terms of Awardee’s employment agreement, if any)”*

# UNENFORCEABLE!

- The court found that the stock award agreement unambiguously excluded the employee's right to vest his stock awards after he was terminated BUT the court held that the termination provisions were unenforceable because:
  - they were “harsh and oppressive”; and
  - because the employer failed to take reasonable measures to bring the provisions to the employee's attention.
- The court held that stating in an email that the terms of a stock award agreement will govern and directing an employee to read that agreement was not a sufficient effort.
- The court awarded the employee damages for the stock options that would have vested during the 24-month period.

## Enforceable Or Not?

*“[Employer] shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of [Employer]. For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of [Employer], regardless of whether the Employee resigns or is terminated, with or without cause.”*

# UNENFORCEABLE!

- Terms of the LTIP did not unambiguously limit or remove the employee's common law right to receive damages as compensation for the lost bonus.
- As a unilateral contract (because the terms were not subject to negotiation), it was particularly important to apply the principle of contractual interpretation that any clauses excluding or limiting liability should be strictly construed.
- Language requiring an employee to be “full-time” or “active” at the time of a realization event or references to “with or without cause” were not sufficient to remove an employee's common law right to damages.

## The Supreme Court of Canada's View...

**...exclusion clauses “must clearly cover the exact circumstances which have arisen”.** So, in Mr. Matthews' case, the trial judge properly recognized that **“[t]ermination without cause does not imply termination without notice”.** Yet, **it bears repeating that, for the purpose of calculating wrongful dismissal damages, the employment contract is not treated as “terminated” until after the reasonable notice period expires. So, even if the clause had expressly referred to an unlawful termination, in my view, this too would not unambiguously alter the employee's common law entitlement.**

- *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at para. 66 [citations omitted]

# Practical Considerations

- The door is still open for well drafted employment agreements and bonus plans to disentitle employees to bonuses during the notice period.
- To restrict an employee's notice entitlement, the employment agreement or bonus plan should include unambiguous language that clearly limits the employee's entitlements following termination – **DEFINE ACTIVE EMPLOYMENT!**
- Bold and underline any termination language in their stock option agreements which limit the vesting period or are otherwise linked to the employee's termination;
- Any renewal documents should expressly highlight the termination language so the employee's attention is drawn to these clauses and should state in plain language that unvested options will terminate in conjunction with the employee's termination.

# Thank you



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