

# **“Bonus Payments on Termination – How to Manage Your Liability” 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 terminated employee's entitlement to discretionary bonus payments 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.

## Bonus entitlement limited by “clear and unambiguous” language – *Kielb v National Money Mart Company* (ONCA, 2017)

- Mr. Kielb’s employment was terminated without cause in 2010.
- The employer’s bonus plan stated that bonuses did not accrue, and were only earned and payable on the pay-out date. Additionally, the plan stated:

*“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.”*

## Bonus entitlement limited by “clear and unambiguous”– *Kielb v National Money Mart Company* (ONCA, 2017)

- At trial, the ONSC dismissed Mr. Kielb’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”



## Language of bonus plan limited payout to bonus entitlement, not bonus earned– *Bois v MD Physician Services Inc.* (ONCA, 2017)

- The employer's bonus plan stipulated that bonuses were payable in three equal installments: 1/3 in the calendar year in which the bonus was calculated and the remaining 2/3 in the next two years.
- Mr. Bois voluntarily resigned from his employment in October 2011 before the pay-out dates for the final installment of his 2009 bonus and both installments of his 2010 bonus.
- The bonus plan stated:

*“In the event a Participant’s continuous Active Employment terminates, either voluntarily or involuntarily and whether for cause or not for cause, the Participant will immediately forfeit any entitlement to any payments under this plan whether attributable to prior years or to the current year”*

## Language of bonus plan limited payout to bonus entitlement, not bonus earned– *Bois v MD Physician Services Inc.* (ONCA, 2017)

- In 2010, Mr. Bois signed and agreed to a subsequent letter which stated:

*“In any given year, you must be a permanent employee of the CMAH Group of Companies on December 31 of the year for which the incentive is paid and continue to be so employed on the payment date(s) to receive a payment. Any employee who is no longer employed with the organization or has given notice of termination prior to the payout date will not be eligible to receive a payment”*

- After resigning, Mr. Bois argued that he had already earned his 2009 and 2010 bonuses and, as such, he was *entitled* to payment of all future installments when his employment ended.

## Language of bonus plan limited payout to bonus entitlement, not bonus earned– *Bois v MD Physician Services Inc.* (ONCA, 2017)

- At trial, the ONSC dismissed Mr. Bois' claim, holding that the language of the bonus policy and subsequent letter clearly required employees to be actively employed on the date of a bonus installment pay-out in order to receive the installment.
- The ONCA agreed, holding that the employer's bonus plan and subsequent bonus letter clearly stated that the employee was not *entitled* to a bonus unless actively employed on the payment date.
- Importantly, the Court held that the *Employment Standards Act, 2000* imposes a requirement to pay "wages to which the employee is *entitled*" and not necessarily *earned* at the time of termination.

## Language of bonus plan did not limit entitlement to deferred bonus – *Bain v UBS Securities Canada Inc.* (2018, ONCA)

- Mr. Bain's employment was terminated without cause in 2013.
- If he earned more than the equivalent of \$250,000 Swiss Francs per year, 40% was paid in cash and 60% was placed into an account in the form of "notional shares", which would vest over a number of years.
- The issue on appeal was whether Mr. Bain was entitled to the deferred notional shares that he had already earned, as they would have been allocated to him after the expiry of the reasonable notice period.
- The ONCA held that while the notional shares would not have *vested* before the end of the notice period, there was "no question the bonus was '*earned*' by Bain during that period."
- This conclusion was reinforced by language in the plan that provided that unvested awards would "not be forfeited and will continue to vest" upon termination of employment.

## The last word on bonus entitlement during the notice period - *Singer v Nordstrong Equipment Limited* (ONCA, 2018)

- Mr. Singer's employment was terminated without cause in December 2016.
- At trial, the motion judge held that Mr. Singer was not entitled to a bonus beyond the reasonable notice period, as a result of the employer's practice of awarding bonuses at the end of the fiscal year based on performance.
- Applying the *Paquette* test, the Court found that: (i) Mr. Singer had established that his bonus was an integral part of his compensation package and (ii) the parties did not contractually restrict Mr. Singer's bonus entitlement.
- The Court noted that while it may have been the company's *de facto* policy not to pay bonuses to employees after their employment was terminated, such an approach was "not written into the document that governs the bonus payment scheme" and therefore did not negate the employee's entitlement to the bonus during the reasonable notice period.

# Practical Considerations

- The Court in *Paquette* left the door open for well drafted employment agreements and bonus plans to disentitle employees to bonuses during the notice period.
- In order 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.
- Beware of bonus plans that contain deferred bonus or deferred payment options. If these plans are in place, there must be specific language disentitling employees to deferred bonuses or deferred payments.

# Thank you

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