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# Active Employment Clause Not Enough: Common Law Right to Damages Must be Ousted

An “active employment” clause in a bonus plan is not sufficient to extinguish an employee’s right to damages for lost bonuses in a wrongful dismissal action. This principle was affirmed by the Ontario Court of Appeal in the recent decision of *Paquette v TeraGo Networks Inc.*

The dispute in *Paquette* arose after the appellant’s employment was terminated without cause after 14 years of service. On a summary judgment motion brought by the appellant, the motion judge fixed the reasonable notice period at 17 months, and awarded damages based on the salary and benefits that the appellant would have earned during that period. However, the motion judge rejected the claim for compensation for lost bonuses on the basis that the bonus plan required the appellant to be “actively employed” at the time of payment. This appeal followed.

The Court of Appeal concluded that the motion judge erred in deciding that the appellant’s entitlement to bonuses was dependent solely upon the wording of the bonus plan. To this end, the Court adopted the two-step approach articulated in *Taggart v. Canada Life Assurance Company*. The first step is to consider the employee’s common law rights. Where bonuses were an integral part of that employee’s compensation, then the employee would have been entitled to receive the bonuses during the reasonable notice period. Second, it must be determined whether the wording of the plan unambiguously alters or removes the employee’s common law rights.

Accordingly, a term that requires active employment when the bonus is paid, without more, will not be sufficient to deprive an employee terminated without reasonable notice of a claim for compensation for lost bonuses.

Moving forward, employers must use unequivocal language if they wish to alter or remove a dismissed employee’s right to compensation for lost bonuses as part of his or her damages for wrongful dismissal.

*With note from Nilour Nezhat*