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# Bonus entitlement during reasonable notice period

*2 Ontario cases show differing circumstances where bonuses can and don't have to be paid to terminated employees*

BY BRIAN WASYLIW

**EMPLOYERS RECOGNIZE** an employee dismissed without cause is entitled to notice of dismissal or pay in lieu thereof. What many employers don't realize is that under statute and common law, the employee is entitled to any bonus during the applicable period of notice as if she had continued to work – the principle being the employee should be put in the same position she would have been had she continued to work to the end of the notice period. However, this principle can be modified through contractual terms.

There are three kinds of potential bonus entitlement upon termination: "accrued" or "vested" relating to a period already concluded but not yet paid; pro-rata or stub relating to a period in which an employee is terminated part-way; and prospective entitlement in respect of a future employment period – such as the notice period).

Many employers spend hours drafting terms and conditions of a bonus plan, but are silent on what happens upon termination or resignation. Some employers import bonus plans from affiliates in other jurisdictions, such as the United States, which generally do not have the necessary language to limit entitlement in Canada. Others try to manage exposure by characterizing a bonus as "discretionary." Savvy employers may require the employee be "actively employed" at the time the bonus is paid out, or not include any notice period in the calculation of service for the purpose of the bonus plan.

While the language of the bonus provision is important, a court will be influenced by the perceived fairness of the result to the employee. Consider two recent decisions with very different outcomes.

In *Lin v. Ontario Teachers' Pension Plan Board*, the Ontario Superior Court of Justice awarded a dismissed investment professional a substantial bonus on account of a period prior to dismissal and also in respect of the reasonable notice period.

David Der Lin had worked for the Ontario Teachers' Pension Plan Board (the OTPPB) for eight years and was 41 years old at the time of his dismissal, allegedly for cause. The court determined the allegation of cause was not supported and, in the absence of a contractual termination provision, awarded Lin reasonable notice of 15 months.

During his employment, Lin was entitled to two types of bonus – a short term annual

incentive plan (AIP) and a long-term incentive plan (LTIP). The AIP comprised more than half of Lin's annual income. The fiscal year for the employer was the calendar year and bonus amounts were typically paid out in April after the end of the calendar year.

Lin was terminated in March 2011, before the bonus for 2010 was paid out but after fiscal 2010 was completed. He sought an award in respect of the AIP and the LTIP for three distinct periods: January to December 2010; January to December 2011, which would have been paid in April 2012 (inside the 15-month notice period); and January 2012 to June 2012, a stub-period reflecting the balance of the notice period, to be paid out in April 2013 (outside the notice period).

A year before Lin's dismissal, the OTPPB implemented a change to the language of the bonus plans, introducing a requirement that to be eligible for payment an employee had to be actively employed at the time the bonus was paid out. This was a material change to Lin's employment agreement to which he refused to consent (together with other colleagues), and for which OTPPB did not continue to pursue its request for written agreement. Under the strict terms of the amended language Lin would not be entitled to a bonus for 2010 or any period thereafter.

The court decided in favour of Lin on three grounds:

First, he relied on a frequently followed case, *Schumacher v. Toronto Dominion Bank*, in which the court held where a bonus is an integral part of an employee's remuneration and the employee is terminated without cause, she is entitled to the bonus she would have earned during the period of reasonable notice, and any requirement to be 'actively employed' at the time of payout is unfair. To this end, the court gave significant weight to the fact the AIP was more than 50 per cent of Lin's annual income, and the employer's past practice of paying out the AIP amounts in other terminations.

Second, the court determined the limitation language was not valid in the first place because it was a significant change to the bonus plan to which Lin had refused to consent. Thus, while the revised AIP might have had the appropriate language to limit entitlement in line with previous decisions (*Duynstee v. Sobeys Inc.*; *Love v. Acuity Investment Management Inc.*; *Kieran v. Ingram*

*Micro Inc.*) without Lin's agreement, such a change could not be imposed unilaterally. Further, as OTPPB did not pursue its request for written agreement to the change, this "abandonment" was "reasonably interpreted by Mr. Lin as a decision by (OTPPB) not to pursue these changes."

Third, the court held that even if it was wrong in respect of the above, it considered the limiting language to be an unenforceable "penalty clause." A court may grant relief from a penalty clause when it functions more like a punishment than a genuine estimate of damages suffered. Because an employee is entitled to compensation for work done, enforcing the limitation language would unjustly enrich an employer at the expense of an employee.

It is significant to note there is no explanation from the court as to why the concept of unjust enrichment should apply to the period during which no work is performed. It will be interesting to see whether the penalty clause analysis is followed in future wrongful dismissal decisions.

Another recent decision, released less than two weeks after *Lin*, is *Kielb v National Money Mart Company*.

Jonathan Kielb was a lawyer working in-house for National Money Mart Company. He had been employed for 18 months when his employment was terminated without cause. An issue was Kielb's entitlement to a key management bonus (KMB). The fiscal year for Money Mart was July 1 through June 30 and Kielb was terminated in April 2010. Money Mart's KMB had clear language stating the bonus was "discretionary," "did not accrue" and "is only earned and payable at the time it is provided to you by the company." The language also included examples of timing to illustrate an employee was not entitled to any bonus amount if she was not employed at the time of payment, even if she had been at the end of the relevant period.

The KMB for 2010 (July 1, 2009 to June 30, 2010) would have been paid in September 2010. Kielb was terminated in April, before the end of the fiscal year and before the time of payment. Even considering Kielb's contractual notice entitlement of eight weeks, he would not have reached the end of the fiscal year or the time of payment.

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# Contracts often silent on bonus

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Despite concluding the KMB was an integral component of Keilb's compensation, and a key negotiating point prior to his accepting the position, the Ontario Superior Court of Justice upheld the limiting language and did not award Keilb any damages for the KMB. To this end, the court considered the following factors to be significant:

- The limiting language in *Kielb* was far more clear than the language from cases such as *Schumacher*.
- Kielb's contractual termination entitlement still would not have taken him to the end of the fiscal period or the qualifying date.
- Kielb was a lawyer and the employment contract had been negotiated back and forth on several items.
- Kielb knew the impact of the limiting language and nevertheless signed the contract.
- There was no public policy reason to disregard the clear wording of the limitation language.

The decision can be seen as a positive decision for employers. The court upheld clear language requiring active employment on the relevant payment date as a valid requirement to receive a bonus. Kielb fell short of the relevant date, thus the necessary condi-

tion was not achieved. However, the significance of Kielb's status as a lawyer and the fact the contract was bilaterally negotiated are key factors that cannot be ignored.

## Lessons for employers

*Kielb* affirms the principle that an employer can limit bonus entitlement on termination by using clear, unambiguous contractual language (perhaps with examples), even when the amount is a significant component of compensation. However, when read with *Lin*, the caution is clear – the language must be contractual, not aspirational.

## For more information see:

- *Lin v. Ontario Teachers' Pension Plan Board* 2015 CarswellOnt 7878 (Ont. S.C.J.).
- *Kielb v. National Money Mart Company*, 2015 CarswellOnt 9377 (Ont. S.C.J.).
- *Schumacher v. Toronto Dominion Bank*, 1997 CarswellOnt 1779 (Ont Gen Div).
- *Duynstee v Sobeys Inc.* 2013 CarswellOnt 4458 (Ont. S.C.J.).
- *Love v Acuity Investment Management Inc.*, 2011 CarswellOnt 1060 (Ont. C.A.).
- *Kieran v Ingram Micro Inc.*, 2001 Carswell Ont 3906 (Ont. S.C.J.).



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