# Employer Ordered To Pay Retired VP $1.8-million In Deferred Bonuses, Stock Options And Unused Vacation



In *Boyer v Callidus*,[1] Ontario's Superior Court of Justice ordered an employer to pay a retired Vice President more than $1.8-million in damages for unpaid and deferred bonus amounts, lost stock options and unused vacation.

### Background

Craig Boyer joined Callidus as a Vice President in July 2009. In 2014, Callidus introduced a deferred bonus program (pursuant to which Callidus withheld a portion of bonuses earned and would then distribute 50% of the withheld amounts in each of the two following years, with interest) and a stock option plan for certain Callidus employees, including Mr. Boyer. In 2015, Mr. Boyer gave notice of his intention to retire at the end of 2016; however, the Court determined that he retired approximately three months early, in September 2016. [2]

Following his retirement, Mr. Boyer commenced an action for specific performance and/or damages on account of alleged unpaid and deferred bonus amounts, lost stock options and unused vacation.

In its defence, Callidus argued that the company's Deferred Bonus Policy stated that an employee "must be employed by [Callidus] to receive his or her principal amount of Deferred Bonus or any interest thereon." Regarding Mr. Boyer's stock options, Callidus argued that the terms of its Amended and Restated Incentive Plan, as well as the Prospectus for Initial Public Offering which Callidus filed with the Ontario Securities Commission, stated that the expiry date for any unvested portion of stock options was the date of termination of employment, except in cases of death. Finally, regarding unused vacation, Callidus argued that the company had a "use it or lose it" policy.

### Court's Decision

Unfortunately for Callidus, the Court found in Mr. Boyer's favour on all three issues.

With respect to deferred bonus amounts, the Court found that Callidus never brought the Deferred Bonus Policy to Mr. Boyer's attention. This oversight meant that Callidus could not rely on any limiting language to preclude a deferred bonus payout when employment ends. The Court even noted that Callidus was aware in 2015 that Mr. Boyer intended to retire at the end of 2016, but said nothing about losing the right to receive his deferred bonuses after retirement. According to the Court:

*Mr. Boyer's evidence that he was not provided with a copy of Callidus' Deferred Bonus Policy or told that he would not be paid for earned and deferred bonuses after his employment ended is not challenged. If this was a condition of Mr. Boyer's employment, it was incumbent on Callidus to inform him of such a condition and obtain his agreement.*

Regarding Mr. Boyer's stock options, the Court similarly held that Mr. Boyer was never provided with a copy of the Amended and Restated Incentive Plan (or the Prospectus). In fact, the Court found that he had been told by Callidus' Chief Operating Officer that retirement would be treated the same way as death – i.e., that stock options would vest upon retirement. Therefore, Callidus could not rely on any limiting language to preclude the vesting of Mr. Boyer's stock options, as they were an integral component of his compensation package.

Finally, the Court found that no "use it or lose it" vacation policy had ever been communicated to Mr. Boyer. Instead, Mr. Boyer's expectation was that Callidus would allow him to roll his unused vacation entitlement forward to subsequent years if he did not use it in any given year. Therefore, the Court ordered Callidus to pay damages for 22 weeks of accrued vacation pay earned over several years of employment.

In the result, the Court ordered Callidus to pay $1,831,933.88 in total damages, plus interest, to Mr. Boyer.

## Takeaways for Employers

Canada's Supreme Court recently held that limiting language in bonus plans and other similar documents must be held to a high standard. Such language "must be absolutely clear and unambiguous". Simply requiring an employee to be "full-time" or "active" to be eligible to receive their entitlement is not sufficient (nor is purporting to remove an employee's common law right to damages upon termination "with or without cause").[3]

The Court's decision in *Boyer v Callidus* also makes it clear that a copy of the document containing the limiting language must be provided to the employee (or the employee must otherwise be made aware of such limiting language). Even if the limiting language is absolutely clear and unambiguous, and meets the high standard established by the Supreme Court, such language may do the employer no good if the employee was unaware of it. Further, if the limiting language affects an existing right, the employee's agreement may also be required.

Similarly regarding "use it or lose it" vacation policies, employers can prevent the payout of entitlements that exceed minimum statutory rights if an employee does not take their vacation time by the employer's deadline. However, these policies must be clearly drafted and properly communicated to employees. Otherwise, they may not be worth the paper that they are written on.

**Footnotes**

1 2024 ONSC 20.

2 Mr. Boyer pleaded that he had been constructively dismissed due to alleged unrelenting criticism,

verbal abuse and threats. However, the Court found no evidence that Callidus had breached Mr. Boyer's unwritten employment contract and/or that they did not intend to be bound by that contract.

3 *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26.

*The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.*

by Ioana Pantis and Paul Boshyk
McMillan LLP