

Termination Pay Can Include Bonuses



When deciding termination pay, many companies will focus on salary only and ignore other forms of compensation. But according to recent case law in Québec, an employee's pay during the notice of termination period must be comprised of every component of remuneration, including bonuses.

Introduction

What elements of remuneration must be taken into account in the calculation of an employee's pay during the notice of termination period? According to Quebec doctrine and case law, all the components of remuneration should be included in the calculation of such compensation. Therefore, benefits such as insurance, car allowance and pension must be included. On the other hand, courts have been reluctant to include bonuses given the discretionary nature of such type of remuneration. However, two recent decisions by the Court of Appeal of Québec and the Superior Court reveal that employee incentive programs may, in certain circumstances, form an integral part of employee's remuneration and consequently, former employees may be granted bonuses as a component of a pay in lieu of a notice of termination.

FieldTurf Tarkett Inc. c. Gilman

On January 22nd, 2014, the Court of Appeal of Québec affirmed a judgment of the Superior Court of Québec that found that a bonus should be paid to employees on the grounds that it was part of their remuneration. In *FieldTurf Tarkett Inc. c. Gilman*¹, the Court of Appeal considered that when bonuses are paid to employees on a regular basis, employees have a reasonable expectation to be paid such a bonus on a regular basis.

In this case, five former employees whose employment contracts were terminated by the company claimed "phantom share" bonuses. The employer's incentive program was intended for key employees of the company and bonuses were distributed at the sole discretion of the company CEO. As a matter of fact, the CEO had the discretion to decide which key employees would receive phantom share bonus payments and how much each would be paid.

Also dismissed in the context of restructuring, plaintiffs claimed none of them had received a final phantom share bonus payment prior to their departure. While the company accepted that plaintiffs were entitled to several months' notice of termination, it refused to provide them with the final bonus payment. The plaintiffs filed an action against the company claiming that they were entitled to receive the

bonus payment.

The Superior Court of Québec granted the plaintiffs' claim.² The Court dismissed the company's argument that the bonus payment to the plaintiffs was at the company's entire discretion. The Court held that former employees are entitled to receive all of the benefits that accrue during the notice period, including bonuses. Since evidence of the company's past practice revealed that the bonus payments had become an integral part of the plaintiffs' remuneration, the Court evaluated that plaintiffs had a reasonable expectation that they would receive a final bonus payment at the end of the year. In addition, the Court considered that the bonus payments were not entirely discretionary.

The Court of Appeal of Québec upheld the trial judge's decision. It also held that the provisions of the incentive program were ambiguous and had to be interpreted in light of the parties' intent. Change of direction in the company did not cease to make the plaintiffs key employees and thus eligible for the bonus payment. The employer's argument with respect to the eligibility conditions was rejected. In the end, the Court asserted that bonuses form an integral part of an employee's compensation and, as such, are generally taken into account as forming part of an employee's pay during the notice period.

Therefore, the Court of Appeal concluded that the final bonus payment became payable at the end of the year the plaintiffs employment contract were terminated. Neither the discretionary nature of the incentive program nor the eligibility policy prevented the plaintiffs from being able to recover the amounts claimed. The Court also endorsed the Superior Court's method of calculation which took into account past bonuses granted to the plaintiffs by their employer in recent years.

Melanson c. Groupe Cantrex Nationwide

On January 29th, 2014, the Superior Court of Québec considered if, when an employment contract is terminated, whether the employee's bonus should be included as part of his pay during the notice of termination period. In *Melanson c. Groupe Cantrex Nationwide*³, the plaintiff requested damages from his former employer for breach of an employment contract as a result of his dismissal.

Citing restructuring issues within the company, the employer had notified the plaintiff in writing that his employment was terminated immediately and offered him an indemnity representing eight (8) weeks' notice in accordance with the *Act Respecting Labour Standards*⁴. In his claim, the plaintiff, a vice-president for twelve years, considered eighteen (18) months to be reasonable notice. He also claimed the bonus payable under the employee incentive program. With regards to the incentive program, the employer considered the plaintiff was not eligible to the payment of a bonus since he was no longer employed by the company at the time of its payment.

According to the Superior Court, the plaintiff was entitled to a reasonable notice of termination of fifteen (15) months. The Court also found that the incentive program is a benefit related to the plaintiff's employment and thus, it was reasonable for him to expect a bonus on the year his employment contract was terminated. The Court considered that the incentive program had been established to replace wage increases for management employees and should thus be included as a component of the plaintiff's compensation.

As in *FieldTurf Tarkett Inc. c. Gilman*, the Court also rejected the employer's argument that the plaintiff was not eligible to a bonus because the incentive program provided that only employees at the time of payment of the bonus were eligible to

receive a bonus. The Court ruled that the employer's policy cannot prevent an employee from claiming remuneration to which he is entitled. According to the Court, one must not conclude that an employee waives his rights to an incentive program by the mere fact that he is aware about the incentive program eligibility policy. As a result, the Court found the plaintiff entitled to claim the bonus payable under the incentive program for the period worked during the year his employment contract was terminated. In order to assess the amount of the bonus to which the plaintiff was entitled, the Court considered the average annual bonuses granted to the plaintiff in recent years.

Conclusion

Courts have been reluctant to award compensation based on bonuses, given that in most cases, these bonuses are the result of a discretionary decision by employers. Since bonus payments are entirely dependent on the employer's discretion, an employee will generally not be entitled to claim a bonus as part of his pay during the notice period.

However, recent decisions by the Court of Appeal of Québec and the Superior Court reveal that even when an employer exercises discretion in granting such a bonus, if such discretion has consistently been exercised in favor of the employee in the past, the bonus will be considered as an integral part of his remuneration.

In addition, both the Court of Appeal of Québec and the Superior Court have rejected arguments by employers in regards to eligibility policies for employed employees at time of bonus payments. Hence, if an employee had a reasonable expectation of a bonus during the year his contract of employment was terminated, courts will likely grant the plaintiff a bonus as part of his pay during the notice period. Applying the principle of proportionality to determine this amount, courts will most likely rely on the employment contract and employer's past practices in granting bonuses.

Footnotes

1 *FieldTurf Tarkett Inc. c. Gilman*, 2014 QCCA 147.

2 *Gilman c. Fieldturf Tarkett Inc.*, 2012 QCCS 1429.

3 *Melanson c. Groupe Cantrex Nationwide*, 2014 QCCS 394.

4 *An Act Respecting Labour Standards*, CQLR c N-1.1.

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