



What's New in HR Law

Court of Appeal finds bonus is part of notice entitlement notwithstanding employee's knowledge of employer policy to the contrary

June 7, 2018

BOTTOM LINE

The Ontario Court of Appeal finds an employer may not deny payment of a bonus during the notice period unless the company policy of not paying the bonus is clearly expressed in a document governing the bonus payment scheme.

Facts: Motion judge denied employee's claim for bonus and loss of benefit package

André Singer was the President and General Manager of Nordstrong Equipment Limited's East Division ("Nordstrong"). He had worked for Nordstrong for eleven years when, in December of 2016, the company terminated his employment without cause.

On a motion for summary judgment, the motions judge set the reasonable notice period at 17 months, spanning from December 2016 to April 2018.

The motions judge found that Mr. Singer was entitled to a bonus for 2016, but not for 2017 or 2018. He reached this conclusion by relying on Nordstrong's practice of awarding bonuses at the end of the fiscal/calendar year based on performance.

As well, Mr. Singer was aware that Nordstrong did not include bonuses in determining notice entitlement. As a result, Mr. Singer would not have had a reasonable expectation of earning a bonus during the 2017 and 2018 fiscal years while he searched for alternative comparable employment.

The motions judge also denied Mr. Singer's claim for the loss of his benefit package since he had not proven that he had suffered an actual loss.

Court of Appeal: Mr. Singer entitled to bonus during entire notice period and compensation for loss of benefits

Justice Feldman, writing for the Court of Appeal, found Mr. Singer was entitled to receive his bonus during the entire 17-month notice period rather than merely the 2016 fiscal year.

First, Justice Feldman found the bonus was an integral part of Mr. Singer's compensation package, which triggered the common law entitlement to compensation for a loss of bonus as part of his damages for wrongful dismissal.

Second, Justice Feldman determined that the parties did not contractually restrict Mr. Singer's bonus entitlement on termination of employment. It was insufficient that Nordstrong had a policy not to pay any bonus after the termination of an employee's employment (since the bonus was considered an incentive for employees to perform). It was also irrelevant that Mr. Singer knew of this policy.

No contracting out could occur without explicitly setting out the company policy in a document that governed the bonus payment scheme. Since this policy was not expressed in any enforceable document, Mr. Singer remained entitled to his bonus during the entire notice period.

The Court of Appeal also overturned the motions judge's decision to deny Mr. Singer's claim for loss of benefits. On a wrongful dismissal action, an employee may claim loss of benefits flowing from the dismissal even if the employee does not prove that he/she suffered a loss of the benefits. Therefore, it was sufficient that Mr. Singer demonstrated the replacement cost of his benefits; he was not required to provide evidence that he had actually incurred the cost of replacing those benefits.

Check the Box

When contracting out of a bonus during a notice period, employers should ensure:

- The intent to contract out is clearly expressed in the document governing the bonus.
- The contracting out provision is included in the employment contract.

- The contracting out provision does not purport to deny the employee's entitlement to a bonus during the minimum notice period required under the *Employment Standards Act, 2000*.

Date: April 13, 2018

Forum: Ontario Court of Appeal

Citation: *Singer v Nordstrong Equipment Limited*, 2018 ONCA 364

Need more information?

Contact [Anthony Panacci](#) at 416-408-5568 or your regular lawyer at the firm.



Toronto

Bay Adelaide Centre
333 Bay Street, Suite 2500,
PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filiation.on.ca

London

620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filiation.on.ca

Hamilton

1 King Street West, Suite 1201
Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filiation.on.ca