KOSKIE MINSKY

JUSTICE MATTERS

Employment Law

This is a summary of employment law matters of interest, from a litigator's point of view.

What Does Your Bonus Plan Say?

On August 9, 2016 the Ontario Court of Appeal released two sets of reasons in wrongful dismissal cases dealing with employees' entitlement to receive bonus payments over a reasonable notice period.

In both *Lin* and *Paquette* the employees were terminated without cause and had a right to pay in lieu of reasonable notice of their termination of employment at common law. In both cases, the employer denied payment of any bonuses that the employees would otherwise have been eligible to receive within the reasonable notice period, relying on the requirement in the plans that employees' be "actively" employed on the date of bonus payout to be eligible. In *Lin* the bonus plan stated: "In the case where a Participant resigns or the Participant's employment is terminated by [Teachers'] prior to the payout of a bonus (normally the first pay period in April), no bonus shall be earned by or payable to the Participant."

The Court of Appeal affirmed the holding in previous cases that the bare requirement that the employee be actively employed at the date of bonus payout is not sufficient to displace an employee's common law entitlement to claim damages, rather than the bonus itself. The Court of Appeal set out a clear path to determine an employee's rights. The first step is to assess whether the bonus formed an integral component of the employee's compensation. The next question is whether the wording in the bonus plan unambiguously alters or removes the employee's right to claim damages for the loss of bonus payments over the notice period. The Court held that a bonus plan may set out limitations on or conditions for the payments, but very clear language is required to take away or limit a dismissed employee's common law rights.

It remains to be seen what amounts to "clear language" to displace an employee's right to damages for lost bonus payments.

Paquette v. TeraGo Networks Inc., 2016 ONCA 618 and *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619 (CanLII)

Employees Who Sign Releases Can't Have Their Cake and Eat It Too

In a recent decision, the Human Rights Tribunal of Ontario confirmed that employees who sign releases in exchange for a termination package may have difficulty invalidating the release if they wish to bring a claim against their former employer.

An employee with nearly 14 years' service in human resources at an oil and gas industry manufacturing business was terminated as part of a staff reduction. She accepted the employer's termination package offer of 12 months' notice and signed a release agreeing that she would not bring any claim, including a human rights application, against the employer with respect to her employment or termination. Less than a year later, the employee brought a human rights application against her former employer claiming that she was terminated on the basis of age and disability.

When the employer brought a Request for Dismissal pursuant to the Ontario *Human Rights Code* on the basis of the executed release, the applicant argued that she had signed the release under economic duress and that the employer had made misrepresentations that induced her to sign the release. The employee testified that she was "a mess" after receiving the offer and that she was under significant financial pressure as university tuition payments were due for her daughters. She felt immense pressure to accept the package and sign the release by the given deadline, fearing that her pay would be interrupted or that she would be paid nothing if she refused to sign. She could not afford to consult a lawyer.

While finding that a contract, including a release, may be set aside if it is signed under duress, the Tribunal held that financial pressure is not enough to constitute duress, given that most employees face financial pressure when their employment is terminated. There was also little evidence of duress stemming from time pressure, as the employee returned the signed release four days before the stated deadline and did not ask for an extension.

The employee also argued that at the time her employment was terminated, the employer led her to believe that mass layoffs were about to occur, when in fact they did not occur for another eight months. The employee argued that but for this misrepresentation, she would have taken the position that the termination was for discriminatory reasons, on the basis of her age and health issues. The Tribunal noted that the employee was not on any medical accommodation and found that her termination was in fact part of an ongoing staff reduction and that no misrepresentations had been made.

Although deliberate attempts by the employer to mislead an employee or the presence of actual duress may be enough to set aside a release, employees should assume a release will be enforceable against them and seek legal advice before signing. For their part, employers should avoid misrepresentations as to the reason for termination, putting unreasonable time constraints or other pressure on employees to accept a

termination package and sign a release, and provide plenty of opportunity for employees to seek legal advice. Employers should also be careful to provide specific information surrounding statutory entitlements that must be paid regardless of whether the employee chooses to accept a termination package.

Nicastro v. Tenaris Algoma Tubes Inc., 2016 HRTO 1128

Court of Appeal Upholds Finding at No Obligation to Mitigate with same Employer in face of Constructive Dismissal

A 58 year old employee of the City of Toronto was constructively dismissed, following 25 years of service in primarily senior project management roles. She was found to be entitled to 26 months' notice. The City did not appeal the finding of constructive dismissal or the notice period. It did, however, allege that the trial judge erred in the conclusions reached relating to mitigation.

The City argued, *inter alia*, that the employee had an obligation to accept the lesser role and/or apply for other roles within the City, both of which she failed to do. It asserted, therefore that she failed to mitigate her damages, in whole, or in part. It also asserted her failure to apply for a job with another township, over 50 km away which was available, was a failure to take reasonable steps to mitigate, as was her taking several weeks away from searching for work to attend the trial of the person accused of murdering her brother.

The Court of Appeal held that considering the totality of circumstances, including a substantial change in the employee's duties from mainly operational to administrative, it was reasonable for her to consider her treatment by the City as humiliating and her relationship with the City to have been irreparably harmed. The Court of Appeal held that she did not have an obligation to accept the role offered, nor did she have an obligation to mitigate her damages by applying for other roles with the City.

The Court further held that failing to apply for a role 50 km from home, or taking some time to attend the trial of the person accused of murdering her brother did not constitute a failure to mitigate.

This decision underscores the approach by the Court to the assessment of mitigation efforts. The 'tie' goes to the employee. Employees' mitigation efforts must only be generally "reasonable", not perfect, and the actions of the employer can destroy trust of the employee to further reduce those mitigation obligations.

Maasland v. Toronto (City), 2016 ONCA 551 (CanLII)

KOSKIE MINSKY

JUSTICE MATTERS

The purpose of this newsletter is to provide general information and should not be relied on as legal advice or opinion. If you do not wish to receive the Employment Law Newsletter, or wish to receive it at a different address, please send an e-mail to publications@kmlaw.ca.

Nancy Shapiro, Partner

This edition of Employment Law News was produced and edited by the Employment Law Group