Case In Point

Appellate Court Finds Employee Entitled to Bonus Which Vested after the End of the Notice Period

Date: March 21, 2018

In *Bain v. UBS Securities Canada Inc.*, the Ontario Court of Appeal upheld a lower court decision which awarded an employee who was dismissed without cause in February 2013 his bonus entitlements for 2012 and the first three months of 2013, as well as for the 18-month notice period.

David Bain worked for UBS as an investment banker for 14 years and at the time of termination held the position of Managing Director, Head of the Canadian Mergers & Acquisitions (M & A) Department. His compensation consisted of a base salary of $385,000 plus bonus and referral fees. Pursuant to the Equity Ownership Plan (Plan), which governed the payment of UBS bonuses, a portion Mr. Bain's bonus each year was paid as notional shares in UBS that would vest over a number of years.

In 2013 UBS made the decision to close the M & A portion of its Canadian operations, as a result of which Mr. Bain's position was eliminated. Upon termination, UBS offered him 14 months' pay in lieu of notice but declined to pay any bonus amounts for 2012 or 2013 on the basis that the bonus was discretionary.

At trial, Justice Wilson rejected UBS's argument that Mr. Bain's bonus was discretionary and awarded the bonus entitlements for 2012, 2013, as well as damages for the bonus entitlement during the notice period. This included the bonus amounts that would otherwise have been deferred through the notional shares and would not have vested until after the notice period had ended.

Justice Wilson also held that Mr. Bain's entitlement to vacation pay, which is calculated as a percentage of "wages" as defined in the *Employment Standards Act, 2000* (ESA), should include both his base salary and average bonuses in the calculation. This decision was based on the finding the bonus entitlements in this case did not fall within any of the exceptions to the definition of "wages" in the ESA.

On appeal, UBS argued that the trial judge erred in awarding Mr. Bain damages that included amounts for the deferred notional shares that would not have vested until after the notice period had ended, and as well by including bonus amounts in the calculation of vacation pay.

The Court of Appeal held that Mr. Bain would have "earned" the bonus, including the notional shares, during the notice period and therefore the fact that vesting had not yet occurred was insufficient to disentitle him from damages for the notional shares.

It also rejected the employer's argument that the language of the Plan unambiguously removed Mr. Bain's entitlement for bonuses once his employment was terminated. The Court stated:

[17] […] The reference in s. 2.2 [of the Plan] to awards being granted to "employees" does not disentitle a terminated employee from having the deferred portion of his bonus included as part of a wrongful dismissal award. As this court noted in *Paquette* at para. 35, a requirement that the recipient be employed in order to receive a bonus, "does not prevent the [recipient] from receiving, as part of his wrongful dismissal damages, compensation for the bonuses he would have received had his employment continued during the period of reasonable notice."

[18] Nor do the provisions of s. 7.1 unambiguously exclude Bain's claim for damages for the deferred part of his bonus. Section 7.1.6 purports to exclude a claim or right of action in respect of UBS's exercise of discretion. Section 7.1.7 excludes

an employee's "right to compensation for any loss in relation to a plan". The claim here is not for compensation for a loss in relation to a plan, or for the improper exercise of discretion. The claim is to have included in his compensation on termination the amounts of the deferred part of his bonus – amounts that pursuant to the plain terms of his employment contract, he would be entitled to expect. Neither provision clearly disentitles Bain to a right to damages for his lost bonus on termination.

While the Court did not disagree that the bonus was discretionary, it stated:

[90] Simply because a bonus is awarded in the sole discretion of an employer does not mean that it can be done in an arbitrary or unfair fashion or that the employer can decide that an employee should not get a bonus without following a fair, identifiable process. The employer may adjust the weight given to various factors, given the market conditions and other changeable criteria, but that does not obviate the requirement that the exercise must be done in a fair manner. The court must analyze the evidence in a particular case and decide whether the process that was followed was fair and reasonable.

In this case, where the termination was without cause and not related to Mr. Bain's performance, the Court held that using the fact of the termination as a reason to deny the payment of a bonus was neither fair nor reasonable.

On the issue of vacation pay, the Court upheld the lower court finding that the bonuses properly fell within the definition of "wages" in the ESA on the basis that the exception for "sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, productivity or efficiency" did not apply.

This case has several key takeaways for employers:

- The Court of Appeal has again confirmed that very clear, unambiguous language is required to eliminate bonus entitlements during the notice period. In reviewing bonus or variable compensation plans, employers should consider whether the language in the plan is sufficiently clear to oust entitlements following termination where that is the intention. Relying solely on the fact that a bonus is discretionary will likely be insufficient to justify denying a bonus during the notice period.
- Employer bonus plans which have deferred payments or vesting options may still result in an employee having an entitlement after the reasonable notice period ends where the employee can prove that the bonus amounts, although deferred, have already been earned and where the plan language does not otherwise carve out the notice period.
- Where an employee's bonus is not truly discretionary in practice (e.g. where there are set factors that determine payout) and the payment is linked to factors such as performance or productivity, these amounts will likely be included in the calculation of vacation pay at termination under the ESA. This will have a significant impact where an employee's bonus entitlements make up a large portion of their overall compensation. Bonus and variable compensation plans should specifically address the carve out of bonus entitlements from the calculation of vacation pay.