COURT OF APPEAL FOR ONTARIO

CITATION: Paquette v. TeraGo Networks Inc., 2016 ONCA 618
DATE: 20160809
DOCKET: C60757

Simmons, Pepall and van Rensburg JJ.A.

BETWEEN

Trevor Paquette

Plaintiff (Appellant)

and

TeraGo Networks Inc.

Defendant (Respondent)

Andrew H. Monkhouse and Samantha Lucifora, for the appellant

Robert Frank and Nicole Marcus, for the respondent

Heard: February 12, 2016

On appeal from the judgment of Justice Paul M. Perell of the Superior Court of Justice, dated June 29, 2015, with reasons reported at 2015 ONSC 4189.

van Rensburg J.A.:

A. OVERVIEW

[1] The appellant Trevor Paquette ("Paquette") worked for the respondent TeraGo Networks Inc. ("TeraGo") from 2000 until his employment was terminated without cause in November 2014. At the time of dismissal, he was 49 years old. He was working as Director, Billing and Operations Support Services, and

earned a base salary and bonuses. After the parties were unable to agree on a severance package Paquette sued for wrongful dismissal.

[2] The appellant brought a summary judgment motion to determine the period of reasonable notice and damages, including the issues of compensation for lost bonuses and mitigation of damages. The respondent agreed that these issues were appropriate for summary judgment.

[3] The motion judge fixed the reasonable notice period at 17 months, having regard to all the circumstances, including the appellant's age, specialized skills, upper-middle management position, length of service, and the state of the economy in Alberta, where he worked. The motion judge awarded damages based on the salary and benefits that the appellant would have received during the notice period. He rejected the claim for damages for lost bonus payments. He found that the appellant had made reasonable efforts to mitigate his damages and directed him to account for any mitigation earnings for the balance of the reasonable notice period, with such earnings subject to a trust in favour of the respondent.

[4] Paquette appeals. There is only one issue on this appeal – whether the motion judge erred in denying the appellant's claim for compensation for lost bonuses as part of his damages for wrongful dismissal, on the basis that the

bonus plan required the bonus recipient to be “actively employed” at the time the bonus was paid.

[5] For the reasons that follow, I would allow the appeal. Briefly, I conclude that the motion judge erred in principle in his approach to the question of whether the “active employment” term in TeraGo’s bonus plan excluded compensation for lost bonuses as part of the appellant’s wrongful dismissal damages. The appellant is entitled to additional damages for wrongful dismissal equal to the bonuses he would have earned during the 17 months following his termination.

B. THE BONUS ISSUE

[6] TeraGo’s bonus program or plan provided that an employee “actively employed by TeraGo on the date of the bonus payout” was eligible for a bonus based on his or her salary. An employee received a bonus if: (a) the employee met his or her personal objectives, determined by the manager and approved by a vice-president; and (b) TeraGo’s performance met the corporate objectives set by its Compensation Committee.

[7] Paquette participated in the bonus plan. At first, bonuses were paid semi-annually in February and August. In 2014, the plan was amended so that bonuses were paid in February of a given year for performance in the prior year. Between 2011 and 2014, the appellant received bonus payments totalling as

follows: $27,814.50 in 2011; $31,832.78 in 2012; $27,932.69 in 2013; and $7,841.41 in 2014.

[8] As part of his damages, the appellant claimed what the motion judge described as the "average of his annual bonus payments" paid by TeraGo: the sum of $29,193.32 for 2014 (that would have been payable in February 2015) and an identical amount for 2015 (that would have been payable in February 2016).[1] If the notice period was fixed at fewer than 17 months, the appellant sought a pro-rated bonus for 2015.

[9] The motion judge concluded that the bonus plan was an integral part of Paquette's employment. He also found that, if such employment had continued, Paquette would have been eligible to receive a bonus in February 2015 for 2014. The motion judge did not address whether Paquette would have earned a bonus for 2015 had his employment continued until February 2016, which was also within the 17 month notice period, however the respondent did not seriously contest this point.

[10] The motion judge, however, refused to award damages for the bonuses Paquette would have earned during the reasonable notice period. He relied on the bonus plan's requirement that an employee had to be "actively employed" by TeraGo at the time the bonus was paid. He stated, at para. 64 of his reasons,

[1] In fact, $29,193.32 is an average of the bonuses Paquette received in 2011, 2012, and 2013, and does not account for the $7,841.41 amount received in February 2014 in respect of part of the 2013 fiscal year.

that the bonus plan was not ambiguous, and that "Paquette may be notionally an employee during the reasonable notice period; however, he will not be an 'active employee' and, therefore, he does not qualify for a bonus."

C. POSITIONS OF THE PARTIES

[11] The appellant contends that the motion judge erred in law by failing to place the appellant in the same financial position he would have enjoyed had he been given proper notice of the termination of his employment. The question is not whether the appellant would qualify for bonuses after his termination and during the notice period, but whether he would have qualified for bonuses under his contract had he been given proper notice of his dismissal. His claim is not for the bonuses themselves. It is for damages to compensate for the loss of the bonuses since he was denied the opportunity to qualify for them because of the respondent's breach of contract in failing to give adequate notice.

[12] The appellant asserts that the motion judge's interpretation of the "active employment" condition in the bonus plan is contrary to settled authority. He refers to the trial decision in *Schumacher v. Toronto-Dominion Bank* (1997), 147 D.L.R. (4th) 128 (Ont. Gen. Div.), aff'd on other grounds (1999), 173 D.L.R. (4th) 577 (Ont. C.A.), leave to appeal refused, [1999] S.C.C.A. No. 369 and the recent decision of this court in *Bernier v. Nygard International Partnership*, 2013 ONCA 780, affirming 2013 ONSC 4578. In these decisions, damages for the loss of a

bonus, or the opportunity to earn a bonus, were awarded or upheld where a bonus plan required that the recipient be employed by the employer at the time the bonus was paid or on another specified date in the year.

[13] The appellant asks that this court vary the judgment below to grant him damages of $58,386.64 (his calculation of damages for loss of the two bonus payments he would have received during the notice period of 17 months).

[14] The respondent contends that the motion judge applied the correct test, which was endorsed by this court in the context of stock options in *Kieran v. Ingram Micro Inc.* (2004), 33 C.C.E.L. (3d) 157 (Ont. C.A.), leave to appeal refused, [2004] S.C.C.A. No. 423. Because the bonus plan was clear and unambiguous in its intention to deprive the appellant of his right to receive a bonus unless he was actively employed, a bonus was not properly part of the appellant's damages for wrongful dismissal. The respondent asserts that the motion judge's interpretation of the bonus plan is entitled to deference. To the extent that the courts in *Schumacher* and *Bernier* interpreted "active employment" differently, those cases should not be followed.

D. ANALYSIS

[15] I begin by observing that the motion judge's decision is not entitled to deference. As I will explain, the motion judge erred in principle in treating the issue of whether bonus amounts would be included in the appellant's damages

for wrongful dismissal as a question of whether the “active employment” term in the bonus plan was ambiguous. The motion judge should have determined whether the appellant’s common law right to damages for compensation and benefits that he would have earned during the reasonable notice period, including the bonus that was part of his compensation package, was effectively limited by the “active employment” condition in the bonus plan. By narrowly focusing his analysis on whether the “active employment” term was ambiguous, the motion judge applied an incorrect principle and his decision is reviewable on a correctness standard. As the Supreme Court explained in *Housen v. Nikolaisen*, [2002] S.C.R. 235, at para. 36, where an error can be attributed to “the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness.”

[16] The basic principle in awarding damages for wrongful dismissal is that the terminated employee is entitled to compensation for all losses arising from the employer’s breach of contract in failing to give proper notice. The damages award should place the employee in the same financial position he or she would have been in had such notice been given: *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, at para. 1. In other words, in determining damages for wrongful dismissal, the court will typically include all of the compensation and benefits that

the employee would have earned during the notice period: *Davidson v. Allelix Inc.* (1991), 7 O.R. (3d) 581 (C.A.), at para. 21.

[17] Damages for wrongful dismissal may include an amount for a bonus the employee would have received had he continued in his employment during the notice period, or damages for the lost opportunity to earn a bonus. This is generally the case where the bonus is an integral part of the employee's compensation package: see *Brock v. Matthews Group Limited* (1988), 20 C.C.E.L. 110, at para. 44 (Ont. H.C.J.), aff'd (1991), 34 C.C.E.L. 50, at paras. 6-7 (Ont. C.A.) (appeal allowed in part on other grounds); *Bernier*, at para. 44 (Ont. S.C.), aff'd, at para. 5 (Ont. C.A.). This can be the case even where a bonus is described as "discretionary": see *Brock v. Matthews Group*, at para. 44 (Ont. H.C.J.), aff'd, at paras. 6-7 (Ont. C.A.).

[18] Where a bonus plan exists, its terms will often be important in determining the bonus component of a wrongful dismissal damages award. The plan may contain eligibility criteria and establish a formula for the calculation of the bonus. And, as here, the plan may contain limitations on or conditions for the payment of the bonus. To the extent that there are limitations, the question may arise as to whether they were brought to the attention of the affected employees, and formed part of their contract of employment. The latter issue does not arise here, however, as the appellant did not dispute that he was aware of the plan's terms.

[19] In the present case, the motion judge's analysis focused only on the wording of the bonus plan. He stated, at para. 64 of his reasons, that there was no ambiguity in its terms, and that, although the appellant might notionally be an employee during the reasonable notice period, he would not be an "active employee" and therefore would not qualify for a bonus.

[20] There are two problems with the motion judge's approach.

[21] First, the appellant's entitlement to bonus payments in the context of the wrongful dismissal action did not depend on whether he was notionally or in fact "actively employed" after his employment was terminated. The issue before the court was the determination of his damages, comprised of the compensation and benefits to which he would have been entitled but for the wrongful termination of his employment. Had the appellant been terminated within the 17 months' reasonable notice fixed by the motion judge, he would have been "actively employed" when the bonuses were paid.

[22] In *Taggart v. Canada Life Assurance Co*. (2006), 50 C.C.P.B. 163 (Ont. C.A.), Sharpe J.A. explained the correct approach. In relation to the requirement for active service as a prerequisite for the accrual of pension benefits, and its impact on wrongful dismissal damages, he stated at para. 16:

> Assuming that the pension plans can be read as requiring active service as a prerequisite for the accrual of pension benefits, I find unpersuasive the argument that this precludes damages as compensation for lost

> pension benefits. This argument, it seems to me, ignores the legal nature of the respondent's claim. The claim is not … for the [benefits] themselves. Rather, it is for common law contract damages as compensation for the [benefits] the [employee] would have earned had the [employer] not breached the contract of employment. The [employee] had the contractual right to work and to be paid his salary and receive benefits throughout the entire … notice period.

[23] Similarly, in the present case the appellant's claim was not for the bonuses themselves, but for common law contract damages as compensation for the income (including bonus payments) he would have received had TeraGo not breached his employment contract by failing to give reasonable notice of termination.

[24] The motion judge's next error was in looking to the terms of the bonus plan, and its requirement of "active employment", and then concluding that because that term was unambiguous, and the appellant could not meet the requirement, no amount for bonus would be included in his damages. The motion judge ought to have commenced his analysis from the premise that the appellant's common law right to damages was based on his complete compensation package, including any bonus he would have received had his employment continued during the reasonable notice period, and then examined whether the bonus plan specifically limited or restricted that right.

[25] Again in relation to a claim for pension accrual, Sharpe J.A. in *Taggart* stated at para. 11:

> I do not accept the proposition that the [employee's] rights can be determined by looking only to the terms of the pension plans. His claim is not for pension benefits but rather for damages as compensation for the pension benefits he lost as a result of the [employer's] termination of his employment contract.

He observed, at para. 12, that the proper way to analyze the employee's claim is to consider first his common law right to damages for breach of contract, and second, whether the terms of the plan alter or remove a common law right.

[26] The result in *Taggart* was that a requirement for active service for the accrual of pension benefits did not preclude damages as compensation for the loss of such benefits. Sharpe J.A. observed, at para. 16, that the employee had the contractual right to work and to be paid his salary and receive his benefits throughout the notice period. When the employer chose to terminate his employment and to pay damages rather than permit him to work out the notice period, it became liable to pay damages that would place the employee in the position he would have been in had the contract been performed.

[27] Sharpe J.A. explained the role of the wording of the plan as follows, at para. 20:

> The starting point or base line for analysis is the [employee's] common law right to damages for the loss of the pension rights he would have earned but for the appellant's breach of contract. The question at this stage is <u>whether there is something in the language of the … contract between the parties that takes away or limits that common law right</u>. [Emphasis added.]

[28] He noted that clear language is required in order to take away or limit a dismissed employee's common law rights. Sharpe J.A. concluded that a condition requiring "active service" as a prerequisite for the accrual of pension benefits did not constitute such a limitation.

[29] In my view, *Taggart* articulates the approach the motion judge ought to have followed in this case.

[30] The first step is to consider the appellant's common law rights. In circumstances where, as here, there was a finding that the bonus was an integral part of the terminated employee's compensation, Paquette would have been eligible to receive a bonus in February of 2015 and 2016, had he continued to be employed during the 17 month notice period.

[31] The second step is to determine whether there is something in the bonus plan that would specifically remove the appellant's common law entitlement. The question is not whether the contract or plan is ambiguous, but whether the wording of the plan unambiguously alters or removes the appellant's common law rights: *Taggart*, at paras. 12, 19-22.

[32] In *Taggart* the requirement for active service did not serve to contract out of the common law right to accrue pension benefits during the reasonable notice period. Other cases dealing with bonuses have reached the same conclusion.

[33] In *Schumacher*, the employee's contractual bonus plan contained a clause that required recipients to be "actively employed by the Bank at the time the award is paid to be eligible for payment". The trial judge observed, at para. 225 of her reasons, that the employee was unable to comply with the active employment requirement because he had been wrongfully dismissed without notice. Had Schumacher been given proper notice, then he would have been "actively employed". As such, he was entitled, as part of his wrongful dismissal damages, to compensation for the bonuses he would reasonably have earned during the period of reasonable notice.

[34] In *Bernier*, this court dismissed an appeal from a summary judgment award of wrongful dismissal damages that, among other things, included an amount for a lost bonus. The bonus plan required the recipient to be employed by the appellant on November 30th each year. The respondent was terminated in December 2012. The appellant paid her bonus for 2012 but denied that she was entitled to any bonus thereafter because she was not actively employed by the appellant after her termination. The motion judge fixed the notice period at 18 months and awarded damages for, among other things, the bonus that the respondent would have received on November 30, 2013. In dismissing the appeal, this court noted, at para. 5, that where the bonus was an integral part of the respondent's total compensation package and she would have been employed on November 30, 2013 if she had been given proper notice, "[t]he

appellant cannot disentitle the [respondent] to damages for the loss of her bonus by reason of its own breach."

[35] In the present case, as in *Taggart*, *Schumacher*, and *Bernier,* the requirement for active employment does not prevent the appellant 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.

[36] The respondent refers to the decision of this court in *Poole v. Whirlpool Corp.*, 2011 ONCA 808, affirming 2011 ONSC 4100, as authority to the contrary. In that case Hoy J. (as she then was), in a summary judgment motion, included in a plaintiff's damages for wrongful dismissal the bonus he would have received but for the termination of his employment without notice. The plan required that employees be "actively employed" on a specified date to be eligible for the bonus. Hoy J. determined that this requirement had not been brought to the plaintiff's attention and that there was no evidence that he had assented or agreed to it. It therefore could not limit his rights. This conclusion was upheld on appeal. Neither court considered the effect of the "active employment" requirement. The case was decided on the basis that this term was never communicated to the employee.

[37] The respondent also asserts that *Kieran*, which was decided after *Taggart* and *Schumacher*, mandates a different approach. TeraGo says that the motion judge correctly relied on this decision to consider only whether the wording in the bonus plan itself was ambiguous (and not whether it unambiguously restricted or limited the appellant's common law entitlement to damages for breach of contract).

[38] *Kieran* is a stock option case. The issue was whether Mr. Kieran's time for exercising stock options upon the termination of his employment was extended by the common law notice period where he had been dismissed without cause. The stock option plans provided that he had 60 days from the termination of his employment for any reason other than death, disability or retirement to exercise any rights then vested. "Termination of employment" was defined as the date the employee "ceases to perform services for" the employer "without regard to whether the employee continues thereafter to receive any compensatory payments therefrom or is paid salary thereby in lieu of notice of termination."

[39] Lang J.A. explained, at para. 56, that under Ontario law, "Mr. Kieran would be entitled to damages for the loss of the plans, as they formed part of his compensation, absent contractual terms to the contrary. In the presence of contractual terms, those terms govern". She then concluded that the plans were unambiguous as they "specifically provided that Mr. Kieran's employment terminated on the date he ceased to perform services, without regard to whether

he continued to receive compensatory payments or salary in lieu of notice." Accordingly, Mr. Kieran's right to exercise the stock options was not extended by the period of reasonable notice. He was not entitled to damages for the stock options.

[40] *Kieran* is one of a number of cases from this court considering the exercise of stock options on termination of employment. Like bonus plans, stock option plans will contain terms and conditions for eligibility, and both types of plans can provide valuable compensation to reward, incent and retain employees. Typically, bonuses are in amounts fixed by the employer and based to some extent on an employee's past performance. With stock options, however, employees who hold vested rights are able to exercise their options when they see fit to do so, in order to maximize value. The timing of the exercise of an option is key to its value to the employee. And stock option plans prescribe and limit the timing of the exercise of options, typically including provisions for the termination of the options when certain events occur, including termination of employment.

[41] Recognizing that the loss of the right to exercise stock options during the notice period is compensable in wrongful dismissal actions, the stock option cases have required clear language to limit the right to exercise stock options on termination. In a number of cases, the courts have found that the time for the exercise of stock options following the "termination" or "cessation" of employment

was extended by the reasonable notice period: see *Gryba v. Moneta Porcupine Mines Ltd.* (2000), 5 C.C.E.L. (3d) 43 (Ont. C.A.), leave to appeal refused, [2001] S.C.C.A. No. 92 (the "effective date" of termination occurred at the end of the notice period); *Veer v. Dover Corporation (Canada) Limited* (1999), 45 C.C.E.L. (2d) 183 (Ont. C.A.) ("whether such termination be voluntary or involuntary" not sufficient to oust presumption that termination would be lawful); and *Schumacher* (recovery of damages for lost opportunity to exercise stock options was permitted under a "phantom" stock option plan referring to cessation of employment, but not in respect of a second plan providing for the exercise of options within 60 days following the employee's termination "without cause"). By contrast, in *Brock v. Matthews Group*, this court held that there was no recovery of damages for the lost opportunity to exercise certain stock options where the plan required the exercise of options within "15 days from the date notice of dismissal is given".

[42] The approach in these cases can be summed up in the words of Goudge J.A. in *Veer,* at para. 14, "the parties must be taken to have intended that the triggering actions [for the cancellation of an employee's stock option rights] would comply with the law in the absence of clear language to the contrary."

[43] In *Kieran*, Lang J.A. stated that there was no ambiguity in the plans at issue. They did not speak only of termination or cessation of employment as the triggering event. Rather, the plans anticipated the very event that occurred – the

termination of employment without just cause or notice. In such circumstances, the plans required the employee to exercise the options within the allocated time.

[44] I do not regard *Kieran* as requiring that a different or new test be applied to bonus cases. Lang J.A. explained, at para. 56, that the employee "would be entitled to damages for the loss of the plans, as they formed part of his compensation, absent contractual terms to the contrary." Without deciding whether the test that applies in stock option cases is the same as that applicable in bonus cases, I note the similarity between the approach I have set out above and that of Lang J.A., as well as the tests adopted in other stock option cases.

[45] In the present case, although the motion judge referred to the approach set out in *Kieran*, he erred in principle by focusing too narrowly on the question of whether the term "active employment" was ambiguous. He should have focused on whether the wording of the bonus plan, and in particular these words, were sufficient to limit the appellant's common law right to compensation in lieu of notice. In my view, that is what Lang J.A. did when she decided that the employer in *Kieran* had effectively limited the employee's right to exercise stock options on termination of employment, which would be presumptively extended by the notice period, by specific wording that limited that right. This is clear when she contrasts, at para. 58, the wording of the plan in question with the wording of the "phantom" stock option plan in *Schumacher.*

[46] In summary, the question in this case was not whether the bonus plan was ambiguous, but whether the wording of the plan (which in this case formed part of the appellant's employment contract) was effective to limit his right to receive compensation for lost salary and bonus during the period of reasonable notice.

[47] A term that requires active employment when the bonus is paid, without more, is not sufficient to deprive an employee terminated without reasonable notice of a claim for compensation for the bonus he or she would have received during the notice period, as part of his or her wrongful dismissal damages.

[48] Finally, although the parties briefly addressed the issue, it is unnecessary to consider the effect of s. 230(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2. That section prohibits an employer, after giving notice of termination of employment, from altering any term or condition of employment of the employee without consent. As I have found, the term requiring active employment at the date of payment of the bonus did not disentitle the appellant from receiving the bonus he would reasonably have earned during the notice period, as part of his compensation for wrongful dismissal.

[49] In the result, the appellant is entitled to compensation as part of his damages for wrongful dismissal for the loss of his bonus for 2014 (that would have been payable February 2015) and the lost opportunity to earn a bonus in 2015 (that would have been payable in February 2016). The parties agreed to a

determination of the appellant's claims in a summary judgment motion. The appellant asserted that his damages for lost bonus should be based on the sum of $29,193.32 per year, which is the average of the bonuses he received in 2011, 2012 and 2013. The averaging approach was adopted by the trial judge in the *Bernier* case. The respondent did not offer any evidence to suggest an alternative amount that Paquette would have received by way of bonus, had his employment continued. Accordingly, I would fix the appellant's additional damages in the sum of $58,386.64. The appellant is entitled to pre-judgment interest on that amount. If the parties are unable to agree on the calculation and amount of pre-judgment interest, they may make brief written submissions to this court within 20 days.

E. DISPOSITION

[50] For these reasons I would allow the appeal in the terms herein described.

[51] Costs of the appeal to the appellant on a partial indemnity basis in the agreed amount of $15,000, inclusive of disbursements and applicable taxes.

Released: ("KMvR") August 9, 2016

"K. van Rensburg J.A."
"I agree Janet Simmons J.A."
"I agree S.E. Pepall J.A."