

BROAD TERMINATION CLAUSE AND A FAILURE TO APPLY PREREQUISITES RESULTS IN A BONUS FOR TERMINATED EMPLOYEE

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A recent BC Supreme Court decision, *Thoma v. Schaefer Elevator Components Inc.*, 2019 BCSC 100, reviewed the impact of a written employment agreement and the employer's past practice of applying it. The employment agreement allowed the Employer to terminate the employee without cause upon providing six months' notice, which expressly included "his contractually agreed remuneration during the six month notice period."

The Employer terminated without cause and paid six months base salary. The employee brought a civil claim for additional contractual remuneration, both during the last year of his employment and during the notice period.

The main dispute revolved around the employee's entitlement to bonuses, both for the year up to the point he was terminated and the following six month notice period. The employment agreement set out a maximum bonus amount per year, payable based on the degree of "agreed upon targets" achieved. In each of the four years prior to the termination year, the employee was paid his full bonus despite the parties only once setting targets. Further, in one of the years, the Employer was not happy with the employee's performance, but exercised its discretion to pay the full bonus.

The Court reviewed the bonus language in the agreement, which was silent on what occurs upon termination, and applied the jurisprudence that asked: could the employee be said to have formed a reasonable expectation of entitlement to the bonus? Four factors were considered in answering that question: (i) whether a bonus was received in prior years, (ii) whether bonuses were required in order to remain competitive with other employers, (iii) whether bonuses were historically awarded and the employer had ever exercised discretion against the employee, and (iv) whether the bonus was a significant component of the employee's overall compensation.

Based on the evidence, and particularly the past practice of paying the bonus regardless of setting targets or satisfactory performance, the Court found the employee was entitled to a prorated bonus for the year he was terminated (he was terminated 10 months into the year). Regarding a bonus for the notice period, the court found it was not owed since the employment agreement expressly permitted pay in lieu of notice, the employee was not deprived of an opportunity to earn the bonus.

Another disputed area was medical and dental expenses. The employment agreement committed to paying for MSP and a medical and dental package. The employee was responsible for setting up the medical and dental package, but it had not been done at the time of termination. The employee sought to recover his out of pocket medical and dental expenses. The Court found that although the employee failed to setup medical and dental package, the ultimate responsibility and contractual obligation rested with the employer. As a result, the employee was entitled to recover his out of pocket expenses.

Lessons for Employers:

- Clear employment agreement language can define and restrict employee entitlements for without cause termination where pay in lieu of notice is given and/or where the termination occurs prior to a bonus payout. For example, the termination provision can limit pay in lieu of notice to base salary only.
- If you have existing employment agreement language that exposes you to higher payments or litigation, steps can be taken (with or without the employee's consent) to legally update the employment agreement to define and restrict employee entitlements upon termination.
- The past can come back to haunt you. Attempting to apply discretion to limit payments at termination will be an uphill battle where the payments were made consistently and the employee has not been put on notice regarding a change in practice and reasonable payment thresholds have been communicated and enforced.



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