

February 2016

Don't Let the Door Hit Your Bonus on the Way Out: Resignations and Bonus Payments

In the recent case of *Bois v. MD Physician Services Inc.*,¹ the Ontario Superior Court of Justice considered whether an employee forfeited payment of a bonus upon voluntarily resigning. In its decision, the Court confirmed that an employee's entitlement to a bonus can be subject to a requirement that the employee be actively employed at the time of payment.

Background Facts

Mark Bois ("Bois") was an employee of MD Physician Services Inc. ("MDPS"). In 2007, a variable incentive plan was put in place (the "VIP-2007") and Bois was eligible to earn a bonus that was calculated based on specific individual performance measures from the previous year. The VIP-2007 had the following condition:

The incentive award, if any, shall be awarded and paid only during the period of the participant's Continuous Active Employment...

In the event a Participant's Continuous Active Employment terminates, either voluntarily or involuntarily and whether for cause or not for cause, the Participant will immediately forfeit

¹ *Bois v. MD Physician Services Inc.*, 2016 ONSC 8133.

any entitlement to any payments under this plan whether attributable to prior years or to the current year.

“Continuous Active Employment” was defined as “actively performing duties or exercising responsibilities and providing services...without interruption or termination.”

In March 2010, Bois received a letter (the “March 2010 Letter”) that addressed the terms and timing of bonus payments, and outlined eligibility restrictions for employees who are no longer employed with MDPS or have given notice of termination of their employment.

Bois resigned from MDPS in October 2011. As of the date of his resignation, he had earned bonuses totalling \$114,916.79 that remained unpaid for the years 2009 and 2010. Bois brought a claim against MDPS for the unpaid bonus payments.

Decision

The case was decided by way of summary judgment, with the Court ruling in favour of MDPS. The Court found that there was no ambiguity surrounding the active employment requirement as outlined in the VIP-2007 and the March 2010 Letter.

The Court held that Bois had received notice of the active employment requirement for the bonus payments. Furthermore, an inference was drawn from Bois’ position as a financial counsellor to conclude that he knew or ought to have known that if he resigned, he would be forfeiting his entitlement to the bonus.

Lastly, the Court concluded that the active employment requirement did not contravene the *Employment Standards Act, 2000*. The Court considered the bonus payments as “wages to which the employee is entitled” (s. 11(5) of the *ESA*) as opposed to “wages earned” as part of a recurring pay period (s. 11(1) of the *ESA*). It is this distinction between “wages earned” and “wages to which the employee is entitled” that permit employers to impose an active employment requirement for wages, such as bonus payments, that are not earned on a recurring basis.

What Employers Should Know

The *Bois* decision confirms that employers are able to include continuous active employment as a requirement to receive bonus payments. That being said, it is important for bonus plans to include precise terms that explain how any payments are affected by such changes as termination of employment, death, disability, leave of absence, retirement or a change from full-time to part-time status.

Employers should ensure that consistent wording is used in any plan amendments or any subsequent communication with employees regarding an existing incentive plan. As was the case in *Bois*, Courts may consider specific wording in a letter (or an email) that may not have originally formed part of the documentation outlining an incentive plan.

Lastly, employers must provide notice of the terms of the plan and any changes. Even if an employer determines that an employee has relinquished his or her entitlement to a bonus, Courts will decide whether or not an employee knew or ought to have known of a particular requirement where the requirement impacts the employee's entitlements under an incentive plan. Failure to show that the employee had sufficient notice of the provision will be a challenge to enforcement.

If you have any questions regarding this decision or how to draft incentive plans, do not hesitate to contact a member of our labour and employment group.

by [Dave J.G. McKechnie](#) and [Mikolaj Niski](#), Student-at-Law

For more information on this topic, please contact:

Toronto [Dave J.G. McKechnie](#) 416.865.7051 dave.mckechnie@mcmillan.ca

[a cautionary note](#)

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2016