

# Workplace Law Bulletin

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## Reasonable Notice Periods – A Multimillion Dollar Warning

By Michael Horvat

As we turn the calendar to a new year, 2017 is beginning with uncertainty in both the political and economic climate. What is certain, however, is that human resource departments will likely be faced with the unenviable task of having to be flexible and nimble in the event economic circumstances create the need for change and workforce reductions.

A recent Ontario case, issued at the end of 2016, now casts a shadow on how judges view employer obligations to departing employees. In this multimillion dollar damages award for notice, the court demonstrated a clear preference for the “complete compensation” model in determining an employee’s entitlement during the reasonable notice period. Only clear and consistent contractual wording, along with company policy and practice, will act as a check and balance. Otherwise, in 2016, Ontario judges swung the pendulum against employers and have been keen to provide terminated employees with complete and total compensation that could be have been earned during the applicable notice period.

In *Bain v. UBS Securities (Canada) Inc.*, Justice Wilson reviewed the termination of a department manager with approximately 14 years of service. The nature of the termination was unremarkable in that it was the result of a simple downsizing and closing of the Canadian department of an otherwise large multinational organization. The affected employee was only 45 years old at the time of termination. He was viewed by the parent company as “middle” management. However, the judge considered him to be more senior within the

Canadian operations and ordered 18 months’ notice to this particular manager. More importantly, the judge took issue with the timing of the termination and the consequential decisions made upon his bonus allocation as a result of that timing, finding that the employee had been improperly denied payment of earned and accrued bonuses.

Of concern to the judge was that the employee had been terminated in February, when bonuses for the prior completed year were often determined. It was particularly problematic for the judge that the company could not provide any documentation or reason as to why the company waited and did not perform a bonus review, even though employees who were being retained were ultimately paid bonuses. The loss of the bonus greatly impacted the employee as his bonus compensation had become an integral and dominant component of his total remuneration package.

Despite having worked the full year, the company denied the employee accrual of any bonus for the prior year, as well as denying him a *pro rata* payment for the bonus earned to the end of the working notice period in the first quarter of the following year. The company attempted to rely upon a provision in the employee’s employment contract which limited bonus payments due to the fact that the employee would not be “employed” at the time the bonus was to be declared and paid. The judge rejected the company’s claim that the terms of the contract should govern. First, the employer could not explain why it had failed to follow its bonus review allocation process following the prior year end (which

conveniently impacted only the two employees who were ultimately terminated). More importantly, the company’s written bonus policies contradicted the terms of the employment contract and the bonus policies did not provide for the same restriction on bonus payment.

Ultimately, the court awarded not only the past bonus and a pro-rata amount earned up to the last day of work, but also “added” the employee’s average bonus to his total compensation, which was paid for the total notice period.

For employers, this case is a clear warning. Courts will use company inconsistencies to limit or eliminate restrictions imposed (either contractually or by policy) on an employee’s common law entitlement and to ensure the employee receives what the court in *Bain* described as a “fair” result.

For employers:

- Policy and practice must be followed consistently and align with any contractual limitations. Any conflict or discrepancy between policy, practice and the contract will negate any waiver or limitation imposed upon the employee.

- Consistency matters. In circumstances where the employer has historically awarded bonuses without much change from year to year, it is much more likely that a court will award a bonus as part of the total compensation package.
- Consideration should be given to providing payment for “earned” bonuses, including on a *pro rata* basis, particularly when it is “fair” to do so.
- All compensation policies and practices should be applied to the employee in the normal course, until such time as the termination takes effect. The employee should not be treated differently until such date.
- Finally, employers must recognize the growing trend toward an increase in the reasonable notice periods for middle-aged and middle-management employees.

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