

Ontario Court of Appeal Upholds Common Law Damages Award for Lost Stock Options and Other Incentives

February 24, 2020

Development

In *O'Reilly v IMAX Corporation*, the Ontario Court of Appeal upheld an award of damages for wrongful dismissal that included damages for lost restricted share units (“RSUs”) and stock options that would have vested during the common law reasonable notice period to which the employee was entitled.

In its decision dated December 17, 2019, the Court of Appeal provided the following summary of the principles that apply to assessing the entitlement of an employee to exercise stock options, receive bonuses, or take advantage of other aspects of her compensation package during the common law reasonable notice period in the event that her employment is terminated without cause:

1. A wrongfully dismissed employee is entitled to damages for the loss of wages, salary and other benefits, that would have been earned during the reasonable notice period.
2. This principle applies to bonuses, stock options, or incentives that are an integral part of the employee’s compensation, as well as pension benefits that would have accrued or been earned during the reasonable notice period.
3. In considering whether the loss of such benefits is recoverable, the court undertakes a two-step analysis.
 - a. The first step requires a determination of the employee’s common law right to damages for breach of contract, bearing in mind that the measure of damages is the amount to which the employee would have been entitled had the employer met its contractual obligations upon termination.

- b. The second step requires the court to determine whether the terms of the relevant contract or plan unambiguously alter or remove the employee's common law rights, having regard to the presumption that the parties intended to apply the common law, in the absence of clear language to the contrary.

Applying these principles to the facts of the case, the Court of Appeal held that the wording of the incentive plans establishing the employee's entitlement to RSUs and stock options did not unambiguously alter or remove the employee's common law rights.

The plans in question provided that the above incentives would cease to vest and would be immediately cancelled without consideration should the employee's employment be terminated for any reason other than death, disability, or for cause. Nevertheless, the Court of Appeal noted that the plans did not establish, in unambiguous terms, when the date of termination was or when employment terminated, leaving open the possibility that "termination" within the meaning of the plans occurred at the end of the reasonable notice period. Accordingly, the Court of Appeal agreed with the lower court's conclusion that the plaintiff employee was entitled to the value of the RSUs and stock options that would have vested during the reasonable notice period had his employment not been terminated without cause.

The Court of Appeal also noted that the lower court had correctly concluded that: (i) the reference to "terminates for any reason" in the plans could not be presumed to refer to termination without cause; and (ii) the phrase "cancelled immediately without consideration" was not a clear, express provision that removed the employee's common law right to damages in respect of lost unvested RSUs.

Context

The decision in *O'Reilly v IMAX Corporation* follows a number of Ontario decisions addressing employees' entitlements during the reasonable notice period.

Date

Dec 17, 1991

Development

In *Davidson v Allelix Inc*, the Ontario Court of Appeal affirms the general proposition that, in determining damages for wrongful dismissal, the terminated employee is entitled to be compensated for all losses arising from the employer's breach of contract in failing to give proper notice, including

the pecuniary value of lost benefits flowing from the dismissal (subject to the employee's duty to mitigate).

Oct 24, 1995

In *Ryan v Laidlaw Transportation Ltd*, the Ontario Court of Appeal holds that an employee is entitled to receive the value of an annual stock option that would have been available to him had his benefits been continued during the reasonable notice period.

May 19, 1999

In *Veer v Dover Corporation (Canada) Ltd*, the Ontario Court of Appeal holds that, absent clear language to the contrary, a stock option agreement establishing the cancellation of stock options upon an employee's termination of employment should be presumed to refer to the employee's lawful termination with reasonable notice.

Jul 26, 2004

In *Kieran v Ingram Micro Inc*, the Ontario Court of Appeal holds that the terms of certain stock option plans defining the date of employment termination as the date upon which an employee ceases to perform services (whether or not the employee receives payment in lieu of notice of termination) are sufficiently clear and unambiguous to limit the employee's right to exercise stock options during the reasonable notice period.

Aug 9, 2016

In *Paquette v TeraGo Networks Inc*, the Ontario Court of Appeal clarifies that, in determining whether there is something in a bonus or incentive plan that would specifically remove the employee'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 employee's common law rights. The Court finds that the terms of a bonus plan requiring the employee to be "actively employed" at the time that the bonus is paid were not, without more, sufficient to deprive the employee of his right to receive compensation for lost bonus payments during the reasonable notice period.

Significance

The Court of Appeal's decision in *O'Reilly v IMAX Corporation* serves as a reminder to employers of the need for clear and careful drafting in devising incentive plans that are intended to limit or remove employees' rights to exercise stock options or take advantage of other components of their compensation package during the common law reasonable notice period.

Where such plans fail to define the effective date of an employee's termination or otherwise directly address the employee's entitlements during the reasonable notice period, it may be insufficient for them to specify merely that the employee's entitlement to the options or incentives in question will cease upon termination of employment.

For advice specific to your situation, consider contacting your regular lawyer at Rae Christen Jeffries LLP.



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