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COURT OF APPEAL FOR ONTARIO

CITATION: Lin v. Ontario Teachers' Pension Plan, 2016 ONCA 619
DATE: 20160809
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Simmons, Pepall and van Rensburg JJ.A.

BETWEEN

David Tay Der Lin

Plaintiff (Respondent)

and

Ontario Teachers' Pension Plan Board

Defendant (Appellant)

Paul J. Pape and Andrea M. Bolieiro, for the appellant

Chris Dockrill, for the respondent

Heard: February 11, 2016

On appeal from the judgment of Justice David L. Corbett of the Superior Court of Justice, dated June 1, 2015, with reasons reported at 2015 ONSC 3494.

van Rensburg J.A.:

A. Overview

[1] The respondent David Tay Der Lin ("Lin"), a "trusted and experienced investment professional" was employed for almost eight years by the appellant Ontario Teachers' Pension Plan Board ("Teachers'"). He was hired in April 2003 in the position of Senior Associate in Teachers' investment bank division, and promoted four times. His final position was as Head of Global Funds Investments and Head of Asia Direct Investments.

[2] In March 2011, Lin's employment was terminated, allegedly for cause, after he emailed a copy of a private placement memorandum ("PPM") to a personal friend who was also in the investment business. In its defence of Lin's wrongful dismissal claim, Teachers' initially asserted that Lin had breached obligations of confidentiality and its code of business conduct (the "Code") in releasing the PPM. In the course of trial, Teachers' abandoned its claim that the PPM contained confidential information, and relied on the alleged breach of the Code.

[3] There were three issues at trial: whether Lin was terminated for cause; and if not, the period of reasonable notice and his damages (in particular his entitlement to damages for payments under two bonus plans).

[4] The trial judge concluded that Lin's employment was terminated without legal cause and that the appropriate notice period was 15 months. He fixed damages at $1,002,905, after mitigation. The damages included certain amounts Lin would have received and earned under the short-term incentive plan ("AIP") and long-term incentive plan ("LTIP") in which he participated during the period of reasonable notice.

[5] The appellant raises a number of issues on appeal.

[6] First, with respect to the finding that Lin's employment was terminated without cause, the appellant says that the trial judge erred in his interpretation of the Code, and his conclusion that Lin had not violated the Code, by ignoring the Code's plain meaning and failing to consider the factual matrix surrounding the release of the PPM and Teachers' position in the investment community. The appellant contends that, contrary to the trial judge's view, if the Code was breached, such misconduct justified Lin's termination without notice.

[7] Second, with respect to the period of reasonable notice, the appellant argues that the trial judge erred in fixing a period of 15 months by extending what would have been an appropriate notice period of 12 months without a finding of bad faith.

[8] Third, the appellant challenges the inclusion in the trial judge's award of damages of any amounts under the AIP and LTIP. The appellant says that the trial judge erred in failing to find that the forfeiture provisions of its new plans, introduced in 2010, were applicable, which would have disentitled Lin to any bonus after his employment was terminated. In the alternative, the appellant relies on the limiting terms of the pre-amendment plans, which provided for no bonus payment after termination of employment, and asserts that the trial judge erred in concluding, in effect, that dismissed employees are always entitled to compensation for lost bonuses.

[9] For the reasons that follow, I would dismiss the appeal. Briefly, there is nothing in the trial judge's comprehensive and detailed reasons for judgment that discloses an error that would justify interference by this court. There was no extricable legal error or error in principle in the trial judge's interpretation of the Code, or his analysis of the issue of cause in this case. The trial judge fixed the period of reasonable notice after considering all relevant factors, including the difficulty Lin would face in securing comparable new employment as a result of the allegations of cause. The conclusion that Lin was entitled to compensation for lost bonus payments earned before his termination and during the period of reasonable notice was based on the trial judge's finding of fact that the new forfeiture provisions had not taken effect, and his correct interpretation of Lin's rights under the eligibility criteria of the original plans.

B. Issue One: Did the Trial Judge Err in Concluding Lin's Employment Was Terminated Without Cause?

(1) Lin's Alleged Misconduct

(a) Background Facts

[10] The termination of Lin's employment was prompted by his disclosure of a document to a third party. On February 2, 2011, Lin received an email from a personal friend and investment professional with whom Teachers' had had prior dealings. She was looking for specific precedents for PPMs for distressed debt funds. At Lin's request a subordinate sent him an electronic copy of a PPM for the WLR Recovery Fund V, L.P. Lin forwarded the PPM to his friend. Lin's junior colleague was concerned about this, and reported what had occurred to senior management.

[11] The PPM was an unsolicited document sent to Lin at Teachers' in June 2010 by Invesco Trimark Ltd., an investment promoter. The PPM was a promotional document, inviting Teachers' (and other recipients) to invest in a fund to be managed by WL Ross and Co., a wholly owned subsidiary of Invesco Limited. Much of the information contained in the PPM could be found in a number of publicly available sources and through market research. The proponent maintained a list of persons to whom the PPM was sent, identified by number. The number on the PPM sent to Lin was "12533". The PPM contained an assertion of confidentiality and what was described by the trial judge as a "negative option" requiring its return to the general partner if the recipient did not invest in the fund. The covering letter contained a similar direction.

[12] On March 21, 2011, Lin was asked to attend a meeting with his immediate superior, Jane Rowe, in Teachers' legal department. External legal counsel for Teachers' was present at the meeting, which

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lasted about 30 minutes. Lin was forthright in responding to questions, and acknowledged having sent the PPM to a friend.

[13] Teachers' terminated Lin's employment for cause and without compensation. The termination letter noted that Lin had deliberately sent by email "a confidential numbered private placement memorandum received in confidence and maintained in Teachers' internal and secured database to an unauthorized third party". A second allegation was asserted, but ultimately not pursued by Teachers' as cause for Lin's termination. Teachers' characterized Lin's actions as "in direct violation of Teachers' Code of Business Conduct".

[14] Lin sued for wrongful dismissal. In its statement of defence, Teachers' pleaded, at para. 10, that "[Lin] admittedly disclosed highly confidential financial information of a third party private equity fund (the Third Party) to another private equity fund who is a potential competitor of the Third Party (the Competitor)", and at para. 16: "Not only was the disclosure of this confidential information a breach of [Teachers'] Code of Business Conduct, but it was also a potential violation of applicable securities laws". Finally, Teachers' pleaded at para. 20, that "[Lin] was terminated for cause when he disclosed confidential financial information of a third party to a competitor of the third party without authorization".

[15] Teachers' did not take the position in the litigation, as it had pleaded, that disclosure of the PPM violated or potentially violated any securities laws. Rather, it asserted that the PPM was a confidential document, the disclosure of which violated the Code.

[16] Teachers' Code of Business Conduct Manual, which includes a number of appended policies, is a lengthy and detailed document, more than 50 pages long. Lin and other employees certified annually their agreement to adhere to the Code and there is no question he was bound by its terms. The passages from the Code that are relevant to Lin's release of the PPM are as follows:

> The Code of Business Conduct of the Ontario Teachers' Pension Plan Board addresses Confidentiality as it applies to Investment Information including Inside Information (as defined below) in the following way:
>
>> Investment Information
>>
>> Employees and Board or Committee Members who receive information about corporations or other business entities in the course of their Company duties shall safeguard such information and shall not disclose it to outsiders during and after their employment by or association with the Company unless Company duties require such disclosure or disclosure is authorized.

[17] This part goes on for three additional pages to deal with "Inside Information" which is defined for the purpose of the policies and procedures as "material investment information which has not been disclosed to the public". Teachers' did not assert that the PPM contained "Inside Information". Rather, its position was initially that the PPM contained confidential information.

[18] Following his dismissal, Ms. Rowe informed her team that Lin had breached the Code by disclosing a CIM (confidential information memorandum) outside Teachers'. At trial her evidence was that she considered a CIM and a PPM as much the same thing and she would use the terms interchangeably. As the trial judge observed, and Teachers' acknowledged, CIMs and PPMs are not the same. Generally, a CIM invites direct investment in a private company and is provided to a small number of qualified investors under signed confidentiality agreements. CIMs contain sensitive financial information not generally available in the public domain. There was no question that a CIM is a confidential document, but whether an unsolicited PPM received by Teachers' was confidential was very much in dispute in the litigation.

[19] With this background, much evidence at trial was directed to the nature and content of a PPM. In the course of closing argument, however, Teachers' made an important concession – that it would not be arguing that the PPM released by Lin contained confidential information. As such, the focus for the issue of cause changed from what was asserted at the time of Lin's termination and as pleaded in its statement of defence. The issue before the trial judge (at least by the end of the trial) was not whether Lin had released a confidential document (an issue to which considerable evidence had been addressed), but whether the Code prohibited the release of the PPM. Teachers' argued that, while it was not asserting that the PPM was confidential, it was a document containing "Investment Information" received by Lin in the course of his employment, that he was prohibited from disclosing to outsiders.

(b) The Trial Judge's Decision

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[20] The trial judge concluded that Lin's release of the PPM did not violate the Code. As I explain, he first determined the scope and meaning of the Code's prohibition against disclosing "Investment Information" to third parties. He then found that the PPM did not fall within this prohibition.

[21] The trial judge's interpretation of the relevant Code provision is found at paragraphs 26 to 32 of his reasons. The trial judge noted that, on a plain reading of the wording of the Code, "Investment Information" is any information that is "received…about corporations or other business entities", circumscribed only by the phrase that the information is received "in the course of …Company duties".

[22] The appellant advanced a broad and literal interpretation of the prohibition. Jim Leech, retired CEO of Teachers', testified that he understood the Code to mean that there was an obligation to safeguard *any* information that comes to Teachers' as a result of being in the investment business.

[23] The trial judge rejected this interpretation as "too broad". He observed that such a reading would mean that information that is not confidential and is publicly available – including information obtained from public sources – would be protected from disclosure. He also commented that this interpretation did not "give fair warning to employees of what information may be shared and what must be guarded as confidential".

[24] The trial judge instead interpreted the passage defining "Investment Information" in the context of the preceding paragraph, which reads: "The Code of Business Conduct… addresses Confidentiality as it applies to Investment Information including Inside Information…". The trial judge observed that "Investment Information" is broader than "Inside Information, but "is not so broad as to mean all information that is relevant to investments". He stated that "the general boundaries of the policy are described by the capitalized word that gives the paragraph its theme, 'Confidentiality'".

[25] The trial judge concluded that the prohibition in the policy was aimed at protecting confidential information. He specified three types of information that it included: "inside information", "material investment information that has not been disclosed to the public", and "information that Teachers' expressly agrees to treat in confidence."

[26] Having determined the scope of the prohibition in the policy, the trial judge then had to determine whether the disclosure of the PPM contravened this prohibition.

[27] The trial judge discussed the evidence concerning the nature and character of CIMs and PPMs, and the differences between such documents, with a view to determining whether a PPM is in fact a confidential document or contains confidential information. At paras. 63 and 64 the trial judge noted:

> By final argument, Teachers' concluded that it would prefer that I not determine whether the PPM is confidential. Therefore it withdrew its claim that the PPM is confidential without admitting that it is not confidential.
>
> As a result, this court makes no finding about whether the PPM is confidential. I find that Teachers' had the burden of establishing that the PPM is confidential and that it has failed to discharge this burden. This conclusion – based on the onus to establish a central fact in this litigation – does not amount to a finding about the nature of the document, one way or another, for any purposes other than this proceeding.

[28] The trial judge then rejected Teachers' argument that, regardless of whether the PPM is confidential, its disclosure was nonetheless prohibited by the Code:

> The Code of Conduct prohibits disclosure of inside information, confidential information, or information which Teachers' had an obligation to hold in confidence. Teachers' has withdrawn its allegation that the PPM is confidential and there is no basis to impose a legal duty on Teachers' to hold the document in confidence in the absence of a finding that the document is confidential. Teachers' did not request the document, did not agree to hold it in confidence, and the proponent took no steps to secure protection of the document once it had disseminated it. I find that the "negative option" contained in the PPM and covering letter does not create an obligation on Teachers' or Lin to treat the document as confidential. And I find that there is no evidence of an established industry practice or standard that the PPM is to be treated as confidential.

(c) Arguments and Analysis

[29] Teachers' seeks to challenge the trial judge's interpretation of the Code. As the point of departure, the standard of review expressed in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, is applicable here. As the Court noted at para. 50:

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> Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[30] In the absence of an extricable error of law, the trial judge's interpretation of the Code, as a provision of the respondent's contract of employment, is entitled to deference: *Sattva*, at paras. 51 and 52.

[31] The appellant says that the trial judge erred in interpreting the Code, and seeks to characterize that error as a legal error or error in principle. First, the appellant says that the trial judge ignored the requirement of interpreting the Code as a whole. This requirement is emphasized in *Sattva:* see paras. 57 and 64.

[32] I disagree. The reasons disclose that the trial judge carefully reviewed the provisions of the Code relied on by Teachers' in the context of the entire policy. He concluded, based on this interpretation, that the provisions were aimed at protecting confidential information, as well as information that Teachers' expressly agreed to treat in confidence, and would not include all information relevant to investments, from any source, regardless of whether the information has been disclosed to the public.

[33] In argument the appellant asserted that the trial judge ignored the plain and literal meaning of the prohibition against the disclosure of "investment information" contained in the Code. In the passages set out above, the trial judge explained why he rejected such an interpretation as overly broad. As Doherty J.A. stated in *Dumbrell v. Regional Group of Companies Inc.*, 2007 ONCA 59, 85 O.R. (3d) 616, at paras. 51-52, "the meaning of [a] written agreement must be distinguished from the dictionary and syntactical meaning of the words used in the agreement… The meaning of a [contract] is derived not just from the words used but from the context or circumstances in which the words were used". What was important here was that the prohibition relied on by Teachers' was found in a section dealing specifically with confidentiality. The broad prohibition had to be understood in that context, according to the trial judge, in order to be workable within the factual matrix of how Teachers' did business.

[34] Second, the appellant asserts that the trial judge ignored Teachers' need to preserve its reputation for keeping information secure to attract investment opportunities. The appellant contends that this aspect of the factual matrix features nowhere in the trial judge's analysis.

[35] Again, this submission has no merit. The trial judge stated at paras. 7 and 8 of his reasons:

> Teachers' is a substantial investor with a global reputation. It treasures its reputation for probity and fair-dealing: Teachers' keeps its promises. Teachers' guards confidences. Teachers' tells the truth. This reputation is important to Teachers', for it engenders trust and respect that gives rise to investment opportunities that might not otherwise come Teachers' way.
>
> The tension for Teachers' and others in the investment business is that it is necessary to share information to obtain information. Co-operating and working with others, developing a "network" of contacts, leads to investment opportunities. This need to exchange information is tempered, always, of course, with the requirement to respect confidences and conduct business with probity.

[36] What the trial judge described was amply supported by the evidence and not challenged by Teachers'. Lin testified about the importance of the exchange of information and developing a network. He was not cross-examined on this evidence nor was any evidence put forward to contradict this assertion. The factual matrix was clearly understood and explained by the trial judge – he did not ignore Teachers' obligations of confidentiality. Indeed, the focus of much of his judgment is to explore the scope of Teachers' confidentiality obligations. Ultimately, Teachers' withdrew its assertion of confidentiality in respect of the document that was at the centre of the litigation and that formed the basis for Lin's termination.

[37] Finally, in argument on the appeal Teachers' sought to minimize the concession at trial that Teachers' was not asserting that the PPM was confidential. Teachers' appellate counsel argued that there is a difference between confidentiality "at large" and confidentiality *inter se.* That is, even if, at trial, Teachers' abandoned its argument that the PPM was a confidential document, it was a document that Teachers' was obliged to treat as confidential in its dealings with the proponent of the fund. Teachers' refers to the fact that the PPM and the covering letter addressed to Lin contained wording that asserted a claim to confidentiality. Teachers' says that the trial judge ignored the important fact that the proponent asked Teachers' to keep the document confidential, and as such, "missed the point" in dealing with the confidentiality argument. Whether the document was legally confidential was "beside the point".

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[38] Again, this is an argument without merit. The trial judge interpreted the Code as prohibiting not only the disclosure of any confidential document, but also any document or information that Teachers' had an obligation to hold in confidence. He concluded that Teachers' did not have an obligation to hold the PPM in confidence.

[39] The trial judge was aware that the PPM, and the covering letter sent to Lin, contained wording asserting a claim to confidentiality. He concluded, however, that such wording was insufficient to create an obligation on the part of Teachers' to keep the document confidential. He found, at para. 65, that there was no such obligation in relation to the PPM because "Teachers' did not request the document, did not agree to hold it in confidence, and the proponent took no steps to secure protection of the document once it had disseminated it", and that the "negative option" contained in the PPM and covering letter did not create an obligation on Teachers' or Lin to treat the document as confidential. Further, he found that there was no evidence of an established industry practice or standard that the PPM, once received by Teachers', was to be treated as confidential.

[40] The trial judge also noted that Teachers' own conduct in relation to the document was inconsistent with an obligation of confidentiality. It was Teachers' practice to keep a copy of any PPM it received in its internal database for "research" purposes. This was notwithstanding the express wording on the document requiring the return of the PPM if the recipient did not invest in the fund. Further, Lin was given a copy of the PPM in his termination meeting and his offer to return the document at the end of the meeting was declined. These factual findings indicating that Teachers' itself did not treat the document in the manner anticipated by the PPM's claim to confidentiality are both unassailable and inconsistent with the appellant's argument that the trial judge overlooked or ignored the expectation of confidentiality between Teachers' and the proponent.

[41] Accordingly, I would not give effect to this ground of appeal. There was no extricable error of law in the trial judge's interpretation of the Code and Lin's conduct in relation to the PPM. As such, his conclusion respecting cause is entitled to deference.

(2) Whether the Alleged Misconduct Would Have Justified Summary Dismissal

[42] The trial judge concluded that, if there had been a violation of the Code, the circumstances were not such as to justify dismissal without notice. He stated that, if he had accepted Teachers' expansive reading of the Code, he would have concluded that Lin's breach was a lapse in judgment that was not of a nature and degree to warrant dismissal without notice. He noted that the disclosure did not result in breach of an obligation of confidentiality, that Lin did not make the disclosure for an improper reason or for personal gain, and that he did not act in a clandestine fashion, reflecting the sincerity of his stated view that he was doing no wrong. He had years of faithful and effective service with Teachers'. An important factor again was Teachers' concession, for the purpose of the litigation, that the PPM was not a confidential document. In other words, the trial judge concluded that termination without notice would not be a proportionate response if Lin's release of the document had in fact violated Teachers' Code.

[43] The appellant asserts that, in arriving at this conclusion, the trial judge erred in law in failing to consider the broader factual matrix of Teachers' reputation in the investment community, which would require it to hold its employees to higher standards than other employees in the same industry. Teachers' asserts that Lin's release of the PPM to a third party, if a breach of the Code, was misconduct so serious that termination for cause was warranted.

[44] Whether there was just cause for termination as a result of an employee's misconduct requires an assessment of the seriousness of the misconduct in the context of the employment relationship. Typically, such a determination is entitled to deference. As this court noted in *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 (ON CA), 246 D.L.R. (4th) 65 (Ont. C.A.), at para. 49, "this is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct". See also *McKinley v. BC Tel,* 2001 SCC 38, [2001] 2 S.C.R. 161, at para. 49.

[45] Since I have concluded that there was no error in the trial judge's finding that Lin's release of the PPM did not constitute misconduct in violation of Teachers' Code, it is unnecessary to consider this ground of appeal. Accordingly, it is not appropriate to express any view as to the seriousness or otherwise of Lin's misconduct if in fact his disclosure of the PPM had violated Teachers' Code.

[46] Before leaving this issue, however, there is one point that was pressed in argument that I must address. On appeal the appellant's counsel argued that Lin's breach of the Code was serious because Lin had engaged in a *pattern* of misconduct that was indicative of a cavalier approach to confidentiality. This was based solely on Lin's own evidence that he had in the past shared information to get information in order to enhance his performance as an investment professional for Teachers', which the appellant

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argued was an admission that Lin had worked "back channels" for personal gain. This is a tortured interpretation of Lin's evidence. There is simply no evidence to support the argument that Lin engaged in a pattern of misconduct and disrespect for confidentiality, which in any event is inconsistent with Teachers' position at trial. Indeed, trial counsel for Teachers' characterized what happened as a "single incident in a very good career", and its position on cause as "a close call".

C. Issue Two: Did the Trial Judge Err in Fixing the Period of Reasonable Notice?

[47] The appellant says that the trial judge in this case erred in fixing the notice period at 15 months, as this amounted to an extension of the proper notice period without a finding of bad faith.

[48] In some circumstances a court will be justified in awarding damages for an employer's misconduct in the course of an employee's dismissal. This will be justified only where the employer has engaged in conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive": see *Wallace v. United Grain Growers Ltd*., 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, at para. 98 and *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, [2008] S.C.J. No. 40, at paras. 57 and 59.

[49] The appellant says that the trial judge in this case erred in principle when he extended the notice period from 12 months to 15 months as a result of its conduct in Lin's termination, but without a finding of bad faith.

[50] I disagree.

[51] First, it would not have been open to the trial judge to impose a *Wallace* "bump up", by extending the period of reasonable notice even if he had found bad faith. While the majority in *Wallace* took this approach, in *Honda*, the Supreme Court observed that the correct approach is no longer to extend the notice period, but to award actual damages for bad faith conduct causing mental distress: at para. 59. Alternatively, punitive damages would be available for employer misconduct where the employer's conduct is an actionable wrong, and so malicious and outrageous that it is deserving of punishment: *Honda*, at para. 62. In this case there was no claim for mental distress and the trial judge rejected the claim for punitive damages.

[52] Second, the appellant misconceives how the trial judge arrived at a notice period of 15 months. He fixed the notice period after considering the relevant *Bardal*[1] factors, which include a consideration of the availability of comparable employment. He considered Lin's training and work experience, and his career with Teachers', including his four promotions, his senior position and significant responsibilities, and his "unblemished record of achievement [with] no prior record of misconduct of any kind". The trial judge concluded as follows at para. 83:

> Investment management on the scale of Teachers' business is a global and exclusive business. Lin was 41 years old and in mid-career at the time his employment was terminated. He had a record of consistent progress and excellence in his career. His eight years at Teachers' was by far the most significant work experience of his career, and his termination for cause and under an ethical cloud was damaging to his prospects and impeded his efforts to find another job. I would put the range of reasonable notice at 12-15 months, and would fix reasonable notice in this case at the outer end of this range, 15 months, to reflect the additional challenge of finding replacement employment because of the circumstances of Lin's termination.

[53] The trial judge did not determine an appropriate period of reasonable notice, and then *increase* the period as a result of bad faith conduct by the employer. Rather, he established a range of 12 to 15 months for reasonable notice, and selected the higher end of that range because of the difficulty Lin would encounter in securing comparable employment as an investment professional as a result of the termination of his employment "under an ethical cloud".

[54] This was a relevant consideration in determining reasonable notice. At its foundation, reasonable notice is the period of time it should reasonably take the terminated employee to find comparable employment: *Ahmad v. Procter & Gamble* (1991), 1991 CanLII 7225 (ON CA), 1 O.R. (3d) 491 at p. 496; *Wallace* (per McLachlin J. dissenting in part), at paras. 115 and 120; *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801, 392 D.L.R. (4th) 341, at paras. 12-13.

[55] There is a difference between fixing a notice period that takes into consideration the circumstances surrounding the employee's dismissal, and their impact on the ability to find new employment, and awarding damages for bad faith termination, irrespective of how long it should reasonably take the employee to find a new job. The former occurred in this case, not the latter.

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[56] The determination of the applicable notice period is typically a question of fact, not to be interfered with on appeal, in the absence of a material error in principle: *Minott v. Tam O'Shanter Development Co.* (1998), 1999 CanLII 3686 (ON CA), 42 O.R. (3d) 321 (C.A.), at pp. 343-344; *Holland v. Hostopia.com Inc.*, 2015 ONCA 762, 392 D.L.R. (4th) 650. There was no such error in this case.

[57] Accordingly, I would not give effect to this ground of appeal.

D. Issue Three: Did the Trial Judge Err in Including Compensation for Lost Bonus Payments in the Award of Damages?

(1) Background Facts

[58] Lin participated in two incentive or bonus compensation plans: the AIP (a short-term incentive plan) and the LTIP (a long-term incentive plan). His payments under these plans typically comprised approximately 60% of his annual compensation. He received annual bonuses under the AIP from at least 2007 onwards and under the LTIP starting in 2009. Under both plans, payments were made to participants annually in April in respect of the "performance period" ending on December 31 of the previous year.

[59] At trial the parties agreed to the components of Lin's remuneration, as well as most of the applicable amounts if he was found to have an entitlement. Where the parties differed was in respect of his entitlements, in some instances irrespective of whether he had been terminated for cause.

[60] Lin claimed he was entitled to receive the bonus payments that he would have received under both plans in April 2011 in respect of the 2010 fiscal year, as well as amounts he would have received had his employment continued during the period of reasonable notice.

[61] Teachers' denied that Lin was entitled to any payment under the two plans once his employment was terminated. The appellant relied on specific wording contained in the 2010 amendments to both plans providing for the forfeiture of any amounts to which a participant would be entitled upon the termination of employment for any reason. In the alternative, if the 2010 amendments were not in effect, the appellant asserted that the original plan language would preclude any payment to a participant whose employment had been terminated.

[62] The relevant provisions of the bonus plans are as follows. The AIP (revised March 2009) provided:

> In the case where a Participant resigns or the Participant's employment is terminated by [Teachers'] prior to the payout of a bonus (normally the first pay period in April), no bonus shall be earned by or payable to the Participant.

[63] The LTIP (revised 2008) contained similar language as follows:

> In the case the Participant resigns or the Participant's employment is terminated by [Teachers'], the Participant's Dollar Grants not yet vested at the time of termination shall be forfeited forthwith without any right to compensation.

[64] The relevant wording Teachers' sought to introduce in its 2010 AIP provided:

> In the event that a Participant resigns his or her employment with [Teachers'] or the Participant's employment with [Teachers'] is terminated for any reason (whether with or without Cause), the Participant shall on the Termination Date forfeit any and all rights to be paid a bonus under the Plan (or any amount in lieu thereof) or to accrue any further bonus under the Plan. For further certainty, in the event a Participant's employment terminates after completion of a calendar year in respect of which a bonus had been earned by the Participant under the Plan but prior to payment of that bonus, no bonus (or any amount in lieu thereof) shall be paid to the Participant.

"Termination Date" was defined as:

> The date on which a Participant ceases to be employed by or provide services to [Teachers'] and, for greater certainty, does not include any period following the date on which a Participant is notified that his or her employment or services are terminated (whether such termination is lawful or unlawful) during which the Participant is eligible to receive any statutory, contractual or common law notice or compensation in lieu thereof or severance payments unless the Participant is actually required by [Teachers'] to provide services during such notice period.

[65] The 2010 version of the LTIP contained substantially identical language providing for the forfeiture of any payment under the plan after the Termination Date. Both plans also provided for a "clawback" of

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payments made in any year in the event of misfeasance, including a material breach of the Code.

[66] The evidence at trial was that in late 2009 Teachers' decided to introduce changes to its AIP and LTIP, in the form of revised bonus plans. In addition to changes in the manner in which bonus compensation would be calculated, the changes included the specific forfeiture and clawback provisions noted above. Between February and April 2010 particulars of the proposed changes were provided to the affected employees. Teachers' provided letters to affected employees tracking the specific forfeiture and clawback provisions, and asking them to sign off on the proposed changes to signify that they agreed to such terms.

[67] There was almost unanimous negative reaction to the proposed changes. Lin and others refused to sign the letters. The issue was taken up in meetings with then CEO, Jim Leech. Ultimately, as Lin testified, he understood that management had "backed off" on the proposed changes. As Mr. Leech testified, Teachers' had made other changes in the past to the formulas and other provisions in its bonus plans without seeking consent from the affected employees. This was the first time he recalled that they sought employee consent, and as a result of the opposition, Teachers' withdrew the request for a sign-back. There was no evidence that Teachers' further communicated to Lin and other employees that the changes would nonetheless take effect.

(2) Trial Judge's Decision

[68] The trial judge concluded that the 2010 amendments did not form part of Lin's employment contract. He said that AIP and LTIP bonus payments comprised the majority of Lin's income and were integral to his compensation. The changes to his entitlement on termination and the introduction of forfeiture provisions were highly material. At para. 132 of his reasons, the trial judge concluded:

> Unilateral imposition of terms affecting [Lin's] entitlement to receive these payments was a highly material change to his employment contract and could not be imposed unilaterally. They required his consent. Teachers' request for his written agreement, and subsequent abandonment of that request was reasonably interpreted by Lin as a decision by Teachers' not to pursue these changes. I find they did not form part of Lin's employment contract. [Citations omitted.]

[69] The trial judge awarded damages for the bonuses that Lin would have received under the AIP and LTIP in April 2011 and 2012, as well as a pro-rated payment under the AIP but not under the LTIP for January 1 to June 22, 2012 (the end of the notice period). He reasoned that a pro-rated payment should only be made under the AIP because that plan provided an incentive for current performance; the LTIP was structured to reward long-term retention of senior employees and thus no pro-rated payment for January 1 to June 22, 2012 should be made under that plan.

[70] The trial judge went on to note that, had he concluded that the amendments formed part of Lin's employment contract, he would have concluded that the amendments resulted in penalties from which relief from forfeiture should be granted.

[71] The trial judge also considered briefly whether the wording contained in the plans before the 2010 amendments would disentitle Lin to any damages for bonus compensation. At para. 93, he described Teachers' reliance on contractual stipulations to the effect that bonus compensation is not payable where employment has been terminated before the bonus compensation is paid as "well-worn ground", and he stated, "where an employee is terminated without cause, he is entitled to bonus income he would have earned during the period of reasonable notice." He referred to and adopted the reasoning of Kiteley J. in *Schumacher v. Toronto Dominion Bank* (1997), 1997 CanLII 12329 (ON SC), 147 D.L.R (4th) 128 (Ont. S.C.J.), in essence, that a terminated employee's involuntary inability to comply with a condition of a bonus plan requiring continued employment ought not to be justification in declining the award of the bonus as part of his wrongful dismissal damages.

(3) Issues Respecting Damages for Lost Bonus Entitlement

[72] Teachers' raises three issues in relation to the trial judge's conclusions regarding Lin's bonus entitlement. First, it says that, in concluding that the 2010 plan amendments providing for forfeiture of bonus entitlement upon termination did not take effect, the trial judge failed to follow and apply the legal test governing unilateral change of an employment contract, set out in *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327 90 O.R. (3d) 547. Second, Teachers' asserts that the trial judge erred in concluding that terminated employees are always entitled to bonuses during the period of reasonable notice, and in ignoring the terms of the original plans that would preclude Lin from receiving a bonus after his employment was terminated. Finally, if effect is given to either argument, Teachers' contends that the

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trial judge erred concluding that Lin would be entitled to relief from forfeiture. I will consider the first two issues in turn. Because of my conclusion that there was no error in the trial judge's conclusion that the new plan forfeiture terms had not taken effect, and that Lin was entitled to compensation for his lost bonuses following termination, it is unnecessary to consider the arguments with respect to relief from forfeiture.

(a) Did the Trial Judge Err in Concluding that the New Plan Forfeiture Terms Did Not Take Effect?

[73] Whether the new plan terms respecting forfeiture took effect was a question of fact that depended on the evidence. Nonetheless, the appellant asserts that the trial judge made an error of law by failing to properly apply the law governing the test for unilateral change in *Wronko,* a decision of this court dealing with constructive dismissal.

[74] *Wronko* involved an employer's attempt to unilaterally reduce the contractual notice period for the termination of Mr. Wronko's employment. When Mr. Wronko objected, the employer gave notice that the changes would come into effect in 24 months. After 24 months, it sought to terminate his employment. The question was whether the change to the contractual notice period had taken effect. The context was a fundamental change that, if implemented unilaterally, would have entitled Mr. Wronko to claim constructive dismissal.

[75] Winkler C.J.O. set out three options available to an employee when "an employer attempts a unilateral amendment to a fundamental term of a contract of employment." The options are for the employee to accept the change either expressly or implicitly through acquiescence, in which case the employment continues under the altered terms; to reject the change and sue for damages if the employer persists in treating the relationship as subject to the varied term; or for the employee to make it clear to the employer that he or she is rejecting the new term, in which case the employer may respond by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. In other words, if the employer permits the employee to discharge his or her obligations under the original employment contract, then — unless proper notice of termination is given — the employer is regarded as acquiescing to the employee's position.

[76] Teachers' argues that the changes to the AIP and the LTIP were a complete package, and as such, when confronted with the changes, Lin and the other employees had the three options set out in *Wronko*. Teachers' asserts that because Lin continued in his employment and accepted the terms of the new compensation structure under the 2010 revisions, he must be seen to have acquiesced in the changes to eligibility.

[77] Teachers' reliance on a *Wronko* analysis is misplaced. First, this was not a case where the employer sought to introduce unilateral changes to employment, and Lin and other employees acquiesced. The evidence was to the contrary. Teachers' sought the specific agreement of its employees to the changes to its bonus plans. Such agreement was not given – the changes accordingly were rejected.

[78] Second, *Wronko* does not address the very argument Teachers' advanced at trial and on appeal – that because it went ahead and implemented the favourable changes to the bonus plans (in terms of enhanced employee compensation) this meant that the employees, notwithstanding their objection, had accepted all aspects of the changes as a "package deal".

[79] The trial judge stated at paras. 130 and 131:

> The evidence discloses that the methods used to calculate AIP and LTIP had been changed before, over time, and that those changes had been implemented by Teachers' without seeking or obtaining written agreement from employees. I conclude from this that the Company and its employees believed that the Company had the discretion to amend the formulae from time to time without obtaining employee consent, and that these modifications would not constitute fundamental changes to the employment relationship. This does not mean, of course, that the Company could make any change it wanted to this aspect of compensation without disturbing the employment relationship. But the changes that were made were accepted without objection.
>
> In respect to the changes in entitlement on termination and clawback of payments, these were controversial among employees, and set the 2010 amendments apart

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from prior unilateral amendments to the AIP and LTIP. The qualitative differences were effectively recognized by Teachers' when it sought written agreement to the changes from employees. I conclude that it was well understood that it was these aspects of the changes that required employee consent to be effective. When Teachers' dropped its request for employee consent to these changes, it did not advise employees that these changes to entitlement on termination and clawback of bonus income would nonetheless take effect.

[80] The trial judge accordingly considered and rejected the "package deal" argument of Teachers'. He concluded that, while Teachers', based on its past practice, could proceed unilaterally in its discretion to change the bonus compensation structure, it recognized that employee consent for the forfeiture and clawback provisions was required. When Teachers' dropped the requirement for a sign-back, without advising that the changes would nonetheless take effect, the reasonable conclusion was that such changes had not been made. This conclusion was supported as well by the evidence that Teachers' had not invoked the forfeiture provisions in any other employee termination.

[81] Teachers' went ahead and implemented the changes in bonus compensation for Lin and other employees notwithstanding that the forfeiture and clawback provisions had not been accepted. It was not the trial judge who "severed" the amended plans, but Teachers' itself. Teachers' Board (at a meeting prior to Lin's termination) approved the amounts for Lin's April 2011 AIP and LTIP payments based on the new formulae. As the trial judge noted, "[n]o alternative figure was proposed or proved."

[82] Accordingly, I see no error in the trial judge's conclusion that the forfeiture and clawback provisions of the new plans did not form part of Lin's employment contract. Lin's entitlement to damages for lost bonuses depended on the wording of the pre-2010 bonus plans.

(b) Did the Trial Judge Err in Concluding that Lin was Entitled to Compensation for Lost Bonuses under the Terms of the Existing AIP and LTIP?

[83] The appellant asserts that the trial judge erred when he stated that "[w]here an employee is terminated without cause, he is entitled to bonus income he would have earned during the period of reasonable notice". The appellant says that whether an employee is entitled to bonuses during the notice period depends on the specific wording of the incentive plan. The appellant says that the wording in this case clearly disentitled Lin from receiving any bonus compensation once his employment was terminated.

[84] Although the trial judge gave the appellant's argument on this issue short shrift, he correctly recognized that it is settled law that damages in lieu of reasonable notice should place an employee in the same financial position he or she would have been in had such notice been given and the employee had worked to the end of the period of reasonable notice: *Sylvester v. British Columbia*, 1997 CanLII 353 (SCC), [1997] 2 S.C.R. 315, at para. 1. Further, "[d]amages 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": *Paquette v. TeraGo*, 2016 ONCA 618, at para. 17, and the cases cited therein.

[85] In *Taggart v. Canada Life Assurance Co.* (2006), 50 C.C.P.B. 163 (Ont. C.A.), at paras. 11 and 16, Sharpe J.A. explained (when considering a requirement of active service as a prerequisite for the accrual of pension benefits in a wrongful dismissal case), that the claim is not for the benefits themselves, but for common law contract damages, as compensation for what the employee would have earned had the employer not breached the employment contract by failing to give reasonable notice. He observed, at para. 12, that the proper way to analyze the claim is to consider first the terminated employee's common law right to damages for breach of contract, and second, whether the terms of the plan alter or remove a common law right.

[86] The trial judge recognized these principles when he stated, at para. 85, that "the parties may bargain for terms that are different from what the common law provides." A bonus plan may contain entitlement terms, setting out limitations on or conditions for the payment of a bonus. Where such terms exist and there is a finding that the bonus was an integral part of the employee's compensation, the question is whether the wording of the plan was sufficient to limit Lin's common law right to receive compensation for lost bonuses during the period of reasonable notice: *Paquette v. TeraGo*, at para. 46. Clear language is required in order to take away or limit a dismissed employee's common law rights: *Taggart*, at para. 20.

[87] Again, the relevant language in the 2009 AIP is as follows:

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> In the case where a Participant resigns or the Participant's employment is terminated by [Teachers'] prior to the payout of a bonus (normally the first pay period in April), no bonus shall be earned or payable to the Participant.

[88] The language in the 2008 LTIP is similar. It provides that:

> In the case the Participant resigns or the Participant's employment is terminated by [Teachers'], the Participant's Dollar Grants not yet vested at the time of termination shall be forfeited forthwith without any right to compensation.

[89] I reject the appellant's assertion that these terms restrict Lin's entitlement to compensation for lost bonuses in the event of wrongful dismissal. The wording does not unambiguously alter or remove the respondent's common law right to damages, which include compensation for the bonuses he would have received while employed and during the period of reasonable notice. A provision that no bonus is payable where employment is terminated by the employer prior to the payout of the bonus is, in effect, the same as a requirement of "active employment" at the date of bonus payout. Without more, such wording is insufficient to deprive a terminated employee of the bonus he or she would have earned during the period of reasonable notice, as a component of damages for wrongful dismissal: *Bernier v. Nygard International Partnership*, 2013 ONCA 780, 14 C.C.E.L. (4th) 155, affirming 2013 ONSC 4578, 9 C.C.E.L. (4th) 41; *Paquette*, at para. 31.

[90] And, as Goudge J.A. explained in *Veer v. Dover Corporation (Canada) Limited* (1999), 1999 CanLII 3008 (ON CA), 45 C.C.E.L. (2d) 183 (Ont. C.A.), at para. 14:

> [T]he termination contemplated must, I think, mean termination according to law. Absent express language providing for it, I cannot conclude that the parties intended that an unlawful termination would trigger the end of the employee's option rights. The agreement should not be presumed to have provided for unlawful triggering events. Rather, the parties must be taken to have intended that the triggering actions would comply with the law in the absence of clear language to the contrary.

[91] While the issue in *Veer* was the employee's entitlement to certain stock options following his dismissal without cause, this court's interpretation of the effect of the "termination" term is equally apt in the present appeal. The phrase "employment is terminated by [Teachers']" must be taken to refer to an employee's lawful termination absent clear language to the contrary.

[92] To summarize: at para. 93 of his reasons, the trial judge stated "[w]here an employee is terminated without cause, he is entitled to bonus income he would have earned during the period of reasonable notice." As I have already explained, the employee's common law right is indeed the correct starting point for the analysis. The second step is to examine whether there is something in the bonus plan that removes the employee's common law entitlement. The trial judge, at para. 85, recognized that parties may bargain for something other than what the common law provides. Although the trial judge did not specifically refer to the relevant entitlement provisions in the applicable plans, he clearly rejected their effectiveness in limiting Lin's entitlement. For the reasons I have set out, I agree that these provisions did not limit the respondent's common law rights.

[93] I would therefore reject this ground of appeal.

E. Disposition

[94] For these reasons, I would dismiss the appeal. I would award the respondent his costs of the appeal, inclusive of disbursements and applicable taxes, fixed at $24,000.

Released: ("KMvR") August 9, 2016

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

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[1] *Bardal v. Globe & Mail Ltd.* (1960), 1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140 (Ont. H.C.J.).

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