

## *Bain v UBS Securities Canada Inc*, 2016 ONSC 5362

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A recent trial decision from the Ontario Superior Court of Justice, *Bain v UBS Securities Inc*,<sup>1</sup> has solidified the long-standing principle in Ontario that executive employees who are terminated without cause are entitled to wrongful dismissal damages based on their total compensation, regardless of whether it is cash or equity based. In addition, the court's decision should serve as a warning to employers who attempt to use their discretion regarding bonuses to unreasonably deprive an employee of a fair determination of his or her bonus in circumstances where that same employee has been terminated without cause or a termination is under consideration.

The plaintiff, David Bain, was 49 years old and had 14 years of service at the time of his termination. He began working for the defendant, UBS Securities Canada Inc., in June 1999 after he was recruited away from secure employment with Scotia Capital. After a series of promotions, at the time of his termination Mr. Bain held the role of Managing Director, Head of Canadian Mergers & Acquisitions ("M&A"). His compensation was comprised of a base salary of \$385,000 plus bonuses and referral fees.

In 2006, there was a plan of arrangement involving various subsidiaries and affiliated companies of UBS. Following this step, the Canadian employees of these companies were advised that their salaries and bonuses would be consistent with the practices of UBS and that the Equity Ownership Plan ("EOP") was put into place in Canada effective in fiscal 2008.

In early 2013, a decision was made by UBS to close down the M&A arm of UBS in Canada. As a result of that decision, various Canadian employees were terminated, including Mr. Bain. Notwithstanding the fact that Mr. Bain had been told by his direct report, Alain Auclair, that he had outstanding performance in fiscal 2012 and the revenue for Canadian M&A had increased significantly in that same year, he did not receive a bonus for fiscal 2012 or for the three months worked in 2013.

Applying the court's reasoning in *Bardal v Globe & Mail Ltd*<sup>2</sup> and *Minott v O'Shanter Development Company*,<sup>3</sup> as well as a number of other leading cases, Justice Wilson determined that the appropriate notice period for Mr. Bain was 18 months. In reaching this decision, the court took note that he had been induced to join UBS despite the time that had passed, but said it ought not to be given significant weight. Perhaps more significantly, Justice Wilson was clear and unequivocal in upholding several other leading decisions from the Ontario courts to find that Mr. Bain's bonus was an integral part of his total compensation and it was unlawful to deny him a proper bonus for fiscal 2012, the stub period worked in 2013, and over the

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<sup>1</sup> 2016 ONSC 5362.

<sup>2</sup> (1960), 24 DLR (2d) 140 (HCJ).

<sup>3</sup> (1999), 42 OR (3d) 321 (CA).

notice period.

With respect to the plaintiff's entitlement to a bonus in fiscal 2012, the court relied on the principles articulated in two leading decisions, *Chann v RBC Dominion Securities Inc*<sup>4</sup> and *Mathieson v Scotia Capital Inc*.<sup>5</sup> That is, notwithstanding any discretion on the part of the employer with respect to the granting of a bonus, that discretion must be exercised fairly, reasonably and without regard to an employee's termination:

Simply because a bonus is awarded in the sole discretion of an employer does not mean that it can be done in an arbitrary or unfair fashion or that the employer can decide that an employee should not get a bonus without following a fair, identifiable process. The employer may adjust the weight given to various factors, given the market conditions and other changeable criteria, but that does not obviate the requirement that the exercise must be done in a fair manner. The court must analyze the evidence in a particular case and decide whether the process that was followed was fair and reasonable.<sup>6</sup>

In particular, the court noted that there was no evidence that Mr. Bain's performance had deteriorated in 2012 or that there was some other reason he was not given a bonus, and UBS had failed to offer any alternative explanation for the fact that Mr. Bain did not receive a bonus when in previous years bonus represented the majority of his compensation. Justice Wilson noted on a number of occasions that she did not find the defendant's witness to be credible and that he was evasive on a number of occasions, which undoubtedly influenced her findings of fact in the judgment. Ultimately, the court concluded that the fact Mr. Bain was being terminated was the driving factor behind the decision not to award him a bonus in 2012 and as such that UBS had failed to properly exercise its discretion in all of the circumstances.<sup>7</sup>

The court also rejected the defendant's argument that it was entitled to rely upon the changes to UBS' compensation plans that were put into effect in 2006 which purported to preclude him from receiving a bonus if he were no longer employed with UBS at the time of payout. In arriving at that conclusion, Justice Wilson specifically noted that the evidence regarding what had transpired after 2008 was "sparse," leading to the conclusion that there was insufficient evidence to suggest that employees were advised of the changes to the compensation plans at the time. She also applied the reasoning in *Schumacher v TD Bank*<sup>8</sup> and the Court of Appeal's recent decision in *Paquette v TerraGo Networks*<sup>9</sup> to hold that, where the bonus is an integral part of an employee's compensation, an employer is not entitled to receive a windfall by wrongfully terminating an employee and depriving the employee of the bonus he would otherwise have been paid.<sup>10</sup>

In order to determine an appropriate bonus award for Mr. Bain in 2012, over the stub period

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<sup>4</sup> (2004), 34 CCEL (3d) 244 (Sup Ct J).

<sup>5</sup> (2009), 78 CCEL (3d) 76 (Sup Ct J).

<sup>6</sup> *Bain* at paras 87-90.

<sup>7</sup> *Ibid* at paras 96-110

<sup>8</sup> (1997) 147 DLR (4th) 128 (Sup Ct J); *aff'd* (1999) 173 DLR (4th) 577 (CA).

<sup>9</sup> 2016 ONCA 618.

<sup>10</sup> *Bain* at paras 111-21.

in 2013, and over the reasonable notice period, Justice Wilson concluded that the fairest approach was to use an average of the bonuses awarded to similarly situated employees in M&A based on evidence produced regarding Mr. Bain's comparators for the same period.

Another noteworthy point in Justice Wilson's decision is that she awarded damages for earned but unpaid vacation pay based on the plaintiff's total compensation and did not limit her calculation to base salary. In arriving at that determination, Justice Wilson cited Section 35.2 of the *Act* which explicitly states that a terminated employee is entitled to his or her vacation pay, which is calculated to be 4 percent of *wages*. Because the plaintiff's bonus was a "significant component of his remuneration" and fell under the definition of "wages" articulated in Section 1(1) of the *Act*, Justice Wilson determined that a fair approach was to calculate the plaintiff's vacation pay using his base salary and an average of the bonuses awarded to Mr. Bain's comparators for 2013.<sup>11</sup>

The *Bain* decision is an important reminder to employer's counsel, at least in Ontario, that the courts will continue to enforce the longstanding principle that a terminated employee is entitled pay in lieu of notice based on total compensation as well as a fair and reasonable assessment of that same compensation. Moreover, this decision makes it abundantly clear that an employer's bonus plans will be subject to serious scrutiny in circumstances where a bonus forms an integral part of an employee's compensation and there is no clear evidence that any changes to those plans were adequately communicated to employees. The trial decision in *Bain* has recently been appealed and rest assured employment counsel will be watching the outcome very closely.

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<sup>11</sup> *Ibid* at paras 149 and 155.