



e2r Alert!

We All Know What Salary Means. Or Do We? Ontario Court of Appeal Redefines Salary in Two Recent Cases

ONTARIO (but maybe other jurisdictions!)

No conversation about a without cause termination would be complete without discussing.... notice!

As a refresher, unless an employee is being terminated for cause (or wilfull misconduct in Ontario), they are entitled to statutory, contractual or common law reasonable notice of termination depending on the contract. This notice can be provided via working notice – where the employee continues to work for the notice period after receiving notice of their termination. Or as salary continuance – where the employee no longer works but continues to receive their salary during the notice period. Or, lastly, as a lump sum payment which represents the pay, they would have received over the notice period.

Under the Ontario *Employment Standards Act, 2000* an employee is entitled to their 'regular wages' for the statutory notice period; which can include bonuses, commissions and other payments. But what about an additional offer in your contract that provides for a fixed number of additional weeks/months of salary to be paid out based on service? That should be just salary, and we all know what salary means? Or do we?

Two recent Ontario Court of Appeal decisions concerning employees' contractual entitlements suggest that the word "salary" does not mean base pay alone.

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In *Maynard v. Johnson Controls Canada LP*, 2023 ONCA 392, the employee's agreement stated that upon termination, he would be entitled to his minimum statutory entitlements as well as "a lump-sum payment equivalent to 4 weeks of pay based on your salary for each complete year of service..."

Both the lower Court and the Court of Appeal determined that the lump sum of pay "based on [his] salary" was not limited to only Maynard's base pay, but also included his bonus and the value of his restricted share units (RSUs).

In *Nader v. University Health Network*, 2022 ONCA 856, the employment agreement stated that upon termination without cause, Nader was to be provided payment "of an amount equal to 12 months' salary", however, the term "salary" was not defined in the contract. The lower Court determined that the payment of 12 months' salary did not include the employee's discretionary performance-related bonus.

The Court of Appeal disagreed and overturned the decision on the bonus. They found that there was sufficient evidence that the bonus was a substantial and integral part of his overall compensation. Furthermore, it was reasonable to infer that Nader would have earned the bonus if his employment had continued. The fact that the bonus was "discretionary" did not change that finding.

Takeaway for Employers

We will be paying close attention to this trend as it is unclear whether courts in other jurisdictions will reach the same conclusion when interpreting 'salary or pay' in termination clauses in employment agreements. One hopes these decisions are appealed as this is yet another sudden change to the understood landscape of employment law and contractual integrity in Ontario.

In the interim, employers should have well-drafted employment agreements and termination provisions that speak to other forms of compensation, beyond an employee's salary, or that specifically exclude any other type of payment other than base salary in an additional notice clause.

If you have any questions about these decisions or your agreements, please do not hesitate to contact ClientCare.