IN FACT AND IN LAW

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FIELDTURF TARKETT INC. V. GILMAN:[1] THE COURT OF APPEAL UPHOLDS THE PAYMENT OF "PHANTOM SHARE" BONUSES WHERE EMPLOYMENT HAS BEEN TERMINATED WITHOUT A SERIOUS REASON

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THE FACTS

On January 22, 2014, the Court of Appeal of Québec confirmed the 2012 decision of the Superior Court of Québec in *Gilman v. Fieldturf Tarkett inc.*[2] At issue in this case was whether the payment of so-called "phantom share" bonuses were to be paid to employees whose employment was terminated by the company.

The incentive program at issue was established for certain non-shareholder key employees of the company. It provided that specific amounts would be contributed to a special bonus fund upon the sale of some of the shares of the company in accordance with the provisions of a Joint Venture Agreement and, later on, of a Share Purchase Agreement. More specifically, the program provided for the conversion of additional capital contribution into a number of notional shares of the company (the "phantom shares"). When actual shares of the company were purchased, an amount was contributed to the bonus fund, that amount being equal to the value of the phantom shares at that time. The incentive program also stipulated that it was the company's CEO, John Gilman, who had the discretion to decide which key employees would receive phantom share bonus payments and how much each would be paid.

The five plaintiffs in the present action were the largest beneficiaries of this incentive program, together receiving almost 60% of the total phantom share bonus amount paid out in September 2005 and about 66% of the one paid out in March 2007. Sadly, in July of 2007, John Gilman died unexpectedly while the last payment was still to be paid.

In September 2008, following a subsequent internal restructuring of the company, four of the five plaintiffs were dismissed without cause, none of them receiving a final phantom share bonus payment prior to their departure. This final payment was made in February 2009 to all employees of the company despite the fact that, in accordance with the incentive program, only key employees who were employed on December 31, 2008 qualified for the final payment.

While the company accepted that these four individuals were entitled to several months' notice of termination ending in 2009, the new CEO refused to provide them with the final phantom share bonus payment.

As for the fifth plaintiff, he refused the new terms of employment proposed by the company and resigned in January 2009. He also did not receive the final phantom share bonus payment.

The five plaintiffs filed an action against the company claiming that they were entitled to receive the final phantom share bonus payment.

THE DECISION OF THE SUPERIOR COURT OF QUÉBEC

The Superior Court granted the plaintiffs' claim. It dismissed the company's argument that, insofar as the bonus was payable entirely at the discretion of the CEO, the company had no obligation to make the final phantom share bonus payment to the plaintiffs. The Court held that *"an employee who is terminated without cause is entitled to receive all of the benefits that accrue during the notice period, including bonuses."*[3] While the Court agrees

[1] 2014 QCCA 147.

[2] 2012 QCCS 1429.

[3] *Ibid* at para 36.

that where its payment is entirely dependent on the employer's discretion, an employee will generally not be entitled to claim a bonus as part of his pay during the notice period, evidence that the employee regularly received a bonus in the past may rebut the argument that its attribution was discretionary.

The Court goes on to conclude that an assessment of the company's past practice demonstrates that the phantom share bonus payments had become an integral part of the plaintiffs' wages by the end of 2008. More specifically, the Court states that the plaintiffs received the 2005 and 2007 bonuses and moreover, they had a reasonable expectation that they would receive a final bonus payment at the end of 2008.

Finally, the Court notes that the bonus payments were not entirely discretionary. Rather, in accordance with the Joint Venture Agreement/Share Purchase Agreement and subject to the company's financial performance, they had to be paid whenever shares of the company were purchased. Moreover, the amount of the bonuses was based on a specific formula and the bonuses were reserved for the company's "key employees." The plaintiffs were, according to the trial judge, "key employees" and were undoubtedly viewed as such by John Gilman prior to his death. As such, the Court comes to the conclusion that *"Gilman's past practice defined what the reasonable exercise of the CEO's discretion had become by the end of 2008."*[4] As a result, insofar as the plaintiffs' entitlement to receive the final phantom share bonus payment vested during their respective notice periods, they were eligible to receive this payment.

THE DECISION OF THE COURT OF APPEAL OF QUÉBEC

The Court of Appeal of Québec upheld the trial judge's decision and held that due to John Gilman's death, the provision of the incentive program which specifically granted him the discretionary power to decide, among other things, which key employees would receive phantom share bonus payments became ambiguous and had to be interpreted in light of the parties' intent, the nature of power was exercised. The Court agreed that the evidence was the incentive program, and the way in which this discretionary clear that John Gilman always considered the plaintiffs to be "key employees" and that no evidence was brought forth to demonstrate that this situation changed during the period between his death and the date on which the plaintiffs' employment was terminated. The Court added that in the circumstances, the new CEO could not "[TRANSLATION] *in the good faith exercise of the discretionary power with which he was invested in Mr. Gilman's stead*" conclude that the plaintiffs ceased to be key employees after July 2007 and before they were terminated.

With respect to the eligibility condition (i.e. that only "key employees" who were employed on December 31, 2008 qualified for the final payment), the Court stated that, under Quebec law, bonuses and share purchase options form part of an employee's total compensation and, as such, they are generally taken into account as forming part of an employee's pay during the notice period. Therefore, the plaintiffs' termination, in the absence of a serious reason, prior to the date on which the final phantom share bonus payment became payable does not prevent them from being able to recover the amounts claimed.

The Court of Appeal's judgment can be accessed here: http://canlii.ca/fr/qc/qcca/doc/2014/2014qcca147/2014qcca147.html

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[4] *Ibid* at para 61.