

ALBERTA COURT OF APPEAL CONFIRMS EMPLOYEE ENTITLEMENTS FOLLOWING WITHOUT CAUSE TERMINATION

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In *Carroll v. ATCO Electric Ltd*, 2018 ABCA 146 ("ATCO Electric"), the Alberta Court of Appeal (the "Court") considered the entitlements owing to a senior long-term employee terminated without cause. In doing so, the Court helpfully addressed a number of central employment law principles that are of considerable importance to employers. In particular, the Court confirmed that employee entitlements to certain benefits during the notice period are strictly governed by the terms of such plans. This position was recently set out in *Styles v Alberta Investment Management Corporation*, 2017 ABCA 1 ("Styles"), which was welcome news for Alberta employers.

Background

The facts underlying this appeal are largely set out in the trial decision of Justice Mah in *Carroll v Atco Electric Ltd*, 2017 ABQB 267 (the [Trial Decision](#)).

At the time Carroll's employment was terminated he had been employed by ATCO (and its related entities) for a period of 28 years. He was 55 years old and held the position of Vice-President, Projects and Construction.

His compensation included an annual base salary of \$180,000, as well as participation in the company's:

- executive [Bonus Plan](#) ("Bonus Plan");
- stock option plan ("[SOP](#)");
- share appreciation rights plan ("[SAR Plan](#)");
- defined benefits pension plan; and

- supplementary employee retirement plan.

Carroll was the only vice-president at ATCO that did not receive a bonus for 2009. The rationale for this decision related to two projects Carroll oversaw, which the company's top management viewed as failures. Under the rubric of the Bonus Plan, which involved considerable discretion and subjective assessment by the Company's top management, Carroll received a performance rating of 1-2 for 2009. A rating of 3, 4 or 5 was necessary to receive a bonus payment. Notably, Carroll had received significant bonuses in 2007 and 2008 (\$102,000 and \$144,000 respectively).

On May 4, 2010, Carroll was notified that his employment was being terminated without cause. He was offered a period of vacation and paid leave until September 1, 2010, at which point he could retire. In addition, he was offered 18 months' salary continuance and a lump sum payment to be paid at a later date. By structuring the offer in this manner, ATCO allowed Carroll to turn 55 prior to September 1st such that he could retire pursuant to the terms of the company's pension plan.

ANALYSIS

Notice Period

The Court confirmed that Carroll's notice period commenced on May 4, 2010 and that the period of vacation and paid leave he took prior to retiring on August 27, 2010 counted as part of the notice period.

With respect to the length of the notice period, Carroll argued that he was entitled to 28 months rather than the 24 months awarded by the trial judge. His position was based, in large part, on the fact that the lump sum offered to Carroll at the time his employment was terminated reflected 28 months' salary. In other words, since the lump sum payment of \$420,000 was equivalent to his salary for a period of 28 months, the applicable notice period should be 28 months. In rejecting this argument, the Court confirmed that it remains up to the courts to determine reasonable notice periods based on the well-known Bardal factors (para 35). In addition, the Court held at para 36:

...It is not obvious that an employer's magnanimity should be converted into a common law commitment or obligation. Nor were we given any authority where unilateral action by an employer under circumstances like these should be converted to a binding undertaking or estoppel.

Furthermore, the Court commented that the 24 months ordered by the trial judge "was already at the 'rough upper limit' for such a notice period," signalling that the notion of an upper limit remains in Alberta (at para 40).

The Bonus Plan

Carroll advanced two arguments with respect to the Bonus Plan.

First, the 2009 bonus was wrongfully denied. Relying on the Supreme Court of Canada's decision in *Bhasin v Hrynew*, 2014 SCC 71 ("*Bhasin*"), Carroll argued that even though the Bonus Plan involved discretion, such discretion had not been exercised reasonably and honestly in the denial of his 2009 bonus.

Though *Bhasin* did establish a general duty to act honestly in the performance of contractual obligations, it did not establish a general duty for the "reasonable exercise of discretion" in contractual performance. This was soundly explained in the *Styles* decision, where the Court noted that the very concept of discretion means that a party is free to choose from a range of options. Interfering with contractual discretion creates uncertainty and undermines the fundamental principle that parties should get what they bargained for (including the employment context).

Pursuant to the terms of the employment agreement between ATCO and Carroll, payment under the Bonus Plan was discretionary. The trial judge reviewed all of the relevant evidence and concluded that he should not interfere with the exercise of discretion that was properly conferred upon ATCO through the contract of employment. "The law does not permit me to do so," he concluded, "even if I thought the discretion had been exercised unreasonably, which I do not" (para 76). The trial judge's determination regarding the 2009 bonus was not overturned on appeal.

Second, Carroll argued that he was entitled to bonus payments for 2010 and 2011 as if he had worked through the notice period. Unlike the SOP and SAR Plan (discussed below), the Bonus Plan document did not explicitly eliminate entitlement to a bonus payment following termination of employment. Thus, the trial judge assessed the likelihood that Carroll would have received a full bonus in 2010 and 2011 to be 25%. In the result, he was awarded \$72,000 – an amount that was not contested by ATCO on appeal.

The SOP and SAR Plan

Carroll argued that during the notice period he should have continued to earn benefits pursuant to the SOP and SAR Plan (collectively, the "**Plans**"). In effect, Carroll's position was that the Plans were akin to earned employee benefits that built up value during the notice period. Similar to a salary, they amounted to compensable losses related to the termination of his employment. Following the Styles decision, the Court outright rejected this argument stating at para 43:

This was not a situation of an employment benefit acquired incrementally in the same way as employment pay is earned as salary. Eligibility for any benefits under these Plans was not an incremental earning, but was subject to the conditions of the Plans. [Emphasis added]

As explained in the Styles decision, the reasonable expectations of contracting parties are found in the words of the contract, not the court's view of what is fair in the abstract (para 44). The Plans expressly addressed Carroll's entitlements upon termination of employment. Specifically, unvested benefits at the date of termination cease upon termination "without regard to any statutory or common law notice periods" (Trial Decision, paras 106-109). Accordingly, pursuant to the plain wording of the Plans, Carroll was not entitled to any payment pursuant to either the SOP or the SAR Plan.

Conclusion

The ATCO Electric decision highlights the importance of clear and well-drafted employment contracts. It also confirms the Court's decision in Styles that the plain language of benefit and incentive plans will dictate employee entitlements following termination without cause.

This decision also confirms a number of core employment principles, including:

- paid vacation and notice periods can be concurrent;
- the calculation of notice periods is up to the courts;
- notice periods for long-term service employees are likely to be significant but a "rough upper limit" of 24 months appears to remain persuasive in Alberta;
- an employer's decision not to award a bonus during the course of employment is unlikely to be interfered with absent bad faith conduct such as dishonesty, lying or misleading the employee; and
- unless there is clear language to the contrary, employees may be entitled to bonus or incentive payments that become payable during the notice period.

Employee entitlements following termination without cause can be complex and are highly fact-specific. The ATCO Electric decision is a helpful reminder that without clear language limiting an employee's entitlements upon termination, employers may be vulnerable. Accordingly, employers should continue to review the wording of applicable bonus and incentive plans and assess whether the contractual language in place is sufficient to exclude additional payments post-termination.

Please contact [Maxwell Brunette](#) or [Bruce Graham](#), members of Gowling WLG's Employment, Labour & Equalities team, for assistance with the preparation and review of your employee benefit and bonus entitlement plans.

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