

Employment & Labour

MAY, 2001

Employees' Continued Stock Option Entitlement Following Termination of Employment

In the event of a termination of employment without cause, an employer must provide the dismissed employee with notice of termination, or payment in lieu of that notice. Employees are also entitled to the continuation of the "benefits" of their employment during the notice period. This continuation is based upon the principle that for benefit purposes, an individual will retain their status as an employee throughout the notice period, following termination of employment.

Given this principle, employers should be familiar with the judicial treatment of an employee's continued right to stock options following dismissal which has helped to clarify the circumstances in which an employee will continue to enjoy some right to the benefits associated with stock options. These decisions have established the general rule that an employer cannot, by its own breach, disentitle the dismissed employee from participating in any type of stock option plan during the normal notice period. In order to avoid damage claims based upon lost stock option rights, employers must consider when an dismissed employee's stock option rights can and cannot be terminated following the termination of employment.

As with many other legal issues, an employer's rights in this area will be largely determined by the language used by the parties in determining the continued right to stock option plans following termination of employment. The varied judicial treatment of three different stock option plans illustrates this important point.

In *Veer v. Dover Corp. (Canada) Ltd.* a 1999 decision of the Ontario Court of Appeal, based on the wording of the stock option agreement, an employee was held to have been entitled to exercise vested stock options during the period of reasonable notice immediately following his termination. The relevant provision of the stock option agreement in this case stated:

If the optionholder's employment with the corporation is terminated for any reason other than the death, retirement and incapacity of the optionholder, whether such termination be voluntary or involuntary, without his having fully exercised his option, the option shall be cancelled and he shall have no further rights to exercise his option or any part thereof and all of his rights hereunder shall terminate *as of the effective date of such termination* [emphasis added].

The Court in *Veer* found that, regardless of whether a termination is "voluntary" or "involuntary," it must be a termination that is contemplated by law. Since a termination according to law is only effective at the end of a reasonable notice period, the employee in this case (a 40-year veteran) had 24 months following termination in which to exercise his rights under the stock option agreement.

A 1991 decision of the Ontario Court of Appeal (*Brock v. Matthews Group Ltd.*) reached a different conclusion based on the following language in a stock option agreement:

Upon the [termination of employment] ... the option hereby granted shall forthwith cease and terminate and shall be of no further force or effect whatsoever ... in respect of [options not previously exercised]; provided that where the Employee is dismissed by the Corporation, the employee shall have 15

days *from the date notice of dismissal is given* in which to exercise the option hereby granted ... [emphasis added].

The Court in *Brock* interpreted this language as providing that the date of the actual dismissal of the employee was the reference point to be used in determining the end of the employee's option rights, irrespective of whether the dismissal was lawful or unlawful.

This issue was again considered by the Ontario Court of Appeal in a decision released in December, 2000 (*Gryba v. Moneta Porcupine Mines Ltd.*) where the Court again determined that the question to be answered was whether the stock option plan clearly indicates that the triggering event determining the rights under the plan is a dismissal done in breach of the employment contract. In *Gryba* the stock option plan stated:

If an optionee ceases to be employed ... by the Corporation otherwise than by reason of death or termination for cause ... any option ... held by such optionee *at the effective date* may be exercised in whole or in part for a period of thirty days thereafter. [emphasis added]

The Court determined that the stock option plan could be read as contemplating only a lawful notice of termination. As a result, the effective date of termination of employment would be at the end of the notice period. Given this interpretation, the employee was entitled to exercise his options during his notice period.

The principles associated with the exercise of options also applies to the continued entitlement to vesting of stock options during the notice period. As the above decisions indicate that an employee's rights under an option agreement can be alive until the end of the reasonable notice period required for lawful termination, these rights should be considered to also include the right to further vesting. This proposition is supported by a 2000 decision of the British Columbia Court of

Appeal (*Iacobucci v. WIC Radio Ltd.*) where the Court found that a dismissed employee was entitled to participate in any vesting of options which occurred during the notice period. The Court also found that the employee was entitled to damages, if he was not entitled to participate due to actions of the employer.

Where the employment contract provides for accelerated vesting following a change of control or where option plans allow an employer to repurchase an employee's shares following termination of employment these rights may also be continued during the notice period. If the language of the plan can be interpreted as applying only after the expiry of a reasonable notice period, actions taken by an employer prior to that time which would disentitle the employee to any rights relating to their stocks or stock options may result in damage to the employee for which the employer will be held liable.

Given the judicial inclination to find in employees' favour in this area, employers would be wise to consider the potential interpretation of their own stock option plans before causing damage to their former employees for which the company may be found responsible.

More information regarding the this issue and other employment related matters can be obtained by contacting any of Goodmans lawyers practicing in this area including:

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