

## Ontario Court Awards \$1.8 Million to Retired Employee for Vacation, Bonus, and Stock Options

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The Ontario Superior Court of Justice's decision in *Boyer v. Callidus*, 2024 ONSC 20, is a cautionary tale for employers that demonstrates the importance of ensuring employment contracts and policies are well-drafted, well-documented, and properly communicated to employees, particularly if the terms of those documents restrict an employee's entitlements upon termination or resignation.

In this case, Craig Boyer sued his former employer for constructive dismissal. He alleged that, while he had announced his intention to retire at the end of 2016, his job responsibilities were removed by the end of July 2016. The employer, Callidus, argued that Mr. Boyer had not been constructively dismissed and had voluntarily resigned early. Callidus was successful in establishing that Mr. Boyer voluntarily resigned early.

However, even though Mr. Boyer was not constructively dismissed and had no claim for wrongful dismissal damages, the Court found that Mr. Boyer was owed more than \$1.8 million in damages for unpaid vacation pay and compensation owing under Callidus' deferred compensation plan and stock option plan.

### Claim for Vacation Pay

Mr. Boyer and Callidus agreed that Mr. Boyer was entitled to four weeks of vacation per year. Mr. Boyer argued that during his employment he had not taken all his vacation, that Callidus knew he was not taking all his vacation due to a heavy workload, and that he had been allowed to carry-forward his unused vacation to subsequent years. As a result, Mr. Boyer believed he was owed vacation pay for all his accrued and unused vacation time.

Callidus argued that it had a "use it or lose it" vacation policy, by which all unused vacation was forfeited at the end of each calendar year and that deviations from this policy required written approval, which had not been given to Mr. Boyer. Relying on this policy, Callidus' position was that Mr. Boyer was not owed any vacation pay.

Notably, Callidus did not have either a written contract with Mr. Boyer or a written vacation policy that outlined a "use it or lose it" policy and was unable to produce any other evidence, such as emails or other communications to employees, to support its position that it had a "use it or lose it" vacation policy. As a result, the Court found that Mr. Boyer was owed 22 weeks' vacation pay which, based on Mr. Boyer's

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annual salary of \$220,000, was valued at over \$93,000.

## Claim for Bonus Payments

Mr. Boyer participated in Callidus' deferred bonus plan. The terms of the plan were outlined in a "Deferred Bonus Policy." Under the policy, Callidus withheld a portion of participating employees' bonuses each year, and then distributed the withheld amounts over the two years following the year in which bonuses were earned. The deferred portion accrued interest at the quarterly rate of 3%. The policy contained a requirement that any person eligible for such deferred compensation must be employed by Callidus to receive the withheld portion of their bonus.

The Court found that Mr. Boyer had not been provided with the policy and there was no evidence that he had agreed to its terms. Citing the decision of the Ontario Superior Court of Justice in *Bain v. UBS*, 2016 ONSC 5362, the Court confirmed that limitations on bonus entitlements must be brought to an employee's attention and accepted by the employee to form part of the contract of employment. Without such evidence, Callidus could not rely on the policy to limit Mr. Boyer's entitlement to the withheld portion of his bonus.

Consequently, the Court found that Mr. Boyer was entitled to the entirety of his deferred bonus for the two years preceding his retirement, in the amount of \$525,000, together with 3% quarterly interest up to the date of the Court's decision.

## Claim for Stock Options

When Callidus' stock option plan was introduced, Mr. Boyer was provided with a document describing the company's policy on stock option awards, which Mr. Boyer reviewed, and which noted that upon an employee's death, the employee's stock options would vest and be exercisable within 180 days. The policy was silent as to the treatment of an employee's unvested options in the case of retirement. Mr. Boyer alleged that he asked his supervisor what happened to unvested options in the case of retirement and was told the unvested options would be handled the same as they are handled upon an employee's death. Two years later, Callidus introduced an amended and restated policy, which stated that the expiry date for any unvested options was the termination of the employee's employment. However, there was no evidence before the Court that the amended policy was provided or agreed to by Mr. Boyer.

Mr. Boyer argued that he was entitled to the vesting of all stock options held by him on the basis that the documents provided to him about the stock options were silent as to the treatment of such options upon retirement, he had not seen the amended policy, and he was verbally told that, on retirement, his unvested stock options would be treated the same way as in the case of death.

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The Court found Mr. Boyer's evidence in support of his claim to be credible and agreed that the stock option documentation was insufficient to limit his entitlements on termination. The Court awarded Mr. Boyer damages for the value of the shares underlying the unvested stock options which should have vested at the time of termination, in the aggregate amount of over \$1.2 million.

## Takeaways for Employers

The case law is clear that the onus is on the employer to establish the knowledge and agreement of an employee to terms that amount to a deviation from the common law and restrict an employee's entitlements.

The *Boyer v. Callidus* decision is an important reminder to employers of the need to not only implement clear and enforceable contracts and policies, but to ensure such documents are provided to and agreed to by employees. Prudent employers will also ensure that key clauses in policies and contracts that restrict an employee's entitlements are expressly called to an employee's attention by, for example, requiring the employee to initial such provisions. Employers should also ensure that they are maintaining records of communications to employees about key policies and any amendments to those policies.

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