

# COURT OF APPEAL FOR ONTARIO

CITATION: Nader v. University Health Network, 2022 ONCA 856

DATE: 20221208

DOCKET: C70357

Simmons, Huscroft and Coroza JJ.A.

BETWEEN

Mounir Nader

Plaintiff (Appellant)

and

University Health Network and Ontario Health

Defendants (Respondents)

David Whitten and Jason Jagpal, for the appellant

Maureen Quinlan, for the respondent University Health Network

Michelle S. Henry and Elizabeth Creelman, for the respondent Ontario Health

Heard: December 1, 2022

On appeal from the order of Justice William Black of the Superior Court of Justice, dated January 19, 2022, with reasons reported at 2021 ONSC 447.

## REASONS FOR DECISION

[1] The appellant argues that the motion judge erred in dismissing his claim for damages arising out of the early termination of his secondment agreement with Ontario Health and his employer, the University Health Network (“UHN”) (the “Secondment Agreement”). The appellant argues that he was entitled to be paid out for the remaining term of the Secondment Agreement in addition to receiving

12 months' severance under the terms of his employment agreement with the respondent UHN (the "Employment Agreement"), and that he was also entitled to payment of a discretionary annual performance-based bonus.

[2] It is clear following *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 that in the absence of a palpable and overriding error or an extricable error in principle, the motion judge's interpretation of the Employment Agreement and the Secondment Agreement (collectively, the "Agreements") are entitled to deference.

[3] The motion judge found that the Agreements are clear and unambiguous: the appellant remained an employee of the respondent UHN during the period of the secondment; the Secondment Agreement was not an employment agreement; and the Secondment Agreement contemplated early termination. Accordingly, the appellant was entitled to 12 months' severance payable under the Employment Agreement when his employment was terminated by UHN following early termination of the secondment. He was not entitled to be paid out for the remaining term of the secondment in addition. These findings were open to the motion judge on the record before him and the appellant has established no basis for this court to interfere with them. Absent palpable and overriding error or an extricable error in principle, an appeal is not an opportunity to seek alternative findings.

[4] However, we are satisfied that the motion judge erred in denying the appellant the performance-based bonus payable under the Employment Agreement. The Employment Agreement clearly provided for a discretionary annual performance-based bonus of up to 25% of the appellant's annual base salary. The motion judge found that there was a dearth of evidence concerning the bonus – no evidence as to the appellant's performance and whether he would have been eligible for 25% or some lesser amount. This finding overlooks evidence in the record establishing that the appellant was paid bonuses of approximately 25% for 2018 and 2019, and slightly less on a pro-rated basis for 2020, up to the termination of his employment. The Employment Agreement provided for payment "of an amount equal to 12 months salary" in the event of termination by UHN without just cause. "Salary" was undefined. The appellant's uncontroverted evidence was that the bonus was a substantial and integral part of his overall compensation. The motion judge found that the appellant's health care spending account, an amount required to be under the Employment Agreement in addition to "base salary", was owing as part of the appellant's compensation on termination. That finding was not appealed.

[5] Like the health care spending account, the bonus is properly considered part of the compensation owed on termination. Termination deprived the appellant of the opportunity to earn the bonus for the year ahead and in our view it is reasonable

to infer that he would have earned it. The respondent offered no basis for finding otherwise.

[6] Accordingly, the appellant is entitled to a bonus of 25% of the 12 months' salary he received for the severance period<sup>1</sup>. The appeal is otherwise dismissed.

[7] The parties shall bear their own costs of the appeal.

“Janet Simmons J.A.”

“Grant Huscroft J.A.”

“S. Coroza J.A.”

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<sup>1</sup> We recognize that performance-based bonus was payable for a calendar year and that the 12-month notice period under the Employment Agreement did not extend over an entire calendar year. However, UHN pro-rated the bonus it paid to the appellant up to the date of termination. In all the circumstances, we find it appropriate to award the appellant a bonus of 25% of his base salary for the severance period.