

Member's Quarterly

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Feature

Court Awards \$170K in Unpaid Bonuses – The Perils of Poorly Drafted Agreements

A cautionary tale for employers

The BC Supreme Court recently released its decision in *Kenny v Weatherhaven Global Resources*, adding to the growing body of case law addressing the often disputed question of employees' entitlement to a bonus, both during employment and during the period of reasonable notice of termination of employment without cause.

This case highlights the importance of carefully drafted contractual limitations on bonus eligibility both during employment and following termination of employment. Payment of a bonus is often a legally enforceable entitlement, depending on the terms of the employment agreement. If the employer's intention is to tie bonus eligibility to individual or company performance, this must be explicit and unambiguous.

In *Kenny v Weatherhaven*, the plaintiff's employment was terminated without cause in early 2016. The employer company had failed to meet its financial objectives in 2014, 2015 and 2016, and as such, none of the senior executives, including the plaintiff, received bonuses in those years.

The two issues in this case were (1) whether the employee was entitled to a bonus for the two years prior to the termination of his employment, and (2) whether the employee was entitled to a bonus for the 12 months following the termination of his employment, despite the company's failure to meet financial objectives.

Bonus entitlement during the two years prior to the termination of employment

The plaintiff employee was an executive with the following contractual bonus provision:

The Executive will be eligible to receive a minimum of 20% and up to 60% of the base salary annually, as a performance bonus, less applicable tax withholdings required by law, based on the achievement of corporate objectives and personal objectives as mutually agreed to by the Company and the Executive.

[Emphasis added]

This clause has two equally plausible interpretations. The plaintiff argued that the clause entitled him to a bonus of minimum 20% and maximum 60% of his base salary, depending on the achievement of personal and corporate objectives. The employer argued that "eligibility is not the same as entitlement", and that the 20% minimum only applied once the required objectives were achieved.

Ultimately, the Court resolved this ambiguity by referencing language in a Change in Control Agreement between the parties, which referred to the bonus as a "non-discretionary bonus", and held that the plaintiff was entitled to a 20% bonus for each of the two years prior to the termination of his employment.

In the face of a true ambiguity, the Courts will employ the principle of contra proferentum, which resolves the ambiguity against the party who drafted the provision. Even if the Court has been unable to resolve the ambiguity by reference to the entire agreement between the parties, it is likely that it still would have found in favour of the plaintiff on this issue.



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Feature continued**Bonus entitlement during the reasonable notice period**

The general principle is that employees are entitled to pay in lieu of all aspects of employment compensation during the reasonable notice period. This includes bonuses when the bonus is an integral part of the terminated employee's compensation, unless the entitlement to a bonus is limited by the contract of employment or the terms of the bonus plan. However, in order to be effective, a contractual limitation of entitlement to a bonus during the reasonable notice period must be clear and unambiguous.

The plaintiff's contract of employment provided that in the event his employment was terminated without cause, he would be entitled to:

An annual Bonus award for a period of 12 months following the date of termination, based on the Executive's original target award for the year in which termination occurs and payable in lump sum on the date of termination.

The Court found in this case that the employment contract was clear that the employee would be entitled to a bonus award for a period of 12 months following the date of termination of his employment, and ordered payment of a 20% bonus for this period as well.

This case is another reminder that employers must use clear language if their intent is to implement a discretionary bonus plan. Employers would be wise to review their bonus plans in light of this decision and other recent jurisprudence in which courts have scrutinized bonus language.

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