

A Lesson On Discretion: Discretionary Bonuses Have To Be Paid Fairly



A common form of compensation for integral members of an organization is the discretionary bonus. In principle, an employer can exercise discretion over bonus payments to their employees in a manner that rewards their contributions to the business over the past fiscal year, and that keeps the employer competitive in the market. In reality, and as illustrated by Ontario's Court of Appeal in a recent decision, employers must be fair and reasonable when paying discretionary bonuses.

In [*Bowen v. JC Clark Ltd.*, 2022 ONCA 614 \(CanLII\)](#), the appellants were portfolio managers of a hedge fund. The respondent acquired the hedge fund in late 2012, and the respondent hired the appellants as portfolio managers for the fund. They worked at the respondent from December 3, 2012 until July 16, 2014, when their employment was terminated on a without-cause basis. At the time of their termination the appellants were each given two weeks' salary plus \$577 in lieu of notice.

The appellants commenced an action against the respondent seeking over \$1.3 million in performance fees that they claim they were owed as a term of their employment for the portion of 2014 that they worked before their termination. The appellants appealed the decision of the trial judge dismissing their claim.

The appellants challenged the trial judge's finding that their only entitlement to a percentage of the performance fees of the fund was through a side agreement with Martin Braun, the lead portfolio manager of the fund, who had been the owner of the fund prior to its acquisition by the respondent. Specifically, they challenged the finding of the trial judge that they were not entitled to an additional 30% of the performance fees of the fund under the terms of their employment agreements with the respondent. The appellants also challenged the trial judge's ruling that they were not entitled to argue their entitlement to a discretionary bonus under a specific term in their employment agreements because the claim was insufficiently pled.

The Court of Appeal allowed the appeal in part. The Court of Appeal did not interfere with the result reached by the trial judge that the appellants were not entitled to a share of the performance fees of the fund beyond the share provided for in the combination agreement and the side agreements with Braun. The trial judge found that the appellants were aware of the arrangement that they would be paid a share of the performance fees of the fund through Braun, rather than directly by the respondent, at the time that they signed their employment agreements. Furthermore, the trial judge found that a plain reading of the appellants' employment agreements revealed

that performance fees were not owed to the appellants by the respondent under the terms of those agreements.

However, the Court of Appeal concluded that the trial judge erred in declining to allow the appellants to argue their entitlement to a discretionary bonus under the terms of their employment contract on the basis that their claim was insufficiently pled. The Court of Appeal determined that this issue was sufficiently pled in the amended statement of claim and adequately raised in the submissions and evidence at trial.

The Court of Appeal rejected the respondent's position that "the discretionary nature of the bonus provision in paragraph 5 of the employment agreements means that the employer was entirely unconstrained as to how that discretion was exercised" (para 35). The Court of Appeal reiterated that "[w]here an employment agreement provides for a discretionary bonus, there is an implied term that the discretion will be exercised in a fair and reasonable manner" (para 35).

Accordingly, the Court of Appeal found that the issue was whether "a fair and reasonable exercise of the discretion" provided in the employment contract would result in the appellants being awarded a discretionary bonus for the period they worked in 2014 plus the two-week notice period, and if so, the quantum of this discretionary bonus (para 36).

The Court of Appeal reviewed the employer's practice for awarding discretionary bonuses and the factors that were considered in making this determination. In addition, the Court found that there was objective evidence of a significant bonus pool in 2014. In determining the quantum of the discretionary bonus to award the appellant, the Court of Appeal reviewed the discretionary bonuses earned by two similarly situated employees for the 2014 year, which was approximately \$200,000. The Court of Appeal and then pro-rated this amount for the 7 months the appellants worked in 2014, and awarded each appellant \$115,000 for the discretionary bonus that they were entitled to.

Key Take Aways for Employers

This case demonstrates that Courts will look to what is fair and reasonable when paying discretionary bonuses. A well drafted bonus plan in an employment contract can assist employers in limiting an employee's bonus entitlement upon termination.

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