

# How An Employee May Become Entitled To A Deferred Bonus Upon Termination



Employers and employees may agree to defer the payment of an employee's bonus upon the occurrence of a certain triggering event. Despite having such a deferral agreement in place, in certain situations, an employee may be entitled to a deferred bonus payment upon the termination of their employment even though the triggering event has not yet occurred.

In the recent decision of *Challis v Maverick Oilfield Services*, 2023 ABKB 514 ("*Challis*"), the Alberta Court of King's Bench dealt with a situation where an employee was entitled to a deferred portion of his bonus upon termination, even though a deferral agreement was in place.

## **Facts**

In *Challis*, Christopher Challis ("**Mr. Challis**") was employed by Maverick Oilfield Services Ltd. ("**Maverick**") as its CEO. Mr. Challis's employment ended on May 31, 2018, following his resignation. When Mr. Challis started with Maverick, no written employment agreement was in place.

Two years earlier, Maverick declared a bonus of \$52,884.62 for each of its executives, including Mr. Challis. Half the bonus was paid when it was declared, and the other half was deferred pursuant to a verbal deferral agreement. The agreement was that the deferred portion of the bonus was not payable until Maverick began to generate "net income". When Mr. Challis's employment ended, Maverick refused to pay the deferred portion of his bonus on the basis that it had not generated net income since the bonus was declared.

The Court granted summary judgment in Mr. Challis's favour, in the deferred bonus amount of \$26,442.31. Maverick appealed the Applications Judge's decision.

## **The Appeal Decision**

The Court made the following five findings of fact based on the evidence:

- First, there was no issue that a bonus in the amount of \$52,884.62 was declared for a group of Maverick executives in December of 2015. Having been declared, the bonus was payable to each recipient as part of their accrued earnings;
- Second, there was no dispute that all bonus recipients agreed to defer payment

- of half the amount of the declared bonus. In other words, each recipient received \$26,442.31 at the time the bonus was declared and agreed to defer payment of the remaining bonus until the company's financial picture improved;
- Third, the deferral agreement was the same for all employees, including Mr. Challis;
  - Fourth, it was not in dispute that Maverick's financial position never improved to the point sufficient to trigger payment of the deferred bonus; and
  - Finally, all the other bonus recipients who were no longer employed by Maverick received a payout of the deferred portion of their bonus when their employment ended.

Maverick argued that the payout given to previously departed employees was simply an exercise of its discretion. However, the Court found no evidence of this to be true. Moreover, two additional factors led the Court to conclude that Maverick was not exercising its discretion when it paid out departing bonus recipients:

- First, when Mr. Challis inquired about payment of the deferred portion of his accrued bonus, Maverick's owner strongly suggested that the deferred portion of Mr. Challis's bonus was payable because Mr. Challis's employment had ended; and
- Second, it was noted that section 8(2) of the *Employment Standards Code* (the "Code") requires an employer to pay all of an employee's "earnings" upon termination of employment within a certain timeframe. The minimum protections provided by the Code cannot be contracted out of.

With the above in mind, the Court found that the bonus had been declared and had accrued as "earnings" to its recipients. Once the bonus was declared, payment of the bonus was no longer discretionary, even if the timing of payment was. When Mr. Challis was terminated, this entitled him to payment of his "earnings" pursuant to the Code. This included the deferred portion of the bonus.

Taking into account Maverick's treatment of the other executives who had the same bonus deferral agreement as Mr. Challis, the correspondence between Maverick's owner and Mr. Challis following his resignation, and recognizing the minimum protections provided by the Code, the Court concluded that it was a term of the deferral agreement that any bonus recipient who left the employ of Maverick would be entitled to payout of the deferred portion of the bonus at the time their employment ended. As a result, Maverick's appeal was dismissed.

## Takeaways

The main takeaway from *Challis* is that it is critical whether a bonus has been declared and therefore accrued as earnings. Once a bonus is declared, payment is no longer discretionary. *Challis* also serves as a reminder that the minimums provided by the Code cannot be contracted out of.

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