You Might Call It A "Discretionary" Bonus, But Is It Truly Discretionary?

Bonuses may be regarded as voluntary and non-contractual payments if they are truly discretionary. However, merely calling a bonus “discretionary” in the employment contract does not insulate an employer from claims for bonus amounts by terminated employees.

Payment of Bonus Upon Termination

The rights and obligations under a bonus plan are generally determined by the terms of the agreement. Employers can limit bonus entitlement on termination by using clear, unambiguous contractual language. Accordingly, employers should clearly address an employee’s bonus entitlement in the event of resignation, retirement, termination with cause, and termination without cause.

If an employer does not intend to pay bonuses to employees during the reasonable notice period, this needs to be addressed directly in the employment contract and in any bonus plan. Any ambiguity most likely will be resolved against the employer. For example, in *Grace*, Justice Sharpe held:

The case law is clear that … where the employer seeks to rely on a term requiring the employee to meet certain conditions such as being on the payroll as of a certain date, the employer must communicate that requirement to the employee. If the employer has failed to do so, then the employee is entitled to claim the bonus.

Recent cases have made it clear that “parties may agree to forfeiture of accrued employment benefits, provided they do so in clear, unambiguous language,” even when the amount is a significant component of compensation. As long as employers are acting in compliance with the Ontario *Employment Standards Act*, they can make the payment of discretionary bonuses conditional on various factors such as continued employment at the time of payment. The key is to have explicit and express contract language.

Recent Decisions

In *Chandaran*, the Court found that the eligibility to the bonus plan was conditional on the employee being employed, both at the end of the fiscal year and when the bonus

is paid. The term of the bonus plan required that in order to be eligible for an annual bonus, an employee must "be employed by the Bank at the end of the fiscal year" and "be employed by the Bank when the bonus is paid." The Court stated that in this case the "policy is clear and unambiguous and therefore its terms should prevail."

The Court in *Wolfman*, however, ruled against the employer, because the bonus plan agreement did not clearly make payment of a bonus conditional upon an employee being employed when the bonus is payable. The terms of the plan only indicated that "participants must be full time salaried employees." According to the Court, there was nothing in the bonus plan that specifically excluded an employee who is terminated without cause before the end of the fiscal year from participating in the plan.

In *Jivraj*, the Court of Queen's Bench of Alberta found that because the limitation in the bonus agreement was clear and unambiguous, the employee is not entitled to the future installments of the bonus plan. The agreement outlined the plan in the following way:

The Employee understands and agrees that all Bonus payments are conditional upon the Employee remaining in the employment of Strategic at the time any portion of the Bonus is actually payable to the Employee and, if for whatever reason, the Employee ceases employment with Strategic, **regardless of the circumstances**, then no further Bonus amounts are payable to the Employee. (Emphasis added)

The Court held that "however unfair or one-sided it may seem in retrospect", the employer and the employee agreed to an arrangement which required the employee to be employed at the time that the bonus is payable.

Finally, in *Kielb*, despite concluding that the bonus was an integral component of the employee's compensation, Justice Akhtar upheld the limiting language and did not award the employee any damages for bonuses. This was because the limitation clause in *Kielb* was very clear. In particular, the Court gave weight to the examples used in the employment agreement in interpreting the restrictive language of the limitation clause. Here is one of the examples used in the agreement:

If your employment is terminated, with or without cause, on the day before the day on which a bonus would otherwise have been paid, you hereby waive any claim to that bonus or any portion thereof. In the event that your employment is terminated without cause, and a bonus would ordinarily be paid after the expiration of the statutory notice period, you hereby waive any claim to that bonus or any portion thereof.

The Court relied on these examples and upheld clear language of the contract requiring active employment on the payment date as a pre-requisite for entitlement to bonus.

Takeaways for Employers

Recent decisions all confirm that clarity is key in limiting liability for payment of bonus upon termination. Employers must consider using explicit language and clear examples in defining the bonus criteria, the payment dates, and the entitlement, if any, applicable in the event of resignation, retirement, termination with cause, and termination without cause.

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