A Cautionary Tale for Employers Drafting Discretionary Bonus Plans

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In the recent British Columbia Supreme Court decision of *Kenny v. Weatherhaven Global Resources Ltd.,*2017 BCSC 1335, the plaintiff successfully claimed unpaid bonuses and bonus amounts owed over the contractual notice period of approximately $170,000.

Background

Karl Kenny was employed by the defendant employer, Weatherhaven Global Resources Ltd. ("Weatherhaven") commencing in 2009, in a number of increasingly senior positions ending with the role of COO. At the time of his promotion to COO in 2013, the plaintiff signed a new employment agreement entitling him to an increased base salary of $265,000, and "Additional Compensation" as follows:

4.2. The Executive will be eligible to receive a minimum of 20% and up to 60% of the Base Salary annually, as a performance bonus (the “Bonus”), less applicable tax withholding required by law, based on the achievement of corporate objectives and personal objectives as mutually agreed by the Company and the Executive.

In May 2014, Fulcrum Capital Partners acquired a controlling interest in Weatherhaven, and the plaintiff signed a further employment agreement confirming his existing compensation terms. In addition, the new agreement provided that upon termination of employment without cause, Mr. Kenny would be entitled to:

- base salary through the date of termination;
- a lump sum amount equal to 12 months base salary;
- a pro-rata incentive award for the year in which termination occurred;
- any unpaid bonus pertaining to prior calendar years, payable in a lump sum; and
- an annual bonus award for a period of 12 months following the date of termination, payable in lump sum.

The plaintiff's employment was terminated on March 9, 2016. He had not received any annual bonus award for 2014 or 2015 (since Fulcrum had acquired the company), despite Mr. Kenny having raised this with the company prior to his dismissal.

Weatherhaven paid out the 12 months' base salary owed under the termination provision, but no bonus amount. The company argued that clause 4.2 did not entitle the plaintiff to a bonus unless personal and/or corporate objectives had been met, and argued that "eligibility" was not the same as an "entitlement." The defendant submitted that because Weatherhaven had failed to meet its corporate objectives in 2014, 2015 and 2016, no bonus amounts were owed to the plaintiff. The plaintiff claimed he had a clear entitlement and that the term "eligibility" referred only to the amount of the bonus (within the 20% to 60% range), and not the requirement to pay a bonus.

Decision

The Court concluded that the plaintiff had a clear entitlement to a bonus over the 12 month contractual notice period based on the language of the termination provision. With respect to past bonuses for 2014 and 2015, the Court concluded that when read on its own, clause 4.2 was capable of either the company's or the plaintiff's interpretation (due to a contradiction in the term "eligible" and the provision for a "minimum" bonus payment.) However, the Court preferred the plaintiff's interpretation which accorded with commercial efficacy and good sense, and was reasonable and fair when considering the contractual language as a whole. The Court concluded that "payment of the annual bonus under clause 4.2 was not discretionary, but rather an integral part of the plaintiff's compensation; the defendant's only discretion was in determining the amount of the bonus within the 20% and 60% range." (at para 57).

Implications

This case is a reminder that employers must use clear language if their intent is to implement a discretionary bonus plan. Clear minimum bonus entitlements may be interpreted as fixed obligations absent express language permitting the employer to determine whether or not to pay a bonus. 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.

By

Jennifer M. Fantini

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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