

# A Cautionary Tale for Employers Drafting Discretionary Bonus Plans

December 01, 2017

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](#)

Expertise

[Labour & Employment](#)

---

## BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

### 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

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.