

BONUS CLAIMS: PAST PRACTICE GETS A BOOST

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In many executive terminations, counsel operate under the flawed assumption that a lack of clear termination wording automatically results in a bonus obligation during the notice period. The recent Ontario decision in *Cunningham v Design Filtration Microzone Inc.*, 2017 ONSC 5486 confirms that a more careful review of past practice may deny so-called “notice period bonus” claims.

Craig Cunningham was an accomplished senior executive who was dismissed without cause after eight years service. He brought a wrongful dismissal case and was ultimately awarded 12 months notice.

A contentious issue in the case was Cunningham’s claim for bonus, which had two elements: bonus during year of termination, and bonus during the notice period.

The company’s response to both elements of the bonus claim was that payment of bonuses was entirely discretionary. This position was supported by the fact that no bonus had been paid in two of the four years which preceded termination.

The Court’s decision was a mixed result, allowing the claim for bonus during the year of termination, and rejecting the claim for bonus during the notice period. In the year of termination, the evidence was that the company president expected to pay bonuses based on financial results. A bonus was therefore awarded to Cunningham based on previous awards.

For the notice period, the judge accepted that the bonus plan and any potential entitlement was discretionary. It would thus be improper to award any bonus to a dismissed employee, since that would put them in a better position than those who remained employed.

Takeaways for Employers

Limiting bonus entitlements, both during the year of termination and the notice period, continue to be scrutinized by the courts. This decision highlights, yet again, the importance of carefully reviewing what specific items will be included in a potential notice award - the courts have long recognized that, absent a clear written agreement to the contrary, dismissed employees may claim all elements of compensation. As a result, employers must either have a clearly worded contract or bonus plan, or evidence that any variable

compensation is discretionary or irregular. For new employees or those being offered a new benefit, close review of termination wording and compensation plan documentation is crucial. And for all employees, a close review of practice and approach to compensation is strongly recommended.

by George Waggott and Martin Thompson

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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