

# PERFORMANCE BONUSES: EMPLOYER DISCRETION ALIVE AND WELL

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Many employers are under the misapprehension that they do not have flexibility with respect to how they compensate their employees. The recent arbitration decision in *RockTenn Company of Canada Inc.*<sup>[1]</sup> provides some comfort to employers looking to change their bonus plan criteria or targets.

## Background

RockTenn is a multinational company with 18 plants in Canada. At its PrePrint location in Mississauga, Ontario, there are approximately 100 employees, with 80 of them being unionized employees represented by Unifor.

The Mississauga collective agreement between RockTenn and Unifor contains a "Letter of Understanding re Annual Bonus" ("**LOU**") which provides as follows:

*The Company shall continue the current Bonus Plan, paid out annually as per the current practice.*

*Renew however, (sic) the criteria will now be under the Rocktenn Guidelines and require Corporate RockTenn approval on an annual basis. (Added in 2013 negotiations).*

In the course of labour negotiations in 2013, the union requested that the employer provide 2013 bonus criteria and targets. The Plant Manager's response was that when he got job approval to post the criteria and targets, he would do so. No other discussion took place regarding bonus criteria or targets.

During the period from 2008 to 2012, the bonus ranged from 5.5% to 8%. For 2013, however, the bonus was 1.5%. The union became aware that the targets had changed from the 2012 targets when the bonus was paid out in November 2013.

## Ruling: Targets Can Change

The union's grievance was based on a flawed argument that they essentially had a right to veto any proposed changes to bonus criteria and targets. The company's successful argument was that at no time had management negotiated an obligation to agree to the criteria and targets.

The arbitrator held that the fact that targets had previously remained consistent was not determinative. Instead, the actual wording of the LOU needed careful review: the company had only committed to bonuses being under RockTenn guidelines and subject to RockTenn approval; there was nothing which required input from the union. There was also no evidence of any consent obligation being referred to or implied through discussions in bargaining.

### **Takeaway for Employers: Flexibility Matters**

This decision provides helpful guidance to employers who provide bonus plans to employees. In many cases, the "purely discretionary plan" structure will not be appropriate, especially if a large group is participating in the plan. The result is that objective criteria and targets may be required. In these cases, the fact that there may be a communication obligation (which implies advising plan participants of relevant criteria) does not equate to there being a consent requirement (where change to targets cannot be made without mutual agreement).

Employers will want to closely review their plan documents in light of this decision. In particular, plan provisions should be structured to provide maximum flexibility both with respect to how bonuses might be calculated, and the process for unilaterally amending targets and payout terms.

by George Waggott and Paul Boshyk

1 (Ont. Arb.), dated February 4, 2015 (D. Brownlee)

### **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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