November 2, 2017

Practice and Policies: Discretion in Bonus Allocation

Justice Diamond's decision in *Singer v Nordstrong Equipment Limited* provides valuable insight with respect to a terminated employee's entitlement to a bonus payment during the reasonable notice period.

Mr. Singer became the President and General Manager of Nordstrong East ("Nordstrong") in 2012. When Nordstrong terminated Mr. Singer's employment in December 2016, he brought an action for damages for wrongful dismissal.

Mr. Singer moved for summary judgement of his claim. Diamond J. addressed both the issues of reasonable notice and entitlement to bonus payment on the summary judgment motion. First, applying the *Bardal* factors, Diamond J. determined that Mr. Singer was entitled to a reasonable notice period of 17 months.

The more contentious issue was whether Mr. Singer was entitled to his 2016 bonus payment, and what the allocation of that bonus should be.

Mr. Singer claimed that his bonus entitlement (and the allocation of that bonus) was fixed and formulaic, calculated at 5% of Nordstrong's pre-tax profit. By contrast, Nordstrong's position was that both Mr. Singer's entitlement to and allocation of a bonus was a matter of pure discretion.

Mr. Singer relied upon Nordstrong's 2009 corporate culture document that contained the following statements:

- "The bonus pool is 15% of the division's yearly pre-tax profit net of head office fees and putative loan interest."
- "The bonus pool for each division is calculated using this formula, and there is no discretion involved."
- "How is the bonus distributed?...we give each division manager wide latitude in allocating bonuses. The division manager receives the largest bonus which usually amounts to a third of the bonus pool in a big business and perhaps as much as half in a small one."

Nordstrong relied on a 2016 corporate office policy document indicating the discretionary nature of bonuses, along with a 2014 mass email noting that bonuses were "within the

prerogative of the owners." Both documents suggested that bonuses could be set at zero in any given year at the discretion of the owners.

Diamond J. held that Singer was entitled to a share of the bonus pool, which flowed automatically if Nordstrong earned a profit. However, the allocation of that bonus pool was discretionary.

Having established the Defendant's entitlement to a share of the bonus pool, Diamond J. subsequently followed the approach recently expressed in *Bain v UBS* which held that discretionary bonuses must be allocated according to a "fair and reasonable process."

Given that the total bonus pools in 2012 and 2015 were similar to the bonus pool in 2016, Diamond J. awarded Mr. Singer the averages of the bonuses he was awarded in those two years to reach an award of 4.634% for 2016. Mr. Singer was not entitled to any compensation for a bonus that may have been earned in 2017 (during his reasonable notice period), as it was unreasonable for Mr. Singer to expect a bonus during the time in which he would be searching for alternative employment.

The reasoning in *Singer* reveals the consequences of "conflating eligibility with entitlement" as well as the importance of the timing of the discretion inquiry. In *Singer*, Diamond J. determined that Mr. Singer was entitled to a bonus and that any residual discretion as to allocation must be exercised fairly. The converse approach prioritises a finding of discretion in the bonus policy in order to conclude that the employee holds no more than a status of eligibility. *Singer* additionally highlights the potential for expressions of prior bonus practices to be converted into markers of entitlement even in the face of a discretionary allocation mechanism. A counsel of prudence suggests that employers clearly distinguish any formula for calculating bonuses on the one hand, from the procedure for bonus allocation on the other.

With notes from James Saunders