

Bonus Not Payable Due to Explicit Contract Language

In late March, the Court of Appeal upheld a trial decision that disentitled a former employee to a bonus payment based on the language of the employment contract.

The case is *Kielb v. National Money Mart Company* and it involved a lawyer whose employment was terminated on a without cause basis on April 21, 2010. The annual bonus in which he participated had a payment date in September. Mr. Kielb sued, for among other amounts, a prorated bonus of approximately \$86,000.

Normally, when employees are terminated without cause, the pay in lieu of notice they are owed includes all compensation they would have received if they had been allowed to work through the notice period. If a bonus is found to be an integral part of the employee's compensation, then the bonus is normally included.

In this case, the trial judge found that the bonus was an integral part of the compensation, despite the terms of the written employment contract, as the negotiations leading up to the contract made clear that the bonus was seen as an integral part of the compensation package. Without the bonus, Kielb would not have accepted the job for only the base salary offered.

However, regarding the payment of the bonus following termination, the trial judge followed the contract in disallowing the bonus if the employee was not actively employed on the payment date.

Earlier case law had held that stating in a contract that an employee must be "actively employed" at the time the bonus is paid is not enough to disentitle him/her from a bonus that would be payable during the notice period. This is due to the fact that if an employee had been given proper notice, they would still have been actively employed during the notice period. To exclude the bonus from what a court later awards as pay in lieu of notice, the contract must be more explicit in that regard.

In this case, the contract provided examples specifically explaining that the clear intention was that the bonus would only be paid following termination if the bonus payment date fell within the (short) statutory notice period under the *Employment Standards Act, 2000*. The contract also stated that the bonus did not accrue until the payment date. This also prevented payment to Kielb as his contract only provided for an eight-week notice period which fell far short of the September date for payment.

The Court of Appeal upheld the trial decision.

This case confirms that the parties can contract out of common law presumptions regarding compensation during the reasonable notice period (beyond the statutory period), but only if they are very explicit in doing so.

If your business would like assistance in drafting employment contracts, please do not hesitate to contact Bergs Law.

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