

# Fighting for Bonus Payments Long Past Due

by Philip R. White

Employee bonus entitlements are often contentious that an employer takes when following such an approach issues upon the termination of the employment relation ship. This is because bonus clauses in employment contracts are often ambiguous. To make matters worse, many employers do not inform their employees how individual bonus payouts have been calculated. The risk that an employer takes when following such an approach was recently demonstrated in *Benson v, Bird Mechanical Ltd.*, 2013 ONSC 5375, 2013 CarswellOnt 11620 (Ont. S.C.J.).

In *Benson*, the employer hired a project manager pursuant to a written employment contract. The contract specified that the employee would be entitled to a bonus in amounts of up to \$10,000, based on the employee's performance and the employer's sales of up to \$12,000,000, and additional incentive bonuses of 1% based on his performance and company sales over \$12,000,000. The contract did not specify when the employee's bonuses would be paid or whether an earned bonus would accrue if it was not paid.

The employee worked for the company between July 2007 and September 2010 before being dismissed. In December 2007 he was paid a bonus of \$4,000. In December 2009 he was paid a bonus of \$5,000. He was not paid a bonus for 2008 or 2010. The employee never questioned the bonus payments he did receive and did not request information regarding the financial performance of the company until after his dismissal when his lawyer wrote the company in May 2012.

In early 2009, the employee had asked the employer if he would receive a bonus for 2008 and was told that he would not because he had not performed well enough to deserve a bonus. However, it appears that the employer never addressed the issue of whether the employee was, pursuant to the employment contract, still entitled to a 2008 bonus based on the company's annual sales performance. Significantly, the employer never provided the employee with access to its annual sales results.

The employee commenced a wrongful dismissal action in 2012. His action included a claim for damages for the employer's alleged failure to pay his bonus in the years 2007 through 2010. The employer brought a motion seeking dismissal of the employee's claim for the unpaid bonuses, arguing that the bonus claim was statute barred in accordance with the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. Under the *Limitations Act, 2002*, a claim must be brought within two years of the date the cause of action arose.

The court dismissed the employer's motion. It accepted the employee's testimony that it was not until the employee had been dismissed that he realized that no further bonus payments would be forthcoming. The court also accepted the employee's testimony that, although his bonuses were lower than he expected, given the power imbalance between him and his employer it would not have been workable for him to have brought a claim for bonuses unpaid or short paid while still employed.

The court also found that the employer's failure to provide the employee with the company's annual sales results left the employee unable to appreciate his potential bonus entitlements and, therefore, amounted to a fraudulent concealment that prevented the running of the limitation period.

*Benson* is a lesson for employers about the importance of clearly setting out the terms and conditions of bonus plans to ensure that employees understand their entitlement. This should include setting out how an employee's eligibility to receive the bonus will be determined, how the bonus will be calculated and when it will be paid. An employer who fails to clearly communicate these basic terms to an employee may find itself at risk of having to pay a significant damage award years after the bonus should have been paid.