



BONUS RULINGS CLARIFY STATE WAGE STATUTE

Justices focus on whether payment is discretionary or mandated

By DAVID S. POPPICK

The state Supreme Court's August decision in *Association Resources Inc. v. Wall* completes a trilogy of recent leading cases defining whether the payment of a bonus is a "wage" subject to Section 31-71a of the Connecticut Wage Statute, and permitting an award of double damages and attorney fees if the bonus is not paid. The Supreme Court ruled that a bonus is a wage when it is non-discretionary because it is required to be paid under the express terms of an employment contract and the amount is calculated according to a precise formula set forth in the contract.

Compensation can be paid to employees in various forms, such as salary, profit sharing, stock, commissions, and bonuses of different sorts. However, not all compensation is a "wage" subject to the wage statute. "Wage" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculations.

What the compensation is called (such as a bonus) does not determine whether that compensation qualifies as a wage. The characteristic and reason for the payment, the employee's performance or efforts for the compensation, and the employer's discretion to pay are determinative. Bonuses may or may not be wages depending upon whether they are for the individual's "labor or services rendered" and whether they are paid solely at the discretion of the employer regardless of the actual services performed

by the employee, such as year-end discretionary bonuses based solely upon the financial success of the employer.

The wage statute does not set forth a specific formula by which the wages must be calculated or determined, or how the wage is earned. It provides remedial protections for those cases where the wage agreement is violated. The wage statute is entitled to liberal construction in favor of those whom the legislature intended to benefit and recognizing the public policy in Connecticut of ensuring that employees are paid wages. *Harty v. Cantor Fitzgerald and Co.*, 275 Conn. 72, 102 (2005).

Three-Pronged Holding

In its June decision in *Ziotas v. e Rear-don Law Firm P.C.*, the Supreme Court ruled that when the bonus amount is within the employer's discretion and not "readily ascertainable" by applying a formula, the bonus does not constitute a "wage" under the wage statute.

In *Ziotas*, the Court cited three reasons for its holding. First, discretionary additional remuneration falls outside the protection of the statute because it depends on factors other than the employee's performance. Second, a review of other statutes shows that when the legislature intends for a statutory scheme to apply broadly to all forms of remuneration, it knows how to make the intention clear. Third, although the wage statute is remedial, a violation gives rise to substantial criminal and civil penalties. An interpretation of the term "wages" that allows penalties when the amount of

the bonus is indeterminate and discretionary would raise serious questions of fundamental fairness and due process.

Ziotas followed the Court's prior ruling in *Weems v. Citigroup*

Inc., 289 Conn 769 (2008), which held that "bonuses that are awarded solely on a discretionary basis, and are not linked solely to the ascertainable efforts of the particular employee, are not wages under § 31-71a(3)." In *Weems*, the bonuses were tied to subjective factors, such as diversity within a bank branch and the profitability of particular branches, which are unpredictable factors not within the control of the specific employee. Both the awarding of a bonus and the amount were entirely discretionary.

In *Association Resources Inc.*, the Supreme Court recognized the employee's executive level and managerial position and that he was directly and solely responsible for his division's profitability "with the bonus tied *directly* to the success of that specific division, rather than the performance of the defendant as a whole."

Therefore, the requisite "ascertainable efforts" were reflected in execution of his management responsibilities with other employees to achieve profitability goals of his particular division. That established the necessary link between the executive's efforts, the



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success of the division he directly supervised and the bonus. The amount of the bonus was derived from the net profitability of the division, applying a contractually mandated, precise formula set forth in the employment agreement and based on budgets attached to the agreement as a schedule, rather than the overall success of the defendant.

In *Weems* and in *Association Resources Inc.*, the state Supreme Court cited and analyzed the New York Court of Appeals decision in *Truelove v. Northeast Capital & Ad-*

visory Inc., 95 N.Y.2d 220 (2000). It found the decision highly persuasive and consistent with Connecticut trial court cases, as well as with cases from several other jurisdictions following the same principles.

Double Damages

Double damages and attorney's fees were awarded in *Association Resources Inc.*, in accordance with § 31-71a. The potential double damages and attorney fees are permissive, not mandatory, upon a finding of

bad faith, arbitrariness or unreasonableness. *Sansone v. Cli ord*, 219 Conn. 217 (1991). Also, the employer may be fined up to \$5,000 or imprisoned up to five years, or both under Conn. Gen. Stat. § 31-72.

Only wages, as broadly and liberally defined by the statute, are subject to double damages, costs and attorney's fees if the wages are not paid. Therefore, for example, failure to pay severance or a solely discretionary bonus that is not a wage would not be subject to double damages. **b**