

## PRESS CUTTING

**Human Resources**  
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### **High Court hearing allows employers to claw back bonuses and payments from departing staff**

Catherine Gannon



**For some months over the winter, the High Court was hearing the case of Tullett Prebon v BGC Brokers, in which BGC was accused of the organised poaching of a team of brokers from Tullett.**

A number of the brokers were also sued, both for organising the poaching and for the return of bonuses they had been paid before they left.

The result of this case has been a major success for Tullett. The case will make the organised poaching of staff, especially whole teams, more difficult and it will make it easier to claw back bonuses, or other payments, from staff who have left when the contract allows you to do so.

There is nothing new in the idea of clawing back payments to or for the benefit of staff when they leave. A common area in which this has happened for some time is training costs. The issue has become more important recently with reference to bonuses - and if costs cannot be recovered when management expects, it is likely to be the HR department that is asked the hard questions.

Tullett was seeking to claw back retention and loyalty bonuses which, according to the contracts, it was entitled to do if the brokers left within a certain time of receiving them. The brokers argued that these were penalty clauses or were in restraint of trade - arguments that had previously been thought could be effective. The court had little difficulty in dismissing these. As for penalties, the repayment of a sum paid under the contract is not capable of being a penalty, so that was that. As for restraint of trade, the court found that the claw back provision did not in fact restrain the employees (as a restrictive covenant would do). It just cost them money.

Unless the terms of a share award or bonus clearly specify that shares or cash can be clawed back under certain circumstances, there will be almost no chance of recovering them from employees. There might be exceptions where the award was granted on the basis of misrepresented performance (especially if the individual was himself responsible for the misrepresentation) or where the employee is guilty of serious misconduct and can be sued for damages which could include the bonus award.

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There is no one size fits all solution to clawback. It will be essential to identify the purpose of the intended clawback and the circumstances which are likely to trigger it, and then ensure that the written scheme is accurately drafted to achieve the desired effect.

The key message for HR professionals is to review the contracts and bonus schemes to ensure that as far as possible they do provide for clawback where this is likely to be wanted. While success can not be guaranteed even if the contracts do make provision, failure is highly probable if they do not.

The main part of the case concerned the organised poaching of a team of brokers. The court found that this had happened, that it was unlawful and that a large amount of damages will be payable. The Tullett brokers had tried to set up constructive dismissals - which would have allowed them to escape their restrictive covenants. The court found that this was a fabrication, BGC had induced them to break their contracts and had unlawfully conspired to injure Tullett. One effect of the case will be to emphasise the risks of poaching staff from rivals, especially as whole teams.

This is the latest in a number of cases which have seen the courts more willing to make the recruiting company liable when whole teams join than just for individuals. Partly this is because it is easier to prove wrongdoing. Recruiters must be very careful how they go about team recruitment, bearing in mind that they could come under the spotlight later and every note and email will be disclosable in court.

**Catherine Gannon** is the managing partner of Gannons and specialises in employment, corporate and commercial matters for professional services firms and others.