

## **Happy with your bonus?**

Now is the time of year when employees look to see their skills, effort and contribution rewarded in the form of a bonus. But what are your options if the bonus awarded is disappointing, or it is never paid at all? The first place to look, and the main basis of the law on employees' bonus rights is the individual's employment contract. We look at the key points you need to establish to mount a successful challenge to an incentive pay scheme or a management bonus decision. Although some of the points we make are specific to FSA regulated organisations like credit institutions or investment firms, the contractual principles covered are universal.

## **Were any promises made to you about payment of bonus before you accepted your job?**

If there were, they may have become part of the terms of the contract, if they were clear and unambiguous. Many employers seek to avoid this by including wording in a written contract making it clear that the terms of the written contract are conclusive and discussions which took place before it was signed are not binding. So if you have a written contract, get the terms checked out by an expert. At Gannons we have experienced solicitors who can help you with this.

## **Is there a term in your contract entitling you to a bonus?**

If so, the way in which this term is expressed can be all-important. It may give you an absolute entitlement to a bonus, or reserve an element for of discretion either about how much bonus to pay, and sometimes whether to pay it at all. Guaranteed bonuses are uncommon, except for newly engaged employees, and will become even rarer under the FSA's revised remuneration code, introduced this January to implement the remuneration principles contained in amendments to the European Capital Requirement Directive ("CRD3"). In the absence of a guaranteed bonus, it is very likely that the employer will have some discretion over how much to award; however, this does not mean employers are free to set the amount of a bonus on a whim. Two factors, in particular, can limit an employer's power to pay reduced or no bonus – terms implied by the courts limiting employer's absolute discretion, and discrimination law:

- Employers must exercise their discretion in a rational way, which may mean looking beyond an individual's performance and at other factors such as the overall performance of an organisation, or team within that organisation. This is consistent with CRD3 principles which require employers to take into account the performance of the business unit and the firm as a whole and not to pay bonuses if payment is not sustainable in the light of the firm's financial situation.
- Where the reason for the bonus decision is tainted by unlawful discrimination – for example on the basis of gender, maternity, age, or disability. In particular, under the Equality Act 2010, efforts have been made to increase pay transparency, which may make it easier to make equal pay claims successfully. So far, these measures are limited to making some types of pay secrecy clauses in employment contracts unenforceable; however, the disclosure obligations introduced by the FSA to implement CRD3, which bite this year, will also have an impact on institutions subject to the FSB's remuneration standards. These require employers to disclose information including the bonus decision making process, the design

of the remuneration system, the criteria used to determine variable elements of pay, and the link between pay and performance, at least annually. Certain organisations (broadly speaking the larger ones) are also obliged to report quantitative information, but this is in aggregate, rather than on an individual basis. At director level, employers must account for, and disclose remuneration under the Companies Acts 1985 and 2006 and the Listing Rules.

Remember that law covering race discrimination covers discrimination on the grounds of nationality too – so a foreign-owned institution is not permitted to treat nationals of its home country more favourably than UK nationals.

**If there is no written term in your contract, does that mean you have no right to a bonus?**

It's fairly unusual for an employer to operate a bonus scheme without putting it in writing, but it is possible for an enforceable contractual right to come into existence as a result of an employer following a consistent practice over a period of time, or for a written incentive scheme to be altered by the effect of custom and practice. Assessing the evidence that an informal bonus scheme is a contractual one is a job for an experienced adviser who will know exactly what to look for. Give us a call to find out how we can help you.

**The bonus scheme documents say that the scheme is discretionary. Does that mean I can't challenge my employer's decision?**

Not necessarily. That discretion can be limited by a number of factors:

- The precise wording used may mean that the employer can opt not to make any payment, or merely that it has discretion as to the amount of payment. For example, a clause stating that an employer could cap the amount of a bonus in "exceptional circumstances" was held not to allow the employer to impose a cap when an employee had a particularly successful year.
- The courts have established that employers must base bonus decisions on rational grounds and not award bonuses capriciously. Where the employer sets subjective criteria for bonus entitlement it can be difficult to challenge a decision unless it can be shown that the employer has behaved irrationally, in bad faith or in a discriminatory way.

**Have you given, or are you under, notice to terminate your contract of employment?**

Most bonus incentive schemes will set out rules covering rights to bonus payments where an employee is leaving. Some may make a distinction between cases of redundancy and cases of resignation or misconduct, treating "good leavers" such as employees who leave because of ill-health or are made redundant more favourably. Any rule limiting payment of bonus to employees still in post at the payment date will only be effective if it is known to the affected employees in advance.

**Is your employer trying to claw back a bonus payment from you?**

Whether you can defeat an attempt to claw back bonus will depend on a number of things. First of all, an employer will very rarely succeed in recovering a bonus unless there is an express term in the contract providing for a clawback in specific circumstances, such as where an ex-employee breaks a

post-employment restriction. Even then, if the employer is seeking to recover an amount which is disproportionate to any loss he has suffered, the court may decide that the clause is unenforceable on the grounds that it is not compensation for a loss suffered but a penalty. Employers often seek to avoid this outcome by instead retaining part of a bonus until a specific period has passed, or a condition been met, and of course this places them in a stronger position in practice. Again this calls for a tailored clause, but it is not subject to the same risk that it may be found to be an unenforceable penalty.

If there is no clawback clause, there will be few cases where an employer could successfully recover a bonus which has been paid through the courts – examples might be where the employee has obtained the bonus dishonestly, or by making misrepresentations about their performance.

It is important for employees to realise that if there is no term of the contract in place allowing an employer to take a particular course of action, like withhold a bonus, the employer does not have a right to impose a new term without the employee's agreement. For example, if an employer issues a new contract with different bonus terms, he will not be able to enforce it unless he can show that the employee has consented to the change. Generally the courts will not assume that an employee has consented to the change if he has not signed the new terms. Further, there is no implied term that employees must give up a bonus agreed in better times.

#### **Had you already left your job before the payment date for the bonus?**

Most employers draft bonus incentive schemes to include rules setting out exactly what will happen where an employee leaves during a bonus year, and a rule imposing a cut-off for employees who have left the employer will usually be the end of the matter. However, if the scheme rules are silent or ambiguous on the point, an ex-employee may successfully challenge a decision not to pay bonus. It is more likely that a challenge of this type will succeed for schemes designed to reward past performance rather than those designed to motivate and retain employees. On a wider point, recently, the High Court rejected an argument by an employer that a term should be implied into a contract that an employee must still be in employment on the payment date to be entitled to payment, where nothing had been put in writing on the point.

It can also be argued that if an employer gives notice of termination with the intention of depriving an employee of their bonus, or makes it unnecessarily difficult for an employee to make bonus targets, these are breaches of contract which could give the employee a damages claim.

#### **What should you do if you have a dispute about a bonus incentive scheme?**

You may have a claim for:

- Damages for breach of contract
- Unlawful deductions from wages
- Unfair dismissal
- Equal pay
- Discrimination on the ground of a protected characteristic

It makes sense to take advice early on, so that you can take any steps needed in time, as different time limits and procedural rules apply to each of these. Moreover, in practical terms, once you know

exactly where you stand legally, you can negotiate from a position of strength. Your employer may, as part of the settlement, ask you to sign a compromise agreement , which will only be legally binding if you have had advice from a properly qualified person on its terms. Be prepared for a fight, though; employers often resist settling claims until they are under pressure from legal proceedings.

Practical steps you can take to protect your position, apart from taking prompt advice, include:

- Make notes of any discussions relating to bonus as you go along
- Confirm those discussions by letter or email – if the employer doesn't challenge your version immediately, it will be hard for them to dispute it later. However, take care. Emailing company confidential information to your personal email address will be regarded as serious misconduct justifying dismissal. If in doubt, just make a note of the date and recipients of an email, so that you can seek disclosure during any later proceedings.
- Discuss with your solicitor whether there is an advantage to raising a grievance, serving a discrimination questionnaire, or making a subject access request under the Data Protection Act, prior to, or at the same time as starting proceedings.

### **And finally**

Incentive pay is a key part of benefits packages throughout the financial services sector, where employers are increasingly being obliged to move towards longer term payments and risk based performance measures and to change the balance between equity and cash payments. Even in this climate, the underlying legal principles offer employees protection against unfair treatment and breaches of contract. Employers within the scope of the FSA regime must implement the requirements of the new FSA Handbook now, and in some cases – where bonus entitlement is contractual -this may require renegotiation of employees' contract terms. While employers' hands will be tied by the new regime, a wise employee will take advice and find out exactly how far an employer can be pushed in these negotiations.

Based in Holborn we serve clients in the West End, City, Covent Garden as well as other areas of London, the UK and internationally. We work with many bankers, brokers, dealers and financial specialists based in the City of London.

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