

Employment Bonus Schemes

We all love the idea of receiving a bonus, particularly when a great deal of hard work has gone into a complex project or initiative. However, where a discretionary bonus is payable, the Employer must not act capriciously or in bad faith.

If the Employer has suffered trading losses, the decision not to award bonuses may well be reasonable. However, be warned, in one case, where an Employee had earned his Employer identifiable profits of just under £22.5 million, the Employer was acting capriciously and in bad faith in not awarding the Employee a performance bonus or setting it at nil.

The Court rejected arguments by the Employer that;

- the Employee's eligibility for the bonus was subject to a trigger condition
- any payment was dependent upon "individual performance"
- other factors in the exercise of the discretion were the defendant's legitimate needs/interests and the need to retain/motivate the Employee
- "performance" was not limited solely to the Employee's profitability, but included his contribution to the success of the business;
- there were other aspects of the Employee's "performance" which were so unsatisfactory as to cancel out his profitability.

A well drafted bonus scheme should indicate;

- When the right to the bonus accrues. It can lawfully state that the Employee is only entitled to that bonus, if he or she is in the Employment at that time. A hasty resignation could lose you the bonus.
- When it is to come to an end. From the Employer's perspective, it is sensible to have schemes with a defined short term rather than one that could be construed as going on indefinitely.

It is desirable that any bonus scheme is in writing but a course of dealing between an Employer and Employees may be sufficient to make the payment of bonuses a matter of contract, rather than purely at the Employer's discretion

The Employer must not discriminate between male and female staff in calculating the bonus. There may be valid reasons why one Employee may get a larger bonus than another

- It was for the applicant in a sex discrimination case to prove facts from which the Tribunal could, in the absence of an adequate explanation, conclude sex discrimination.
- It would be unusual to find direct evidence of such facts. The Tribunal has to draw inferences
- Where the applicant had proved such facts, the burden of proof moved to the Employer, who had to prove that the treatment was in no sense whatsoever on the grounds of sex.

Even if the bonus scheme is discretionary, there may come a point where correspondence shows that the bonus has become a contractual entitlement and payment cannot be withheld.