

Bonuses in Bother

Pay freezes, pay cuts and apparently inappropriate bonuses have been widely reported in the last 2 years. There has been indignation at payment of large bonuses to exiting chief executives who have arguably failed to do the job they were employed to do and global pressure to bring bonuses in the banking sector under control.

However, rewarding employees by pay increases, payment of bonuses and commissions remains a useful way of incentivising employees and motivating them to achieve goals. Schemes have become more sophisticated and inventive, helping employers to maximize productivity, profit, safety and quality. Some railway workers were promised bonus payments in return for a 'strike free' year and in the private sector cash based bonuses are still 'king'.

In a difficult economic climate it is more important than ever to link individual achievement to maximising profitability. In the latest Chartered Institute of Personnel and Development UK Reward Management Survey over a third of businesses surveyed had a reward or bonus scheme and a further 3 in 10 intended to implement one in the near future. There has been a shift from paying 'cost of living' pay increases across the board to pay rises that reflect performance and progression. Employers are also seeking non cash alternatives to reduce the impact on already tightly constrained budgets.

Bonus and reward schemes are generally intended to be positive for both employee and employer but they are not without their pitfalls. Employers should ensure that schemes are fair and that they do not reward one particular part of the workforce to the detriment of others. Part time workers often miss out on bonuses due to the nature of targets and indirectly this may affect female workers or those with disabilities. Employers should assess the impact of the scheme to check that it achieves its aim without discrimination.

Paperwork

Bonuses and rewards are usually written into a contract of employment but are equally payable if the payment is regularly made by way of 'custom and practice'. The terms of bonus and reward schemes and clauses should be very clear in order to avoid disputes. They should cover in particular, when entitlement arises, timing and frequency of payments, whether it is dependent on any other factors (such as overall business performance), whether the employer reserves any right to stop or withdraw payment and what happens on termination of employment. Most disputes over bonuses arise when an employee is leaving their employment.

The basic rule is if the bonus has been earned, or is expected by the employee, it is payable. Employees can bring a claim for unlawful deduction of 'wages' under the Employment Rights Order (NI) 1996 if the claim can be quantified and has fallen due, otherwise they may be able to claim damages for breach of contract. Although the very definition of the word bonus means something given or paid over what is due, if a bonus has been regularly paid it is very difficult to say it is discretionary. This applies even where the bonus clause reserves discretion to the employer over whether and when it is payable.

Cutbacks and changes

Bonus payments and other rewards are controversial against the backdrop of an ailing economy. Bonuses are often the first thing an employer will look at when trying to make savings. There



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is a temptation for employers to consider bonuses as an expendable luxury instead of a contractual right. Care must be taken in implementing any change to bonus and reward schemes. The European Parliament approved legislation in July 2011 that will cap and defer bonuses to banking employees. However, it is not clear whether the UK government will seek some exemption from this legislation. Banking employees may argue that they are contractually entitled to payments but their employers will be able to defeat these arguments if they are required to make cuts as a matter of law. Few employers outside this sector will be able to rely on such an argument.

Employers need to review the terms of their schemes and treat them as they would a variation to any other term of the contract. Notice should be given and agreement sought for any change or non payment the employer is planning. Failure to do

so can have drastic consequences. The perception of unfairness in treatment between employees when it comes to pay and bonuses is especially contentious. Even the largest of organisations have faced the threat of strike action over what employees consider an unfair pay deal and bonuses.

As with any change to employees' terms and conditions acceptance will depend on effective communication. Research has shown that engaging with employees to establish the necessity and benefits of change will lead to greater levels of acceptance. This can be time consuming but consultation and consent is usually less expensive than claims.

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