



Case of the Month

Bonuses are under scrutiny. Despite the views of the press they are not confined to bankers and are widely used as a reward mechanism by many businesses. The ironically named case of ***Small v The Boots Co PLC and Boots UK Ltd*** [2009]UKEAT/0248/08 is a timely review of the issue of when a bonus will be contractually enforceable. Many employers want to maintain that their bonus systems are non-contractual and describe them as “discretionary”. This case demonstrates how carefully that word has to be used.

The employees in this case were not fat cats. They were warehousemen employed by Boots. Their employment had been transferred out of Boots when warehousing was outsourced and then had returned when the outsourcing ended. Before the outsourcing bonuses had always been paid by Boots. The outsourced company did not pay bonus. When the employees returned to Boots’ employment it was contended by the company that no bonus was payable because the contract did not confer a contractual right to bonus. The employment tribunal agreed saying that most of the documents were “couched in language of discretion rather than obligation”.

Two handbooks had been issued. One in 1994 said that bonuses were discretionary benefits and not contractual. The other, issued in 1998, also referred to the bonus as discretionary in the part of the handbook describing benefits rather than in the part including contractual terms. Another document issued in 2003 also referred to bonuses in a part of the document said to be capable of amendment or withdrawal.

One might have thought from all of this that the employment tribunal had good reason to decide as it had.

Mrs Justice Slade in the Employment Appeal Tribunal took the view that matters were not necessarily that simple. She reviewed the existing case law and drew attention to the ambiguity of the word “discretionary”. There were at least two contexts in which the word might be used. The first as to the obligation to pay a bonus at all and the second as to the amount payable. Even in cases where no formula for calculation is revealed and no criteria for performance are expressed it is possible that the context may create a contractual obligation to pay a bonus. In particular when there are terms attached to a bonus that indicate that it exists to encourage future loyalty (such as a requirement not to give notice and be working on the bonus pay date) these indicate a contractual content. This is to be distinguished from a mere declaration by an employer that it may pay a bonus if it wishes, a right any employer enjoys regardless of the contract.

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According to Mrs Justice Slade the Employment Judge had failed to consider if the reference to discretion related to the decision whether to pay a bonus at all rather than its calculation or its amount. The contrast made by the Employment Judge of obligation with discretion meant that there had been a failure to consider properly the nature of the contract and as such was a mistake of law. The case was remitted to a different tribunal to re-consider that issue.

In addition there had been a failure by the Employment Judge to take into account the invariable practice of Boots before the outsourcing to pay bonus. They had done so for some 40 years. This had been considered only in the context of whether a non contractual bonus had been varied to acquire contractual effect and not to provide a context to establish the way in which the word “discretionary” had been used.

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Further Information

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