Bonus Season: Key considerations to minimise disputes

It is bonus season and inevitably each year there are employees who are disappointed that either they have not received a bonus at all or have not been awarded the amount of bonus they were expecting. Disputes relating to bonuses in the financial sector are coming into even sharper focus in light of the announcement that the cap on bankers' bonuses will be abolished. The PRA and FCA's consultation on the proposal closes on 31 March 2023 and it is possible the cap will be lifted towards the end of this year, with the result that bonuses for the 2024/25 performance year could be uncapped.

In this article we consider the main arguments that arise in bonus disputes.

Is there a contractual entitlement to a bonus?

The first bone of contention is often whether or not an employee is contractually entitled to a bonus.

If a contract of employment provides for a guaranteed bonus, or that a bonus will be paid upon certain performance criteria being met, this is likely to amount to a contractual entitlement to the bonus. A failure to pay the bonus, or the correct level of bonus, would give rise to a claim for breach of contract or unlawful deduction from wages.

However, it is important to be aware that bonus entitlements, including the level of bonus that could be awarded, may be expressed differently in offer letters and contracts of employment. Often this is missed – until a dispute arises in respect of a bonus.

Generally, offer letters set out broad expectations of the amount of bonus that could be awarded, and are used as a means of enticing employees to accept a role. However, if the right to the bonus and/or the level of bonus are not replicated in the contract of employment, it is unlikely to have contractual status. This is because, in the majority of cases (not all), the contract of employment will supersede the offer letter and/or any other pre-employment discussions or agreements between the parties, including those regarding bonuses.

More often than not, contracts of employment do not provide for a contractual bonus entitlement. Instead, they tend to provide that an employee is "eligible to be considered"' for a bonus and that the entitlement to a bonus, as well as the amount of any bonus award, is at the sole discretion of the employer.

Yet, even where bonuses are expressed to be discretionary in the contract of employment, there might be an argument that a term has been implied into the contract of employment such that the employee is, in fact, contractually entitled to a bonus. The Courts will look beyond the express terms of the contract and consider how it operates in practice. For example, if an employee receives a bonus at the same time each year and/or receives a certain amount of bonus each year, it could be argued that in reality the employee's eligibility is not discretionary – rather a contractual entitlement to a bonus has arisen over time as a result of custom and practice.

What constraints apply to discretionary bonuses?

Even if a bonus is truly discretionary, there are limits on how an employer may exercise such discretion. The Courts recognise that employers should not be able to treat bonus schemes as a sort of mirage, intended to encourage an employee on to better performance, only to find it later snatched away.

Employers are subject to the following duties which, if breached, may mean that the subsequent bonus award is unlawful:

- a duty not to breach the implied term of trust and confidence;
- a duty to exercise their discretion honestly and in good faith; and
- a duty not to exercise discretion in an arbitrary, capricious or irrational way.

In all contracts of employment, a term is implied such that an employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence that exists between employer and employee. Should an employer single out an employee on capricious grounds and refuse to offer them the same terms as offered to similar employees, the employer may be in breach of contract.

This term of mutual trust and confidence obliges employers to treat employees even-handedly. It does not necessarily mean treating all employees identically, but there must be non-capricious, cogent reasons for doing so. Applying this principle here, should an employer fail to pay a bonus to an employee in circumstances where comparable colleagues have received a bonus, the employer could be in breach of contract (and depending on the reason for the treatment it may also have breached discrimination legislation). This is a high hurdle to cross, but one worth considering pursuing for potentially valuable bonuses.

Employees may also be able to challenge a bonus decision on the basis of a lack of good faith or irrationality on part of the employer. The duty to act rationally is not the same as a general duty to act reasonably. A test of rationality is subjective but applies a minimum standard to the employer's mental processes and the factors it takes into account when determining bonuses. It introduces a requirement that there should be some logical connection between the evidence and the apparent reasons for the decision. The absence of any evidence or logical or cogent reason for the decision might result in claims for breach of contract.

Merely because a bonus decision appears to be unreasonable does not necessarily mean it is unlawful. The Courts will only step in to remedy discretionary bonus decisions or processes which are not logical, contrary to accepted standards or practice, or as a result of sudden and unaccountable changes of mood or behaviour.

Recommendations for employees

When entering into a new employer contract it is important to ensure that your bonus expectations are expressly and accurately reflected in the contract of employment. If possible, it is also advisable to have the level of bonus that could be awarded, as well as the factors that will be taken into account in assessing the level of bonus, included in the contract as well, albeit this may not always be possible as performance factors are likely to change or evolve over time.

In any event, it is vital to ensure that discussions regarding bonuses, performance criteria, assessment of performance, etc are agreed in writing or, at the very least, recorded in writing contemporaneously by the employee. This may help in the event of a future dispute.

Where a guaranteed bonus has been offered the language of discretion is not appropriate and clear conditions for payment should be set out.

Employees should also be mindful that regardless of whether bonuses are expressed as contractual or discretionary, there is often a clause in contracts of employment stipulating that employees must remain in employment, and not be under suspension or under notice of termination (whether given by them or received from the employer) on a specified date or the bonus payment date in order to receive the bonus. If there is such a clause, care should be taken when considering resigning from employment. If it is not possible to wait until bonuses are paid before leaving employment, employees may wish to consider negotiating a guaranteed payment upon commencing new employment to compensate for the amounts that may be lost.

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specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Samantha Prosser (SamanthaProsser@bdbf.co.uk) or your usual BDBF contact.

BDBF's Employment Tracker for 2023 and Beyond

Our tracker highlights new domestic legislation and other key proposals for legislative reform.

Please click the image below to view the full tracker document:

If you would like further information, or to discuss how to prepare for any of these changes, please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Is it time to move to a four-day working week?

From June to December 2022, 61 UK employers participated in a four-day working week pilot scheme organised by the “4-day Week Campaign”. A report detailing the findings of the pilot suggests that the scheme was a success for both employers and workers, with 92% of employers continuing with the arrangement. Is it time for more employers to give this way of working a go?

What did the four-day week pilot scheme involve?

Under the scheme 2900 workers from 61 different UK organisations were asked to deliver 100% of their normal work output over 80% of full-time hours in exchange for 100% of pay. The pilot scheme ran for seven months, between June and December 2022.

The participating organisations spanned a range of sectors including retail, professional services, finance and insurance and manufacturing. However, two thirds of the participating organisations were small businesses with 25 members of staff or fewer. Only 12% of organisation had more than 100 employees.

Organisations could choose the non-working day, with Fridays being the most popular choice followed by Mondays. Only a few employers opted for a variable non-working day or a combination of two non-working half days.

What did workers say about the pilot scheme?

The participating workers reported that the shorter working week had a positive impact on their work/life balance and overall wellbeing. Notably:

- 71% reported lower levels of burnout.
- 62% found it easier to balance their work and social life.
- 60% were better able to manage their caring responsibilities.
- 54% found it easier to balance their work with household jobs.
- 40% said they were sleeping better.
- 38% said they were less stressed.

Workers reported using their day off for a range of different activities including getting on top of "life admin", volunteering, playing sport and helping elderly relatives. Workers were also able to save on commuting and childcare costs – something of particular value during the current cost of living crisis.

What did employers say about the pilot scheme?

Crucially, employers reported that revenue was unaffected, and even improved slightly. On average, revenues increased by 1.4% over the trial period. In addition, absenteeism and staff retention rates improved: sickness absences dropped by a massive 65% and resignations dropped by 57%. Employers also reported that the four-day week arrangement made recruitment easier – one company reported an 88% increase in applications during the pilot.

Overall, the pilot scheme has been a hit with employers with 18 of the 61 organisations committing to make the change permanent and a further 38 intending to continue with the four-day working pattern at least in the short-term.

Should more employers give it a go?

The 4-Day Week Campaign says that the pilot scheme has been a "resounding success" and it has called for more employers to embrace the change.

Employers considering giving it go should ponder carefully how any such change would be viewed by existing part-time workers engaged on an 80% FTE basis. It is far from unusual for part-time workers to work in excess of their contractual hours. Workers in that boat may well feel aggrieved that they are paid only 80% pay for 80% of full-time hours, where they believe that they are delivering value to the business in excess of this. Not only could this damage employee relations, but it could also lead to grievances and potentially even Tribunal claims, for example, for equal pay. Employers would need to consider offering such employees the option of changing to the "five days' pay for four days' work" pattern, on the understanding that they would be given a full-

time workload.

It should also be recognised that once the move to a four-day working week has been made it will be quite difficult to undo without damaging employee relations. Employees could simply refuse to agree to step back to the old ways of working, leaving employers wishing to backtrack with little option but to dismiss. Indeed, the pilot scheme showed that 15% of workers said that “no amount of money” would induce them to return to a five-day working pattern. For this reason, if employers do not want to make the change permanent initially, it should be made clear to employees that the arrangement is offered on a trial basis only and there has been no permanent change to terms and conditions of employment.

The UK’s Four Day Week Pilot, February 2023.

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Workers to be given the right to request more predictable

working patterns

Workers to be given the right to request more predictable working patterns

The Government has announced that it is supporting the Workers (Predictable Terms and Conditions) Bill that would give workers and agency workers a statutory right to request a more "predictable" working pattern.

Last November, we reported on the Government's plans to pursue employment law reforms by way of backing a series of Private Member's Bills. You can read more about the proposals to improve redundancy protection **here** and expand harassment law **here**. And you can read about four further proposals **here**.

Continuing this theme, the Government has recently announced that it is supporting a further Private Member's Bill – the Workers (Predictable Terms and Conditions) Bill – which would entitle workers (and agency workers) to request a more "predictable" working pattern. In this briefing, we consider how the new right will apply to workers.

When will a worker be able to make a request?

Only workers who are employed by the same employer at some point during the month immediately preceding a "prescribed period" ending with the request will be able to make a request. The "prescribed period" will be set down in

regulations but is expected to be 26 weeks. In other words, a worker will need six months' service before a request may be made.

Workers will have the right to make a request for a more predictable working pattern where:

- Their work pattern lacks predictability. In this context, "work pattern" refers to the number of hours worked, the days of the week worked and the times on those days that the worker works (e.g. someone working under a zero hours contract or who works an irregular shift pattern). "Work pattern" also covers the length of the contract and a presumption is made that a fixed-term contract of under 12 months lacks predictability.
- The change requested relates to their working pattern.
- The purpose of the request is to achieve a more predictable working pattern.

Are there any rules on how such requests must be made?

Applications must be made in writing, state that it is a request for a more predictable working pattern and set out the date on which the worker proposes the change will become effective. The draft Bill states that further regulations may be made about the form that such applications must take.

Up to two applications may be made in a 12-month period,

although these may not be made concurrently. It is worth noting that this limit extends to requests made under the separate flexible working regime, where the flexible working request is for a change that would have the effect of delivering a more predictable contract.

What duties will an employer have in relation to such requests?

The draft Bill provides that employers must deal with such requests in a "reasonable manner". This is not defined in the draft Bill, but probably means that employers will need to hold a meeting with the worker and give them the opportunity to make representations in support of their application.

The employer must notify the worker of its decision within one month of receiving the application (the "decision period"). If the employer grants the request, the employer has a further two weeks to offer the worker a new contract with terms and conditions that, taken as a whole, are not less favourable than the original contract and reflect the change that has been agreed.

Employers do not have to accept requests; however, a request may only be rejected on one of the following grounds:

- The burden of additional costs.
- Detrimental effect on ability to meet customer demand.

- Detrimental impact on the recruitment of staff.
- Detrimental impact on other aspects of the employer’s business.
- Insufficiency of work during the periods the worker proposes to work.
- Planned structural changes.
- Such other grounds as specified in regulations.

If the worker’s contract is terminated during the decision period the employer is still required to respond to the request, however, additional grounds for rejecting the request will then be available (namely, that the worker has resigned or been dismissed for a qualifying reason – meaning one of the five potentially fair reasons for dismissal).

Employers will not be obliged to offer a right of appeal but may choose to do so (and if they do, there are limits on how the appeal process should be run).

What rights will a worker have if something goes wrong?

If the employer does not adhere to the statutory procedure for considering requests, or it rejects a request based on incorrect facts, then the worker will have three months to present a complaint to an Employment Tribunal. The Tribunal may order the employer to reconsider the application and/or pay compensation to the worker of an amount it considers to be

just and equitable. The maximum amount of compensation may be capped in regulations – we would expect this to mirror the maximum compensation available under the flexible working regime (i.e. 8 weeks' pay).

Workers will also be protected from detriment and/or dismissal for having requested a predictable working pattern or bringing proceedings to enforce the right to make such a request.

What should employers do now?

Employers do not need to take action just yet. The draft Bill passed its second reading in the House of Commons on 3 February 2023 and is due to progress to the Committee stage and then the Report stage and third reading. It will then have to repeat the process in the House of Lords. So, there is still a long way to go before this Bill becomes law – and additional regulations will be needed. Therefore, it seems unlikely that the right will come into force before 2024. However, employers should keep an eye on the progress of the Bill and ensure that relevant staff, such as line managers and members of HR, are kept updated.

If and when the Bill becomes law, employers will need to introduce new policies setting out how such requests may be made and whether, for example, there will be a right of appeal. Employers will also need to devise processes for handling requests (noting the tight timetable for responding to them) and amending contracts where relevant.

Workers (Predictable Terms and Conditions) Bill 2022 – 23

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Requirement to work a potentially discriminatory working pattern applied to the employee once flexible working appeal was rejected

In Glover v Lacoste UK Ltd the EAT said the rejection of a flexible working request on appeal resulted in the "application" of a potentially discriminatory working pattern on the employee. This was the case even though the employer later changed its mind and the employee never had to work under the unwanted working pattern.

What happened in this case?

Ms Glover worked for Lacoste as an assistant store manager. She worked five days out of seven per week, with the working days set out in a rota provided to her every four weeks. She went on maternity leave in March 2020 and her store closed during the Covid -19 pandemic.

In November 2020, Ms Glover made a flexible working request asking to work three days per week. Lacoste rejected her request at the initial stage and also on appeal, although it offered a compromise of four days per week to be worked on a fully flexible basis (i.e. on any day of the week, including weekends). No further right of appeal was offered.

Ms Glover felt that the requirement to work on any day of the week would be impossible given her childcare commitments. Her solicitor wrote to Lacoste asking for the original request to be reconsidered, failing which Ms Glover would constructively dismiss herself.

In April 2021, Lacoste relented and agreed to the original request to work three days per week. At the time, Ms Glover was absent on furlough and so had never had to work under the four-day week working pattern proposed by Lacoste. After Lacoste reversed its position, she returned to work.

Ms Glover went on to present a claim for indirect sex discrimination. She said that Lacoste's requirement to work fully flexibly across the week was discriminatory because it put women at a disadvantage compared to men (due to the fact that women still have primary responsibility for childcare), and it also put her at a disadvantage individually.

The Employment Tribunal rejected the claim on the basis that the requirement had never, in fact, "applied" to Ms Glover in practice because Lacoste had reversed the decision before she returned to work. This meant that she had not suffered any individual disadvantage. However, the Tribunal went on to say that had the requirement been applied to Ms Glover then it would have been discriminatory and could not have been

justified.

With funding from the Equality and Human Rights Commission, Ms Glover appealed the decision.

What was decided?

The EAT allowed the appeal. In particular, the EAT noted that the Tribunal had misinterpreted previous case authority when deciding whether Lacoste's discriminatory requirement had been "applied" to Ms Glover.

In the case of Little v Richmond Pharmacology Ltd, the employer had rejected Ms Little's flexible working request and required her to work full-time. Their decision was said to be provisional, and she was offered a right of appeal. However, Ms Little resigned and did not return to work under the full-time arrangement. In Ms Glover's case, the Tribunal had concluded that the requirement had not been "applied" to Ms Little because she had never worked under that arrangement. They applied the same logic to Ms Glover's case.

However, this interpretation was wrong. In fact, the real reason the full-time working requirement did not apply to Ms Little was because the employer's decision was expressed to be provisional and subject to appeal. In other words, the internal process was not over.

Properly understood, Little was authority for the rule that a final determination of a flexible working request amounts to the "application" of the requirement in question, even if the

employee never actually works under the arrangement. Therefore, in this case, the discriminatory requirement to work four days per week on a fully flexible basis “applied” to Ms Glover upon the determination of her appeal. It did not matter that Ms Glover never actually worked under that arrangement, nor did it matter that Lacoste later changed its mind

However, the question of whether Ms Glover suffered any disadvantage was remitted to a fresh Employment Tribunal to consider. On one hand, it could be said that the decision was eventually reversed and so she did not have to constructively dismiss herself. However, the EAT Judge said it was hard to see how it could be said that she suffered no disadvantage at all when the request was rejected twice leaving her with no option but to consider resigning.

What are the learning points for employers?

This decision clarifies that reversing a final decision to impose a discriminatory requirement will not extinguish liability for discrimination. The problematic requirement or practice will be deemed to have applied to the employee from the point of the final decision, regardless of what actually happens in practice.

The extent to which the employee has suffered as a result of the decision will be a question of fact. If matters are ultimately resolved in the employee’s favour, and he or she returns to work, there will be no loss of earnings. In such circumstances, the employee’s remedy will probably be limited to an injury to feelings award only. However, as Lacoste no doubt found out, such claims carry with them the risk of

unwanted publicity alongside the considerable time commitment and legal costs associated with defending discrimination claims.

Where a flexible working request is feasible, but you have reservations about it (as Lacoste clearly did) the better option might be to permit it on a trial basis. If it proves not to be workable, you will be able to point to evidence underlining why the arrangement cannot be permitted on a permanent basis and you will also be in a much better position to defend any claims that follow.

Glover v Lacoste UK Ltd

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