

Claiming your bonus when your employment has been terminated prior to the bonus payment date

By Philip Landau

The majority of bonus schemes operated by city employers are discretionary in nature, thereby allowing employers as much flexibility as possible in determining the level of awards which should be made. A well drafted bonus clause from an employer would typically reserve the right to make payments based on a number of factors other than simply performance, and this often includes where employees may leave their jobs prior to the bonus payment date. Often, (and this is especially the case with traders), the employee will argue that they have earned significant money for their employer that year, and should not be penalised simply because they are made redundant, or leave for some other reason before the bonus announcements and payments are made.

In a case brought by Mr James Keen, a former star trader with Commerzbank late last year, one of his arguments sought to challenge the provision in his contract that no bonus would be paid to him if he was no longer employed or on notice (whether given by him or the Bank) at the date when the bonus was paid. Mr Keen was claiming he was owed millions of euros for the half year he had worked prior to his redundancy. During this time, Mr Keen made a profit of 46.5m euros. In addition to arguing that the Bank had exercised its discretion perversely, he argued that the provision in his contract preventing him from being paid was 'an unfair term' and therefore unenforceable under the Unfair Contract Terms Act 1977 (UCTA).

The Court of Appeal held that a clause in Mr Keen's contract that he would not be paid any bonus where he is no longer employed in that bonus year was clear on its face, and prevented him from making a claim for that year. The Court also unanimously rejected the argument that such a clause was 'unfair' pursuant to the UCTA. The Court stated that the Act was for the benefit of 'consumers' and not employees.

The decision in Keen does not necessarily mean all is lost for employees who are chasing bonuses having worked part of the year only. An employee's contract of employment may not be sufficiently tightly drawn to allow an employer to escape their responsibility. Furthermore, many banks are making pro-rata bonus payments regardless of what the contractual position is. This 'custom and practice' is very useful to a disgruntled employee who may be singled out for non-payment of their bonus for reasons of not having been employed at the relevant date. Banks can be held to apply their custom and practice for all. In addition, despite the decision in the Keen case, the courts may well be prepared to find another way to challenge an employer's decision, where that decision has so obviously been made to avoid the bonus payment. Watch this space!

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