

## **Discretionary Bonus Payments**

### **Calculating the lost benefits**

- Basic Rule: lost contractual benefits only (*Lavarack v. Woods of Colchester Ltd* [1967] 1 QB 278)
- includes anticipated future salary increases which are provided for in the contract (*Clarke v BET plc* [1997] IRLR 348)
- Employer deemed to act in the manner most beneficial to itself
- No “loss of chance” claim (*Janciuk v. Winerite Ltd* [1998] IRLR 63)

### **The Problem of Discretionary Bonuses**

- Seemingly non-contractual in that employee has no right to demand the payment he has at best a mere expectation.
- No “good faith” doctrine in English Law
- Court cannot substitute its own view for that of the employer
- An employer is entitled to be unreasonable

### **The Implied Term Solution**

- Not to act perversely or irrationally
- Higher threshold than reasonableness
- Same test as in the Administrative Court:- no reasonable employer would have reached the conclusion this employer did (*Clark v Nomura* [2000] IRLR 766 Burton J)

### **Critique of the Implied Term**

- Arguably only one obligation: an entitlement the discretion exercised by the decision-maker
- The capricious refusal of the decision maker amounts to a refusal to exercise a discretion
- Reviews of decisions in a public law context are not analogous to assessments of damages
- Raises difficult issues over burdens of proof
- Language suggest that the court is being invited to intervene

### **Application of the Implied Term Principle**

- Paramount importance of the construction of the clause
- Objective purpose of the bonus payment - to reward for past performance or to motivate future performance or loyalty
- Employee’s Entitlement to a genuine and rational exercise
- Link to trust and confidence obligations
- Quantum is not the minimalist threshold of irrationality
- *Horkulak v. Cantor Fitzgerald Int’l* [2004] IRLR 942

### ***Commerzbank v. Keen* [2007] IRLR 132**

- Does it represent a shift away from the employee?
- Part 24 CPR Application
- Morison J's decision
- Mummery LJ's trust & confidence analysis
- Emphasis on the employer's wide discretion
- Burden of Proof placed upon on the employee
- Significance of tailoring the evidence (Moses LJ)
- No application of UCTA 1997 to the proviso: *No bonus will be paid to you if on the date of payment of the bonus you are not employed by the bank or if you are under notice to leave the bank's employment whether such notice was given or received by you*

### **Issues which flow from *Commerzbank v. Keen***

- Is there a difference between a nil bonus and a lower than expected bonuses ? (*Ridgway v. JP Morgan* [2007] EWHC 1325, Forbes J)
- Are employee share schemes governed by the same principles ?
- Application to equal pay claims (*Barton v. Investec Henderson Costhwaite Securities Ltd* [2003] IRLR 332)

### **PILON Clauses and Bonuses**

- Construction of the clause
- Is the employee entitled to an exercise of discretion during the notice period?
- Is there a *Commerzbank v Keen* type of exclusion to bar the entitlement?
- If so, does the giving of notice amount to a wrongful or unfair termination?

### **Conclusions**

- Care to be taken in the drafting of bonus clauses
- *Commerzbank* type provisos do work in favour of employer
- Evidence gathering is critical
  - For the employer: to identify the decision maker and provide reasons; and
  - For the employee: to discharge an evidential burden by factual and/or expert evidence