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Capping Bonuses – An update on what's happening here and in the US.

48 Hour working week Opt-Out – Update from European Commission

Dismissed For Being Bitten By A Flea – The real reason behind any "redundancy" is always spotted by tribunals. Here's an example.

Statutory Dismissal Procedure - Step 1 Letter – What not to forget in the run-up to the new ACAS Code of Practice.

Claim For Bonus Could Be Brought In Employment Tribunal – Tradition Securities And Futures Sa V Mouradian

News

CAPPING BONUSES

We've been reviewing the different positions adopted by the US and UK in relation to bonuses.

The US congress has agreed to implement controls on executive pay. New rules have been inserted into President Obama's \$787 billion economic stimulus plan. This amendment to the stimulus bill cleared the House of Representatives and Senate on Friday and is expected to be signed into law by Obama this week.

The pay restrictions go further than the salary cap for top executives already imposed by Obama. Earlier this month a \$500,000 salary cap was announced for top executives at companies that receive the largest amounts under the \$700 billion federal bailout. The new measures would affect the highest-paid traders and department heads and allow the government to "claw-back" money if it was given in breach of the new rules.

The measures would:

- Ban cash bonuses (the wages of top officials are often dwarfed by bonuses);
- Ban many other non-salary incentives for the top 5 officers and 20 highest-paid executives at any firm receiving substantial help from the US's bank bail-out, known as Tarp (Troubled Asset Relief Programme);
- Limit bonuses to no more than a third of the total value of annual pay;
- Ensure bonuses are paid only in the form of share incentives – they could not be cashed in until a firm had repaid the money borrowed under Tarp;
- Enable the treasury to clawback pay and bonuses from top executives if compensation was found to have been awarded wrongfully or based on inaccurate criteria; and
- Limit 'Golden parachute' severance packages for top executives (an agreement between a company and an upper executive employee specifying that the employee will receive certain significant benefits if employment is terminated).

There are expected to be further negotiations in Washington to refine Obama's measures, but it is still expected to be passed.

Meanwhile, in the UK, as a consequence of Obama's proposed legislation, Gordon Brown is under rising pressure to clamp down on the City's bonus culture.

There are no similar legislative plans for the UK as yet. Alistair Darling admitted on Saturday that bonuses had been discussed during a meeting of G7 finance ministers in Italy, although the summit's final communiqué suggested no firm conclusions had been reached. However, on Tuesday 17th February, the Chancellor announced that the government is cutting bonuses paid out to staff by RBS from the £2.5bn paid last year to £340m. Future bonuses will no longer be paid in cash, but in shares. There has been criticism of this clamp-down on executive pay which includes not just £175m to meet contractual obligations for some investment bankers and another £165m to be paid out of a profit share scheme to 80,000 front line staff, but probably as much as £600m in deferred benefits.

The Prime Minister has committed himself to considering a "clawback" scheme, where bonuses would have to be repaid if the bank subsequently suffered significant failures. He has also set up a review of bank bonuses which will report later this year.

Meanwhile, the FSA does not wish to become involved in setting remuneration levels. However, it expects financial institutions to move away from pure cash-bonus arrangements towards risk-adjusted deferred-compensation arrangements. There is likely to be substantial regulatory pressure to reconsider key remuneration policies.

48 HOUR WORKING WEEK OPT-OUT

There have been further developments in relation to the European Parliament's proposal to scrap the opt-out from the 48-hour working week which is contained in the Working Time Directive. The European Commission has issued an opinion rejecting the proposal to remove the opt-out from the Directive. The Commission also rejected a proposal to restrict the validity of a worker's opt-out to a six month period. However, the Commission is supportive of the eventual phasing out of the opt-out and its opinion does allow for greater restriction on the opt-out than is currently the case.

The Commission also gave its opinion on other proposals for amendments to the Directive. It agreed that the inactive portion of on-call time should not count towards minimum rest period and that this time would be regarded as working time. It also agreed that where working hours are being substantially changed, workers should be informed of this well in advance.

Comment:

The Commission's opinion is important as the European Parliament and Council will take it into account when agreeing final text to any amendments to the Working Time Directive. It is likely to be around 3 months before the Council decides whether or not to approve the Parliament's proposal to remove the opt-out – this would require unanimous approval from the Council. We will keep you updated with any further developments.

DISMISSED FOR BEING BITTEN BY A FLEA

A waitress, Miss Moon (M), was unfairly dismissed by Butlins after raising health and safety concerns that she had been bitten by fleas. M shared a chalet with another employee which allegedly boasted a broken shower, soiled mattresses and was damp. M's doctor informed her that she had infected insect bites probably from rat fleas. The chalet was fumigated but M was then dismissed due to overstaffing. The Tribunal looked at the facts and circumstances of the case and found that there was no overstaffing issue and that no other staff members had been seriously considered for redundancy. The Tribunal found that she had been in fact dismissed for raising health and safety issues.

Comment:

Care must be taken to ensure that a full and fair procedure is followed and that any redundancy is not merely a smoke screen for any underlying desire to "get rid" of an employee. As this case reminds us, Tribunals will look at the real reason why the employee's employment ended and whether that was fair, and they are very good at spotting a dismissal dressed up as a redundancy.

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Recent Cases

STATUTORY DISMISSAL PROCEDURE - STEP 1 LETTER ZIMMER LTD V BREZAN

The Employment Appeal Tribunal has held that a step 1 letter was insufficient because it did not inform the employee that he was at risk of dismissal. The statutory dismissal procedure does not expressly state that the employer has to set out in writing that it is contemplating dismissal. However, the EAT held that the wording of the statutory procedure should be interpreted purposively so as to include this requirement. The EAT held that if the letter does not state that the employer is contemplating dismissal, any resulting dismissal will be automatically unfair.

Comment:

The statutory procedure does not set out this requirement expressly and so we are not convinced by the EAT's reasoning in this case. However, employers should ensure that step 1 letters do include a sentence which makes it clear that the outcome of the disciplinary hearing could be dismissal.

The new ACAS Code of Practice provides that *"if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting."* On the basis of that paragraph, we recommend that post April employers should continue to set out the potential outcome(s) in invite letters to comply with the ACAS Code.

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CLAIM FOR BONUS COULD BE BROUGHT IN EMPLOYMENT TRIBUNAL UNDER UNLAWFUL DEDUCTION OF WAGES PROVISIONS TRADITION SECURITIES AND FUTURES SA V MOURADIAN

Mr Mouradian (M) managed a team of brokers for his employer, Tradition (T). His contract of employment provided that he was entitled to a bonus from a bonus pool made up of 60% of billed income after deduction of specific costs identified in the contract. The bonus was to be divided between M and the other brokers in the team at M's discretion after consultation with T's CEO. In January 2007, prior to the announcement of the bonus pool, M allocated £100,000 of the pool to be divided among the three other brokers with the remainder to himself. Upon declaration of the bonus pool, M argued that a number of deductions which had been made were not within the list specified in his contract. These additional costs reduced the bonus pool and therefore M complained to the employment tribunal that this was an unlawful deduction from his wages.

Under the Employment Rights Act 1996, an employee has the right not to suffer unlawful deductions from wages (which includes bonuses). This right is designed to allow the employment tribunal to hear straightforward claims by employees for an identifiable loss. In this case, T sought to argue that M's loss was not quantified, as the amount and whether it would be paid in cash or by way of benefit was dependent on the exercise of their discretion. T therefore argued that M could not bring a claim for unlawful deduction from wages in the Employment Tribunal and that his claim should be for damages for breach of contract in the High Court. The Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal all upheld M's case pointing to the fact that in practice, notwithstanding the provisions of the contract, M exercised total discretion in relation to the allocation of the bonuses from the pool. This, coupled with the fact that the amount claimed was a quantifiable sum, meant that the Employment Tribunal had jurisdiction to hear the claim.

Comment:

Where there is a straightforward claim for a bonus and the employee's loss is quantifiable, it can be dealt with under the

unlawful deduction from wages provisions. This will usually be the case where bonuses are calculated by reference to a formula and where there is little discretion exercised by the employer. Any claims under a more complicated bonus scheme involving the exercise of the employer's discretion are still likely to be heard in the High Court. Employers should note that employees may prefer to make claims in the Employment Tribunal rather than in the High Court where possible as tribunal claims tend to be dealt with more quickly and are much less costly for the claimant.

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