

If it's in your contract, bonus season cometh

Michael Herman

Turmoil in the financial sector and state bailouts of several British banks led Gordon Brown to declare in October that “the days of big bonuses are over” - but the reality this Christmas will be much more complex.

The views of the Government, the Financial Services Authority (FSA) and the public - for whom “bonus” has become a dirty word - will all be present in the minds of senior bankers when dishing out the bonus pot, but no amount of financial turmoil, state rescues or popular pressure can change what is written in an individual banker's contract.

This puts bankers with guaranteed bonuses in the strongest position. Paul Griffin, a partner at Norton Rose, the law firm, said: “It makes absolutely no difference if you work for a healthy, independent bank or one that took government money to avoid collapse and is now owned by the taxpayer. If your contract says you are entitled to a specific guaranteed bonus, then the bank is legally obliged to pay you, however awkward it may be in the current climate.”

Should a “state-owned” bank refuse to pay a guaranteed bonus on the grounds of its radical change in circumstances and government or public pressure, Mr Griffin said that bankers who lose out would be in a very strong position to litigate: “The courts do consider wider public policy issues when evaluating individual disputes, but it would be extremely difficult for a bank to convince the court that a change in ownership was enough to overrule what is written in black and white.”

The issue facing most bankers is that their bonuses are not written in black and white but are discretionary - a vague and ambiguous term that has kept lawyers and the courts busy for years. This Christmas is already creating further work as banks struggle to understand what impact market turmoil has on their discretion to cut bonuses or withhold them.

In practice, banks must consider several factors when calculating a discretionary bonus, including the individual's performance, that of his or her department and the bank as a whole. This year some banks are faced with an additional consideration: did we take a government bailout and are we now effectively nationalised?

A bank cutting or withholding discretionary bonuses will cite a range of justifications and so, while lawyers believe that a change to “state ownership” is, in isolation, not a reason to withhold a bonus, it could be used with other factors.

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Recent changes in the law in favour of employers put banks in a relatively strong position. A banker suing for non-payment of a discretionary bonus would have to convince a court that the bank had acted perversely or arbitrarily in withholding or cutting his or her bonus to recover the money.

Oliver Brettle, a partner at the law firm White & Case, said that as long as a bank could show it had considered the matter carefully, it was very difficult for the employee to prove it acted in that way.

Mr Brettle added: "This year some banks will have the additional prop of state ownership with which to justify withholding bonuses. In conjunction with the general deterioration in the economy and steep losses, this is an extra factor banks may be able to call on to show they were acting reasonably. Of course, the Government would not have had to put money into a bank that had not been affected by the current market conditions."

Each case will depend on a specific individual's performance and the terms of his contract but, in general, Mr Brettle said that the extra justification available to "state-owned" banks could put their employees with discretionary bonuses at a disadvantage to their peers in banks that did not take government money.

Although the shake-up in the British banking sector undoubtedly has created legal challenges and reasons to litigate, it remains to be seen whether any of these issues will ever come before the courts. Many employees who have been made redundant will be given severance packages and will be asked to sign agreements waiving their right to sue in return.

Belinda Eriksson, a partner at SW19 Solicitors, said: "Bankers who are keeping their jobs will have a lower appetite for litigation than in previous years. Given all that has happened in recent months, they are not likely to want to upset the apple cart."

Ronnie Fox, an employment lawyer who has been advising banks for more than 30 years, said: "I don't expect much litigation: this year, your bonus is keeping your job."