

Lawyers come to bankers' aid as battle of the bonuses starts to get nasty

Government attempts to cap banker's bonuses is meeting with resistance from the City's lawyers, writes **Jon Robins**

RONNIE Fox, one of the City's leading employment law specialists, has over the last few months taken on the role as unofficial spokesman for the most morally reprehensible social pariah of the moment, the banker.

The "hysteria" about bankers' bonuses is "something of a diversionary tactic", reflects the lawyer at his firm Fox's office off Threadneedle Street. "Investment bankers understand that it is a high-risk, high reward job. You might do very well one year, not well the next and lose your job in the third. That is the result of market forces. What we've had is political interference with the system."

Fox counts among his clients "senior individuals who work at big international banks or who have worked at big international banks". "These are people who have been promised bonuses or even allocated bonuses who are now being warned: 'We are looking at this question again'." He describes those clients, starting at the modest end of the spectrum, as having bonuses of "between £50,000 and £100,000" through to those with bonuses worth "£2-3m. I have a client whose base income is £10m," he says. "I have dealt with a compromise agreement in excess of £20m."

Fox was grilled last year by a hostile Treasury Select Committee who expected the employment law specialist to justify such pay-outs at a time of national economic crisis. Sample question: "Why does someone on an annual salary of £1.3m need incentivising?" It was "quite obvious that there was a political agenda", comments Fox.

FLEXIBLE SYSTEM

"Politicians are keen to blame very well-paid bankers," continues the lawyer, who is a member of the Law Society's remuneration committee. "They don't appreciate the flexibility of the bonus system, which means in the good times you get a lot of money, in the bad times you get very little or no bonus. It seems to me that it is the job of government to create a stable financial environment in which every kind of business, financial or otherwise can succeed. Their role in managing the economy has not been brought to the fore at all."

Ronnie Fox, of course, isn't the only lawyer in the City to have been taking calls from anxious bankers over the last few months. John Marshall from the

claimant firm Russell Jones & Walker has a mixed clientele. The employment law specialist has a number of "mid-to-low level" clients where the bonuses are just "a few thousand" who rely on bonuses to pay the mortgage as opposed to extending the yacht collection. Then again, he claims to have one client "due a multi million pound bonus. The threat is that he won't get it at all or he'll have to take it in stock."

Gordon Brown upped the ante at the end of last week when he told the Commons Liaison Committee that the "short-term bonus culture of the banks" had to end. "It should not be a one-way bet," he said. "In other words, if you fail there is a 'clawback' which is also possible within a bonus system."

FINER POINTS

Peter Talibart, head of the employment practice at Norton Rose, believes that the prime minister's comments brushed over the finer points of employment law. "Clawback" appears to be a misunderstood term, the lawyer notes. It was being used by the PM to mean reclaiming money already paid out to employees which, as Talibart notes, is "legally problematic". Alternatively, it could mean remuneration awarded to employees but still retained by the employer (which Talibart calls "bonus retention").

The introduction of clawback provisions into bonus schemes, whereby awards might be reduced or reclaimed, could provide a mechanism for ministers to attempt to link risk to reward or punish poor conduct. Talibart is sceptical, though.

"Clawback as a concept sounds simple, but it is rather more complex upon examination," he argues. Such a scheme raises a whole host of questions. "If a bonus is based on company, team and personal performance, what element is affected by clawback?" the lawyer asks. "Who decides what that element should be? Does this have to include the risk management function of the institution? Is there a right of appeal to such a decision? What if the employee has per-

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Ronnie Fox represents a number of high-earning City bankers.

Picture: Micha Theiner/CITY A.M.

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sonally done nothing wrong? Are more senior employees put at a higher clawback risk than others?"

The lawyer argues that any contractual right to clawback in the case of money already paid to employees would "only give the employer a right to sue an employee, and litigation is costly". For this reason, he argues that withholding money is more straightforward. But Talibart adds: "Bonus schemes are intended to motivate employees and employees will not be motivated by potentially hollow promises of bonus with a significant clawback threat."

LEGAL STATUS

So, what's the legal status of the non-payment of bonuses? "There is a lot of noise from ministers and the public but ultimately, whether somebody is entitled or not, is a matter of contract," reckons John Marshall. "The trouble is that the whole of the bonus system depends on banks having pretty broad discretion to pay the bonus that they think is right in the cir-

cumstances," reflects Ronnie Fox. "Lawyers have to look carefully to see how a bonus is described to see if it is contractual or non-contractual. Is the bonus there to reward past performance or to incentivise future performance? Does it vest unconditionally or is it subject to conditions? To what extent is the performance of the business as a whole relevant?"

Bonuses come in a number of different forms. For example, there are the London-based employees of the German bank Dresdner waiting to hear whether or not they will receive their bonuses after the bail-out of its new owner, Commerzbank, by the German government. "There are two types of bonus at Dresdner," says Fox. "One is the guaranteed bonus, like a retention bonuses for a particular amount, and others that are purely discretionary."

One situation which Fox has come across "over and over" is where the banks have been forced to make pay cuts and staff have left. "Sometimes those workers have actually performed quite well in a way that would normally entitle them to a substantial bonus," says Fox. "If bonuses are supposed to be on the basis of past performance then somebody who has performed in the same way and at the same level, other things being equal, they should get the same bonus as somebody who, for February 2009 reasons, is leaving. Often that has not happened."