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## What Wealth Professionals Should Do To Protect Bonuses

The present turmoil in the financial sector means that sizeable bonuses are rapidly becoming history. With the ever-increasing number of state bailouts of banks, wealth managers can expect to be told that their bonuses will be nil. Most wealth managers will accept this and walk away grateful that they still remain employed. But should they battle for their bonuses?

In the financial services industry, base salaries are often comparatively low and the bulk of the remuneration package is comprised of a non-pensionable bonus payable if certain criteria are satisfied. We see many wealth managers unhappy with their bonuses; here are the steps we suggest.

### **Ask why**

Email a request for an explanation of a nil or low bonus. In *Commerzbank v. Keen*, the Court of Appeal held that to comply with the duty of trust and confidence, employers must explain reasons for bonus decisions.

### **Look at the clause wording**

Is the bonus a contractual commitment or discretionary? If the former, then regardless of the current climate or state funding, a wealth manager should prepare for battle. If the bonus is discretionary (apparent from wording such as "The employer has an absolute discretion as to whether any bonus is payable"), then the fight will be harder.

Employers' discretion to award bonuses is not unfettered. Discretion must be exercised in good faith, i.e. not "*capriciously, perversely or irrationally*" ( *Clark v. Nomura approved in Horkulak v. Cantor Fitzgerald*). It is not easy to prove bad faith. It is not enough to refer to higher bonuses paid in previous years or to argue that the bonus paid is less than expected. To establish bad faith, the employee must show that no reasonable employer would have awarded the bonus which he received.

### **Collate evidence and seek advice**

Evidence supporting indications that the employer has acted in bad faith should be gathered and collated. Look for signs of unjustifiable differentials between comparable employees, or weight being accorded to irrelevant factors when calculating bonuses.

Did Bank of America management approve bonuses for Merrill Lynch staff just before the take-over, knowing that (or reckless as to whether) as a result that there would be no bonus pot for Bank of America employees? If so, bad faith could be alleged. The way that the employer has explained the bonus decisions to Bank of America employees could be important and relevant evidence in proceedings.

### **Remain close to your colleagues**

There is always strength in numbers, and employers will be more inclined to listen when they are confronted with a number of wealth managers who are angry and upset about not being paid bonuses.

Bonus cases may be brought in employment tribunals rather than a court if the employee can show quantifiable loss. This is treated as an unlawful deduction from wages and the jurisdiction of the tribunal is unlimited; the definition of "wages" for this purpose includes bonuses. Tribunals are quicker and cheaper than the High Court. The risk of costs being awarded against an unsuccessful claimant is much lower.

Any wealth manager planning a battle for a bonus (or a better bonus) will have an uphill struggle which may not be career-enhancing. Nonetheless employers cannot just jump on the "credit crunch band wagon" or refer to state aid to avoid paying bonuses. Even banks in trouble must act in good faith and if they do not do so, they risk legal claims as well as disillusioned staff.

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