

Discretionary bonus schemes

It is not unusual to provide a bonus scheme, whereby payment is defined in the contract of employment as being 'discretionary'. However, this has been the subject of several case law rulings recently and we thought it important to make you aware of the current situation.

Discretionary bonuses are acceptable, provided that the express term is not used simply to avoid making a payment. Case law has established that there is an implied term in the contract of employment, that an employer will not apply an express term regarding discretionary bonuses in an irrational, perverse or arbitrary way, or in a manner that is not *bona fida*.

When exercising a discretionary bonus there is no requirement on the employer to provide the employee with details on how it has been calculated. However, it is important that the payment is based on objective criterion and it is strongly recommended that you keep a record of this; as evidence would be required in the event of a claim by an employee to an employment tribunal.

Case law has also established that you are entitled to include in the contract of employment, an express term that restricts the terms under which the payment will be made. For example, 'that the discretionary bonus will not be paid unless the employee is still in employment with the company and is not working their notice for any reason'. This is provided that you do not terminate the employee's contract or move the due payment date intentionally, to avoid making the payment. If it is intended that the employee will receive no payment, including any accrued bonus for the period already worked, It is advisable that this is defined in the contract of employment as an express term.

As a final note, once an employee has been informed that they will receive a discretionary bonus, whether or not they have been informed of amount to be paid, you are obliged to pay it, it cannot be withdrawn. To do so would result in an unlawful deduction of wages, and this may also be a breach of contract.

Home-Workers

It is not unusual these days for employees to work from home. That is, working remotely from the office. But what are the implications and risks concerning this?

In an office environment it is easy to control the day to day activities of the employee and the work environment; for instance when the worker starts and finishes including rest breaks, progressing work, controlling workload and monitoring performance, plus the management of the computer system, the control and security of data plus health & safety .

But in a remote situation this is quite different. For a start not all employees are capable or comfortable of working remotely; some need the day to day contact or supervision of others and/or do not have the ability to organise their work or working time when in isolation. In addition, most employees are not computer experts and when things go wrong with the system they can get frustrated and stressed, resulting in lost time, an unsuitable work situation and the potential of work-related illness.

So what should the employer do? Consider carefully the individuals you believe could work from home, but be aware training may be required on working in isolation. Ensure that procedures are in place to support the individuals. Ensure that lines of communication are not lost, and that discussions are held regularly on work and progress. Ensure that equipment provided and the working environment is adequate and suitable and that there is a quick and efficient route to resolving problems. Ensure that regular meetings are held with the individuals, and most importantly do not leave out the home-workers from any of the company's activities, opportunities or information provided to others working within the company office. For more advice do call us.

Without Prejudice

It may be that you want to encourage an under-performing employee to resign and you are thinking of holding a 'without prejudice' meeting, and offering a favourable compensation package, leading to a quick settlement; If so beware, it may backfire and you may end up with a claim for constructive dismissal.

It is generally thought that things said or done during a 'without prejudice' discussion cannot be used as evidence in tribunal or court proceedings, and that to offer a settlement package is an alternative to following disciplinary and dismissal proceedings. However, two recent cases prove otherwise. In the first case it was held that the invitation to resign on favourable terms clearly amounted to a 'vote of no confidence' – a breach of trust and confidence sufficiently serious to found a claim of constructive dismissal. In the second case, the Court held that for the 'without prejudice' rule to apply there must be a genuine dispute between the parties. If not, the contents of the discussion may be admissible in tribunal or court proceedings.

Our advice is that you always to follow the correct formal disciplinary and dismissal procedures to ensure that the process is fair. There may occur during this an opportunity to open up 'without prejudice' discussions, but do consult with us before taking the step.