



Glasgow: 0141 331 5150

Aberdeen: 01224 683 286

Manchester: 0161 920 5990

London: 020 7590 3152

[Annual Retainer Service for Employers](#) | [Employment Tribunal Representation](#) | [Project Work](#) | [FREE](#)
[Email Updates Service](#) | [Seminars and Training](#) | [Meet the Team](#) | [Contact Us](#) | [F.A.Qs](#) | [Features &](#)
[Articles](#) | [Home](#)

Bonuses - Your Discretion?

Do you think that your organisation's employment contracts contain all of the terms and conditions that govern its' relationship with its' employees? It may surprise you to know that no matter how exhaustively your contracts are drafted, they are unlikely ever to paint the whole picture.

Many employers quite sensibly wish to operate a scheme to reward good performance. A bonus scheme is the obvious way of achieving this.

As a result, we often end up with bonus clauses carrying the rider that bonuses are only payable at the employer's absolute discretion.

On the face of it, if the employee has agreed to that term, one might believe that the employer then has an unfettered discretion either to refuse to pay a bonus or to pay a smaller bonus than the employee would otherwise be entitled to under the terms of the scheme.

In recent years, the appellate courts have been asked to interpret a variety of discretionary bonus clauses. A consistent point in their judgements has been that an employer's discretion is *never* totally unfettered.

The reason for this is that the courts will generally imply into the contract certain limits as to how the employer may exercise its discretion.

A recent decision of the Court of Appeal stated that "*... its is presumed to be ... the common intention of the parties that there should be a genuine and rational exercise of discretion.*"

Therefore, we can see that although the courts will allow an employer some latitude in the exercise of discretion, there are limits. Let's look at an example of what this means in practice:

Often, an employer elects not to pay a discretionary bonus that would otherwise be paid, because the employee has already given notice to **terminate the employment**.

Not paying may be permissible if the employee knows that this is one of the relevant factors in deciding upon bonuses, either because the employer has explicitly communicated this information or by custom and practice.

However, if the bonus had always been based solely on meeting financial targets, a court might decide that no reasonable employer would have taken into account a hitherto irrelevant factor in deciding not to pay the bonus on this occasion.

Finally, it is also worth remembering that these principles apply not just to bonus schemes, but also other discretionary benefits you might offer such as share options and other financial rewards.

David's Hints and Tips for Employers

There are still plenty of good reasons to give yourself a margin of discretion in the operation of your organisation's bonus scheme. Also, there are a number of steps you can take to minimise the risks:

- Always have your **contractual documentation professionally drafted**, to ensure that there is as little ambiguity about the applicable terms as possible.
- When drafting the scheme, try to think through some of the issues that might arise - what effect will issues like **employee misconduct**, financial difficulties or resignation be likely to have on your decisions?
- If there are certain circumstances in which you know you will not wish to pay a bonus, make sure these are specified in the contract.
- When exercising your discretion, remember that you may be setting a precedent for the future - if you are making a payment in exceptional circumstances, make it clear why you are doing so and say that this is a one-off.
- Ensure that the scheme is drafted in a way that its terms can be changed for a good reason.