APPLEBY

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A cautionary tale during bonus season

This month many employers are currently going through the sometimes painful annual process of making bonus awards to tie in with year-end results. The recent decision by the UK Court of Appeal in the case of *Hills v Niksun Inc* acts as a timely reminder that although some form of discretion is incorporated into almost every bonus or commission scheme, it is not absolute. Whilst the Courts are generally slow to interfere with the exercise of discretion by employers, they can do so where they feel a decision has been perverse or irrational.

This latest case involves a commission scheme which was expressed to be discretionary, but contained detailed rules as to how it should operate - including where different regions were involved, how commission awards should be split.

The dispute arose over the decision by Niksun to only award 48% of the commission for a new contract to the UK region, with the rest going to the US region, when it had been in fact the UK region and a Mr Hills in particular who had negotiated the contract, and the US involvement was limited. Mr Hills subsequently brought a claim for breach of contract claiming that 100% of the commission should have been allocated to the UK. In upholding his claim in the first instance, the High Court concluded that it would award him two thirds of the commission, based on the evidence of the witnesses. In arriving at its decision, the High Court stated that "in a world where split commissions were common" an award of less than two thirds was in the circumstances quite simply outside the bracket of what was "fair and reasonable under the circumstances".

The company subsequently, unsuccessfully, appealed the decision at the Court of Appeal. In rejecting the appeal, the Court of Appeal observed that once the employee had demonstrated there were reasonable grounds for concluding that the company's decision was not reasonable, the burden then shifted, and it was for the company to show its decision was reasonable. As the company did not call the decision maker as a witness, or present any other documentary evidence as to how the decision was taken, the court could not simply assume the company's decision had been a rational one.

Each year more of these cases are coming through, where employees are willing to challenge decisions over bonus and commission awards and that trend looks set to continue. What is particularly unusual in this case is that an employee was able to successfully increase the amount of the award, because many of the successful cases have tended to come from where there had been no award at all. Although in this case the Court of Appeal found in favour of the employee, they have provided some useful guidance and points to consider for employers:

- The Court will not automatically assume a decision is rational; therefore this highlights the importance of considering how the thought process behind decisions should be captured, especially when you know they are likely to be contentious.
- Whilst in *Hills v Niksun Inc* the Court of Appeal did not go so far as to say that employers must show that all decisions are reasonable, or that you must always have contemporaneous documentary evidence, it does make it clear that once the employee has shown there are grounds to conclude a decision was unreasonable, the onus will shift to the employer and it will not be enough to simply say the award was down to an exercise of discretion.

Whilst it should be noted that this is a UK case and therefore not strictly binding in the Guernsey Court, it is likely to be highly persuasive, and no doubt there will be a few grievance letters ghost written by lawyers on behalf of employees disgruntled over this year's bonus awards which will be citing it – you have been warned!

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