

WHOSE BONUS IS IT ANYWAY?

by Victoria Myerson

Writing out a cheque in settlement of an ex-spouse's claim in divorce proceedings can be an unedifying experience at the best of times, ameliorated only by the certainty that it's the last instalment. However, in cases where the capital assets are insufficient to permit the parties to go their separate financial ways, the Court may consider it appropriate to make an order which provides for part of an ex-spouse's on-going maintenance to be paid from a percentage of the breadwinner's future bonus payments.

Bonus payments in the finance and banking sectors are usually contingent not only upon market factors but also work related performance. Consequently it may seem inherently unfair that a proportion of such bonuses may be ordered to be paid to a former spouse who is no longer making any contribution to the home-life of the breadwinner.

It is important to remember that the Court will only take account of future bonus payments where there is insufficient capital in the "matrimonial pot" for a "clean break" to be ordered. A clean break divides the existing capital and ends further financial claims between former spouses. This is often the desired solution but where capital is more limited, recourse may be had to future income to fund spousal maintenance payments by one party to the other either for a fixed term or during their joint lives (i.e. until one of them dies).

Percentage Rules

Historically, there has been no cap on the amount a party could receive from their spouse's future bonus payments. If, for example, the Court awarded the wife 15% of the husband's future bonus payments for their joint lives, the wife would receive 15% of the bonus whether or not the bonus was in the sum £1,000 or £1 million.

There is however some good news. In the recent English case of *H v W* [2013] EWHC 4105 (Fam), the High Court gave guidance about the correct approach to assessing, making and drafting spousal periodical payments orders payable from future bonuses.

H v W: Round One

The parties in *H v W* started to cohabit in 1992, married in 1997, separated in 2011, and were therefore together for some 19 years. The husband was the managing director of a bank and earned approximately £250,000 gross, plus a non-guaranteed bonus of about £200,000 consisting of cash and deferred cash and shares. The wife had not been in the workplace for approximately 15 years at the time of trial, but had previously been a legal secretary. The judge considered that the wife had a limited earning capacity in the region of approximately £500 per month gross (£6,000 per annum).

At first instance, the capital assets were divided between the husband and wife, who was awarded spousal maintenance on a joint lives basis at the rate of £3,750 per month, as well as 25% of all of the husband's annual bonuses (net of tax and National Insurance) on a joint lives basis. The husband appealed and contended that the judge had been plainly wrong in awarding the wife 25% of all his future net bonuses on a joint lives basis.

H v W: "Bonus" Round

On appeal the Court found that the judge at first instance had fallen into error in failing to identify a cap on the amount to which the wife would be entitled from the husband's total annual bonus. The Court agreed that the wife was entitled to 25% of the husband's annual bonus income, but held that this entitlement should be capped so as to ensure that, regardless of the amount of bonus payments earned by the husband, the wife would not receive more than £20,000 per annum from those bonus payments.

Of course whether spousal maintenance is ordered at all, in what sum and for how long lies in the discretion of the judge when negotiations fail. Inevitably some judges will favour encouraging wives along the path to financial independence while others may consider long term on-going support to be appropriate. To eradicate such inconsistency, the introduction of a formula to calculate the amount and duration of spousal maintenance has been recommended by the Law Commission's long awaited Report on Matrimonial Property, Needs and Arrangements published in February 2014. However it will be several years before such a formula is devised and available.

In the interim, the amount at which maintenance from future bonus payments is capped will depend upon the circumstances of the case, and will be calculated accordingly but *H v W* illustrates a more equitable approach by the Courts in dealing with future bonus payments on divorce, and should provide some relief at last for earners with a bonus boosted income.

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