1. Introduction

1.1 This seminar gives guidance to employers on how to draft and operate bonus schemes for their employees. The subject is extremely complex, and raises many difficult legal issues. Some of these issues have been considered by the courts, whereas others have not been. It is a subject that all employers who operate bonuses need to know about. By reason of legal developments in recent years, employers are subject to many restrictions on how to deal with the subject of bonuses. Employers who think they can simply say that all bonuses are entirely at the discretion of management, and then exercise this discretion however they wish, are in for a nasty surprise.

1.2 There are many restrictions on how employers should exercise bonus schemes. Employers need to know how to draft a scheme, and also how to operate it. We give advice on both.

2. Drafting bonus clauses

2.1 If an employer does wish to offer to an employee the opportunity to earn a bonus this should be expressed in the employment contract. The vital issue is just how it should be drafted. Sections 2 and 3 of this paper outline how they might be drafted; what they do not do is to explain what legal rules surround the payment of bonuses. This is done later. In some cases the employer may wish to retain maximum discretion in respect of the entitlement to a bonus, the amount of any bonus, the date of payment, and the conditions governing entitlement. If this is the case, it should have a clause along the following lines:

“The Employee shall be entitled to considered for a bonus under the Company’s bonus scheme. The decision as to whether to pay a bonus, and the amount of any bonus, are entirely at the Company’s absolute discretion. Bonuses are normally paid in or about [month] each year. The Employee will not be entitled to be considered for a bonus if he has left the employment of the Company or is serving out any notice given by him or by the Company to terminate his employment at the date when any bonuses are in fact paid. The Company may at any time withdraw or modify the bonus scheme. It is expressly agreed that the fact that the employee may have received a bonus at any time does not give rise to any expectation or entitlement to receive any bonus in the future, or as to the size of any future bonus.”

2.2 Several things should be noted about this drafting. First, it is expressed to be entirely at the company’s absolute discretion. We consider below what restrictions there may nevertheless be on the exercise of that discretion. Second, it is usual to state when they are normally paid. Generally, this will be within a month or two after the end of the period in respect of which they are due. So, a bonus year may run from January to December, and bonuses may be declared and paid in the following January or February. Third, it says that it is not payable if, at the payment date the employment has ended, or notice has been given to end it. This may be modified in appropriate cases to make it more favourable to the employee. Fourth, it makes it clear that past bonuses do not give rise to an entitlement to future ones.

2.3 An employer may wish to give a more definite entitlement than that set out above. It may be more definite in one or other of a number of respects. The following clause
may be considered where an employee is guaranteed a minimum bonus in respect of the initial period of his employment; such clauses are often seen in the banking sector:

“You shall be entitled to be considered for a bonus under the Company’s bonus scheme. Whilst the decision as to the amount of any bonus will be at the Company’s discretion, subject to the conditions referred to below, the Company guarantees a minimum bonus of £[XXX] payable on or around [DATE 1], and a minimum bonus of £[YYY] payable on or around date [DATE 2]. You will receive these bonuses unless by [DATE 1] and [DATE 2] respectively you have received notice to terminate your employment under the summary termination provisions in clause [ZZ] of your contract, or you have voluntarily served notice on the Company to terminate your employment. If your employment terminates for any other reason prior to the respective payment dates, you will still receive the bonus payments in full, at but not before the stated payment dates.

2.4 This is more generous to the employee than the clause referred to at section 2.2 above. In some cases this will be required in order to persuade the employee to join the Company. If an employee has a secure bonus entitlement where he is, he may not be prepared to leave unless he gets a minimum guaranteed bonus for at least the first year or two of his next employment. Note that he loses it only if dismissed for cause (e.g. gross misconduct) or if he voluntarily resigns. He gets the payment at the date he would have got it had he not left; he does not get it any sooner.

2.5 In other cases, the employer will wish to make the amount of any bonus referable to some identifiable sum, such as company profit or revenue generated by the employee and/or the team or group in which he works. There may be many variants on this theme, but the main factors to bear in mind are the following. Care must be taken to define the meaning of profit for this purpose, and it is best to have the final figure certified by the company’s auditor. Indeed, the auditor may usefully be consulted during the drafting stage to ensure the proposed formula is workable. Second, you need to specify when it is to be paid, and what happens if the employee leaves before it is paid, but after it is notionally earned, whether in whole or in part.

3. Special types of bonus arrangements

3.1 In some cases, an employer may wish to offer a signing on bonus, often known as a “golden hello”. The essence of this is that the employee receives a substantial payment on starting his employment. Often these are paid in cases where an employee will lose a bonus entitlement by leaving his old job, and in order to persuade him to move, he demands to be promptly compensated for this. This is understandable, but plainly the employer needs to have some assurance that the employee cannot take the money, bank it, and then leave. The clause needs to be drafted carefully. The following basic wording, appropriately modified as may be necessary, is suggested:

“The Employee is entitled to receive a signing-on bonus of £[XXX], which will be payable with his first regular monthly salary payment. In the event that before the date 12 months after the date when the employment begins, either his employee’s employment is terminated by the Company for cause (defined in clause XX) or he voluntarily resigns his employment, then he shall be required promptly to repay either [the whole of said bonus] or [such proportion of said bonus as is equal to the proportion of the unserved part of the first 12 months service]. The Company reserves the right to make any
appropriate deduction from outstanding salary which may be due to the Employee, and to have a right of action against the employee for the balance.

3.2 Another type of bonus arrangement is where the employee is given a forgivable loan. The idea is that when first advanced, the money forms no part of the employee's remuneration, but is a genuine loan. If the employee remains employed for a specified period (e.g. 2 or 3 years), then it is forgiven. This gives the employee an incentive to remain, and in that sense is very similar to a signing on bonus referred to above. The drafting should be similar.

3.3 A further type of clause is one under which, whilst a bonus has been declared, not all of it is paid immediately. Instead, a part is paid at once, and a part will be paid at a later date or dates, so long as the employee remains employed at the relevant date (or at least has not voluntarily resigned or been dismissed for cause).

3.4 In some cases, a part of a bonus may become payable following termination of employment, but only on condition that the employee complies with post-termination restrictive covenants. Such covenants (e.g. non-compete, non-dealing with customers, non-solicitation of customers or fellow employees) may be contained in the employment contract itself, and/or in a severance agreement. This may be a useful way of seeking to ensure that the employee complies with the covenants. As the employer is “withholding” the employee’s payment, the employee has an added incentive to continue to comply; instead of facing a perhaps unrealistic threat of seeking an injunction to prevent breach, the employer has the possibly more potent weapon of causing financial pain to the employee. We consider later on whether and to what extent these are enforceable.

3.5 Finally, a bonus may be promised to an employee in the context of a takeover, sale of business or change of control. In such situations, the employer may wish to ensure that employees remain loyal to the company through what may be a time of uncertainty. Since takeovers are often followed by redundancies, employees may be tempted to “jump ship” before that happens, and take up other job opportunities. But such departures may be damaging to the company, and indeed inhibit a sale or depress the price. The way to ensure loyalty is often by the promise of a cash payment if the employee does not “jump ship.” Such may be expressed as follows:

“To incentivise you to remain with the Company during and after a change of control (defined below), you are eligible to receive a bonus equal to £[XXX] if you remain with the Company from today until the date 6 months after a change of control. You will also receive said bonus if the Company or any successor terminates your employment (other than for cause) during the period from 6 months before the change of control until 6 months after it or the Company or any successor acts in such a way as to entitle you to terminate your employment without notice (constructive dismissal).”

3.6 Once again, note that the entitlement to the bonus is lost only if the employee voluntarily resigns or is dismissed for cause. It is also right that the employee is protected from arbitrary pre-change of control dismissal, since otherwise he has no incentive to stay for as long as the change of control date. The amount of any payment depends on how important it is for the company that the employee stays up to and beyond the change of control, and the timing of it depends on how long the employee’s continued presence is necessary to ensure an effective sale of the company. He may well need to be tied in for some months after the sale, since the value of the business may in part reside in the presence of key employees remaining there for a decent period of time after the change.
3.7 Note that these types of payment (change of control payments) may be drafted such that the payment is due only if the employee is actually dismissed, or his job materially downgraded, within a certain period following change of control. Further, these payments may be attacked as not being in the best interests of the company, since if they are excessively high, they may, far from encouraging a sale or enhancing the price, actually deter a potential buyer. The question of ultra vires payments is dealt with below in section 9.

4. The exercise of discretion when awarding bonuses - what are the restrictions?

4.1 It is quite common for bonuses to be expressed to be payable at the discretion of the employer; see the clause drafted at 2.2 above. Despite this, employers should be aware that even if they are drafted in this way, there are still some restrictions on the way in which employers are entitled to exercise that discretion. Indeed, recent legal development, both case law and statutory, has served to place quite strict limits on employers’ discretion. This section seeks to identify what those restrictions are, and how much freedom employers have. Subsequent sections consider other legal rules which govern the way employers should pay bonuses.

4.2 How then does an employer ensure that any discretion is exercised lawfully? It is not enough that the contract expressly states that the discretion is unfettered; in real terms it is fettered. An employee may allege that the way in which the discretion has been exercised is unlawful through being in breach of contract, and in making this argument he would be supported by some recent cases. In Clark v. Nomura International plc (High Court, 6th September 2000), the issue concerned the bonus entitlement of a senior trader with Nomura. He was dismissed on insubstantial grounds, and not given any bonus, even though at this time, bonuses had been paid to other traders. He claimed damages for breach of contract but Nomura argued that as bonuses were expressed to be discretionary, they had not breached the contract in exercising that discretion as they did.

4.3 The court decided in favour of Mr Clark. They said that the scheme was one which was mainly designed to reward employees for past performance, rather than one designed to keep the employee with the company going forward. Mr Clark had brought in significant revenues for the company (some £4.6 million, with much more to come in future years). The court said that when exercising a discretion, the company must not act perversely or irrationally, or in a way that no reasonable employer would act. Applying that ruling to the facts of the particular case, the court held that Nomura had acted in breach of that obligation. Mr Clark was awarded £1.35 million as damages, based on the court’s view of the amount of the bonus that he would have received had the employer exercised its discretion properly. This case shows the importance of the general duty on employers not to act in such a way as to destroy the relationship of trust and confidence which must exist between the parties.

4.4 This decision is plainly important, however, its limits must be understood. There is not an implied contractual obligation on the employer to act “reasonably” when assessing bonuses. Rather, there is a duty not to act irrationally, perversely, or in a way that no reasonable employer would act, which is a somewhat different standard. This means that an employee will not have a right to complain merely because his bonus is lower than he hoped or indeed might reasonably have expected.

4.5 The truth is that most bonuses are paid (as opposed to merely promised) primarily on the basis of work actually done or results actually achieved, rather than to retain the employee going forward. This is because the employee has little financial incentive
to stay based simply on what he has already received and banked; the incentive to stay is based on what he hopes to get in the future (although this expectation may be influenced by bonuses already paid). Hence employers should ensure that when exercising their discretion, they do so taking into account the value of the work actually done or contribution made, during the period in respect of which the payment is made. To make the assessment without taking this into account at all would be pointless.

4.6 The employer should, when making this assessment, take into account the value of bonuses paid to other employees. If a particular employee gets a bonus, or a bonus of a particular value, then unless there are special circumstances, another employee in broadly the same position should also get a bonus of broadly the same value. Differences in bonus levels should be justifiable on the basis of objective factors, such as performance, value of contribution to the company and what other employees get.

4.7 The Nomura case was decided on the basis that the company had breached the employment contract by exercising their discretion irrationally or perversely. An employee may make a complaint about non-payment of a bonus under the statutory provisions governing unauthorised deductions from wages. These are now contained in s.13 of the Employment Rights Act 1996. This provides that where the total amount of wages paid on any occasion is less than the amount properly payable, then there has been an unauthorised deduction. Wages are defined to include “any bonus … whether payable under his contract or otherwise.”

4.8 This has led the EAT to conclude that a bonus and commission scheme which was expressed to be “discretionary and ex gratia” fell within the definition of wages; see Kent Management Services Ltd v. Butterfield [1992] IRLR 394. The EAT said that where the payment “would normally be expected” or it was “anticipated that in the ordinary circumstances, if it was earned it would be paid”, then it would be unlawful for the employer to withhold it. Although some have suggested that this decision is wrong, it does nevertheless provide a further warning to employers that they must act with care when exercising their discretion regarding payment of bonuses. Even if the employer’s decision as to bonus level does not amount to a breach of contract, nevertheless, if the employee gets less than what he reasonably anticipated, without good reason, then the employer may be guilty of making an unlawful deduction from wages.

5. Bonuses and unlawful discrimination

5.1 Section 4 explains that in determining whether to pay a bonus, and if so how much, an employer should not exercise its discretion perversely or irrationally, or in a way which no reasonably employer would behave. It is also important for an employer to avoid committing acts of unlawful discrimination when paying bonuses. Most employers will be aware of the principal pieces of discrimination legislation; namely the Sex Discrimination Act 1975 (“SDA”), the Race Relations Act 1976 (“RRA”), and the Disability Discrimination Act 1995 (“DDA”). These make it unlawful for an employer to treat an employee less favourably than another employee on grounds of either sex, race or disability. Such discrimination is automatically unlawful under the SDA or RRA, and is unlawful under the DDA unless justified on objective grounds.

5.2 In addition, each of the SDA and RRA prohibit indirect discrimination; this is where the employer applies some requirement or condition equally to all employees/applicants, but it is one which, (under the SDA) fewer women than men can comply with, and is not objectively justifiable on legitimate business grounds. Therefore employers should ensure that when devising and operating bonus
schemes, they avoid unlawful discrimination. There will be cases where, even if the employer is acting within the rules of the scheme, and even if their behaviour is not irrational or perverse, they may be breaching the SDA, RRA or DDA.

5.3 For example, the enforcement of a requirement still to be employed at the bonus payment date in order to get any bonus payment at all, may be indirectly discriminatory against women, since women are more likely than men to leave employment on account of childbirth or the discharge of childcare responsibilities. Employers should therefore ensure that a woman who leaves employment in such circumstances is not entirely deprived of a bonus; one way of dealing with this may be to pro rate the bonus in respect of that part of the bonus payment period that she was still employed (see section 6 below for further consideration of the issues that arise in respect of maternity or parental leave).

5.4 Employer must also take care to ensure that they do not unjustifiably discriminate against part-time employees when devising and operating bonus schemes. By reason of the Part-time workers (Prevention of Less Favourable Treatment) Regulations 2000, it is unlawful for an employer to treat a part-time worker less favourably than a comparable full-timer, unless such less favourable treatment can clearly be justified on objective grounds. In terms of remuneration (including bonuses) part-timers should ordinarily receive a pro-rata of what a full-time worker would receive.

6. Bonus payments and absence: maternity and parental leave

6.1 How should an employer determine bonus entitlement where an employee has taken time off work? The employee may be absent either at the time of payment and/or during the period in respect of which the payment is made. The employer must ensure that in making payments, it does not breach the law on sex discrimination, maternity rights and parental leave. All employees who fall pregnant are entitled to maternity leave of at least 18 weeks, regardless of length of service. Those who have worked for at least a year are entitled to a total of 40 weeks’ leave. What then happens if a woman who is eligible for consideration for a bonus is actually off work when it becomes payable, or for some or all of the period in respect of which it falls due, or indeed both?

6.2 The case law on this point is not entirely clear. However, the correct position seems to be broadly as follows. An employee is not entitled to “remuneration” during either the 18 week period of Ordinary Maternity Leave or the further (up to 22 week) period of Additional Maternity Leave. If a bonus payment is a reward for work done (and in most cases this is the correct analysis), then it is unlawful for an employer to totally exclude a woman from a bonus either because she has been absent for some of the payment period, or is absent at the payment date.

6.3 Rather the employer should pay a bonus, pro rated down to reflect the length of the period of maternity absence. In effecting this pro rating, the employer should not make any discount for the absence during the 2 week period of compulsory maternity leave. The idea is that an employee should not suffer a bonus deduction in respect of a period where it would have been unlawful for her to work. For an analysis of the applicable rules, see the ECJ decision in Lewen v. Denda [2000] IRLR 67.

6.4 In respect of parental leave, the employer should apply the same principles. That is, the employer can lawfully reduce the bonus proportionally to take into account a period of parental leave taken by the employee, but cannot refuse to pay any bonus
at all either because the employee was not working through the entire period, or was not working on the payment date.

7. Restraint of trade and penalty clauses in the bonus context

7.1 As is explained in section 3, an employer may choose to stipulate that a bonus falls due or can be retained only if the employee remains employed for a certain length of time (such as signing on bonuses), and/or on condition that he complies with some post-termination restrictive covenants. Are such provisions legally enforceable? The answer is “sometimes, but not always”. Such provisions may be attacked as being an unlawful restraint of trade or else an improper penalty for a breach of contract. Let us consider each in turn.

7.2 The “restraint of trade” doctrine says that a person should not be restrained from engaging in free competition (such as working for a competitor or providing a service to particular clients) unless such a restraint is necessary in order to protect the legitimate interests of the party seeking to enforce the restraint. Thus an employer cannot enforce a contractual clause saying that the employee must not, at any time in the next 5 years, work for a competitor. This rule also applies even if the “enforcement” is not by means of a court order, but rather by the employer withholding or demanding the return of a particular benefit otherwise due to the employee. There can be an unlawful restraint of trade even if there is merely a monetary sanction visited upon the employee, rather than a court order for alleged breach of a covenant.

7.3 What does this mean for employers? It does not mean that they should necessarily refrain from making a bonus payment conditional upon the employee complying with restrictive covenants. Rather, they should ensure that such restrictions as they wish to impose are proportionate and designed to protect their legitimate business interests. Perhaps the best way of doing that is to make the payment conditional upon continued employment with that employer, rather than conditional upon not joining a competitor. Employers should seek professional advice on this issue.

7.4 A further point that may come up relates to so-called penalty clauses. This term describes a contractual provision which states that a party who breaks a contract must pay a defined sum to the other party to that contract, where the sum to be paid is clearly in excess of the loss which the innocent party suffers by that breach of contract, and where the clause has been inserted as an act of “oppression”.

7.5 Thus if a contract provided for the return of a signing on bonus if the employee left the employment in breach of contract, that may in some cases be treated as an unlawful penalty on the employee, and hence may not be enforceable. In order to reduce this risk the employer might either: (a) state that the payment is repayable in part, based on the length of time served by the employee; or (b) provide that the payment is due whether the employee’s departure is in breach of contract or not. Adopting this latter approach means that the law on penalties does not necessarily apply.

8. Bonuses and garden leave

8.1 Garden leave describes a situation where the employee has given or received notice to terminate his employment and the employer does not wish him actually to continue to work during the notice period. However, the employer does not wish to release him from his employment contract, since in that way he may become free to start work with a competitor. Instead, the employer keeps him employed, but asks him not
to attend for work or to contact customers or fellow employees. In this way the employer hopes to “freeze him out of the market”, such that when he is eventually free to join a competitor, his potential to harm the employer by poaching clients or fellow employees has been reduced.

8.2 In principle, an employer can place an employee on garden leave, but it must be for a period which is no longer than the notice period, and even within that period it can be for no longer than is genuinely necessary to protect the employer's legitimate interests. This period will vary from case to case, but only rarely will the courts enforce garden leave for more than 6 months. If an employee is put on garden leave, he is still entitled to receive his salary and all other contractual benefits.

8.3 However, what happens to his bonus entitlement? There is little case law on the point, but drawing on the other recent cases, it is suggested that the employer cannot simply withdraw bonus entitlement because the employee is on leave. Since it is the act of the employer which has prevented the employee from working (and thus earning the bonus) it would not be legitimate for the employer to cease paying any bonus.

8.4 This is not simply a question of whether the employer “does the decent thing” and pays bonus during garden leave; it is rather more serious than that. If the employer breaches its obligations under the contract then the employee is entitled to treat the employment as at an end (i.e., constructively dismissed), and is thereby released from both his garden leave and also any post-termination restrictive covenants. Recent case law suggests that an employer may be acting in breach of its obligations of good faith if it withholds a bonus simply because an employee has evinced an intention to leave. Therefore, it is suggested that the contract should provide that if an employee is put on garden leave, this will not prejudice his right to be considered for a bonus in the same way as if he were still working.

8.5 The contract should stipulate something to the effect that the employer will make a bonus payment based on its reasonable estimate of the amount that the employee would have been awarded had he not been put on garden leave. This would involve taking into account the amounts he has been awarded previously, the amounts granted to other employees whilst he is on garden leave, and business conditions generally. Despite the recent cases (especially Nomura) the employer is not under a duty to ensure the payment is objectively reasonable; rather there is merely a duty to ensure that the payment is not so unreasonable in amount (or non-existent) that a reasonable employer could not have acted in that way.

9. Potential illegality of excessively generous bonuses

9.1 So far this paper has considered the circumstances in which an employer may be acting unlawfully where it gives no bonus or a bonus which is lower than the employee reasonably anticipated. It may therefore seem odd to suggest that an employer might act unlawfully in giving a bonus which is excessively high. However, there will be circumstances where a company may act unlawfully in paying a substantial bonus. How is this? Company directors are under a legal duty to act in a way which furthers the best interests of that company. If they act otherwise, then their actions may be ultra vires, and undertakings given in breach of the good faith obligation may be unenforceable by the person in whose favour the undertaking was made.

9.2 In the context of bonus payments, there is a risk that (in particular) a promise of a guaranteed bonus may be ultra vires. If the company, acting through the directors,
promise to a potential or existing employee a guaranteed bonus which is substantially higher than the possible value which that employee may bring to that company, then it is difficult to see how they may be acting in the best interests of that company. Of course some level of guaranteed bonus is often justified, especially in the first year or two of employment; it may be necessary to incentivise the employee to leave his current employment.

9.3 Likewise a high level of bonus may be justified if it properly reflects the value which the employee has in fact brought to the company. For these reasons, it is advisable for companies to consider carefully the justifiability of guaranteeing a particular level of bonus, and to seek to make the size of bonuses to a material extent dependant upon the value of performance rendered.

9.4 A further situation where a bonus promise might be ultra vires is where it is due to be payable in the context of a sale of the business or a change of control of the company's shares. Such payments, and the reasons for them, are considered in section 3.5 above. The risk of them being invalid arises if they are properly regarded as a "poison pill" rather than a legitimate incentive to senior employees to continue to show commitment to the company, and thereby maintain its value, during a time of uncertainty for them.

9.5 A balance must be struck between; (a) providing a proper incentive to stay with the company through the change of control; and (b) saddling the potential purchaser with an enormous liability, the size of which greatly exceeds the loss which would have been caused to the company by the employee leaving his employment prior to the takeover or in the period immediately following it. In this context, there is increasing awareness among shareholders - both institutional and individual - of the remuneration packages available to executives working in those companies, and a willingness to question the justifiability of perks due to them.

9.6 Finally in this context, mention should be made of the restrictions on bonus payments which can be made to directors on the termination of their appointments. Section 316 of the Companies Act 1985 stipulates that a company should not make such a payment to a director by way of compensation for loss of office, unless either (a) that payment is a bona fide payment by way of damages for breach of contract, or else (b) has been approved by shareholders.

9.7 Thus terminal bonuses which are not related to loss suffered by the dismissal (e.g. which are greater than the total remuneration due during the notice period, or which fail to make an appropriate deduction for mitigation of loss) can be unlawful. This rule applies even if the directors believe they are bona fide acting in the best interests of the company in making the payment; the idea is that if they can show that, then they have nothing to fear in seeking shareholder consent.

10. **Bonuses and TUPE transfers**

10.1 The Transfer of Undertakings (Protection of Employment) Regulations 1981, provide that when a business is sold or otherwise transferred, the employees in it will transfer automatically into the employment of the new owner. They go across on their existing terms. Whilst most employment terms can readily be replicated by the new owner, there may be some special difficulty in respect of bonus provisions. If the undertaking, once transferred, is continued as a separate and identifiable business, the basis of calculating bonuses based on profit or turnover should be straightforward.
10.2 However, if only part of a business is transferred, and/or else the transferred business becomes integrated into the transferee’s existing business, a provision requiring the employer to pay a bonus to the employee based on the profits of the (original) undertaking may be difficult to apply. It is likely that it will no longer be possible to ascertain how much the employee is entitled to under the contract.

10.3 There is very little case law on this point, although there is one case dealing with the issue of what happens if the transfer takes place after bonuses have been declared for a particular year, but before the date when the fall due for actual payment; *Unicorn Consultancy Services Ltd v. Westbrook* [2000] IRLR 80. The EAT held that the new employer was obliged to make payments to the transferred employees of the amount already declared by the transferor.

10.4 That case does not deal with the more difficult issue of how the bonuses should be determined going forward. The best suggestion is that the new employer should try to negotiate (or failing which, simply put in place) a new scheme which seeks to provide broadly equivalent benefits to employees. This will inevitably be difficult since it will be impossible to know what bonuses might have been due to the employees had the business in which they worked not been transferred. For this reason, an agreed solution is doubtless the best way forward.

11. **Practical advice to take away**

11.1 This concluding section seeks to summarise the most important pieces of practical advice in the context of bonuses.

- Consider carefully how to structure the bonus clauses in contracts, and how to operate the scheme.
- Remember that the desire to retain discretion when awarding bonuses may conflict with the need to incentivise employees to join and remain employed by guaranteeing at least a minimum level of bonus.
- Consider making a part of the bonus payable only if the employee remains employed for a certain period after the award is made; this may reduce the “stampede” out of the door immediately after bonus payment time (normally in the early part of each calendar year).
- Consider how to make bonuses dependant (at least in part) upon achievement of particular ascertainable goals. This gives employees a greater measure of assurance, and reduces the scope for employees to argue they have been unfairly treated.
- Where possible and realistic, state that bonuses are paid partly to encourage continued loyalty and to retain staff, and are not simply a reward for past performance. This should give the employer greater (though not complete) freedom in limiting bonuses to employees who have resigned or been given notice to leave.
- Consider using a bonus “holdback” as a way of enforcing post-termination restrictive covenants. It may in practice be much more effective than trying to go to court to enforce such covenants. But beware of the risk that, if not properly drafted, they may be invalid.
- When exercising a discretion as to what bonus to pay, ensure this is properly considered, and not exercised in a way which is irrational or wholly unreasonable.
- Ensure there is no direct or indirect discrimination when assessing bonuses, and in particular ensure that your scheme does not inadvertently work to the disadvantage of women or part-timers.
- Do not completely exclude someone from a bonus because they were or are absent on maternity or parental leave.
• Do not deny an employee a bonus simply because they have been put on garden leave; to do so may be a breach of contract such that they are released from all future obligations.
• Be astute to the risks of paying excessive large or unjustifiable bonuses, especially where the recipient is a director and the sum is payable on the termination of the employment.
• If acquiring a business, consider carefully whether you can replicate any bonus scheme operated by the seller, and if not, what you might put in its place.

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DISCLAIMER: This booklet does not contain legal advice or provide a thorough and complete analysis of the law, and no liability is accepted in connection with it. Some provisions of the law are not covered. The purpose of this booklet is to provide a basic summary of selected main provisions and their effects and to offer some general practical guidance for the setting up, operation and termination of agency relationships. Specific legal advice should be taken in relation to the facts of any given case.