

High Court finds that assessment of bonus pool does involve contractual discretion

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The High Court has held that the calculation of a bonus pool by an employer bank involved an exercise of discretion and therefore the bank was under a duty, by virtue of an implied contractual term, to exercise its discretion honestly and in good faith and not arbitrarily, capriciously or irrationally.

The claimants, Brogden and Reid, were equity derivatives traders at Investec. They were both entitled to a contractual bonus based on a set percentage of the economic value added by the bank's equity derivative business. For the bonus year 2010/11, Investec calculated the bonus pool for this bonus as nil, which the claimants disputed.

The claimants argued that when calculating their bonus pool, Investec were exercising their discretion and therefore were under an implied contractual duty to act honestly and in good faith and not arbitrarily, capriciously or irrationally. Investec argued that when calculating the bonus pool, the preparation of accounts involved questions of judgement about which reasonable people could differ and therefore it was not using its discretion and no such term could be implied.

The High Court ruled that an employer is exercising their discretion where: (i) a contract gives one party responsibility for assessing or judging a matter which materially affects the other party's interests; (ii) the matter to be decided has ample scope for reasonable differences of opinion; and (iii) the decision will be binding upon the other party. Accordingly, the Court had a right to scrutinise the decisions the bank had taken. However, on the facts of this case, the judge held that Investec's decision was reasonable and should stand. Therefore, the employees won the issue of principle but lost the case.

This case emphasises the need for employers to document the exercises of their discretion properly so that when it is questioned, as in this case, they can demonstrate the decisions were made rationally.

Brogden and another v Investec Bank plc [2014] EWHC 2785

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