

Employee Bonus Entitlements

The payment of employee bonuses can be a thorny issue for employers. Decisions concerning the quantum of bonuses, or whether they should be paid at all, must be made with due consideration to the company's financial resources, questions of fairness and the expectations of employees. The following article seeks to assist employers by setting out the basic principles governing employee bonuses with a particular emphasis on the payment of a 13th cheque.

The Law

It is important to appreciate that employees have no statutory entitlement to the payment of a bonus (with the exception perhaps of some public service legislative entitlements). Given this fact, it follows that an employee's entitlement to a bonus is regulated only by the contractual arrangements that employee has with his or her employer.

Types of Bonuses

There are two common types of employee bonuses, referred to as performance bonuses and 13th cheques.

As the name suggests, performance bonuses are linked to performance in some way, whether it be individual performance, division/departmental performance or company/organisational performance. The most prevalent type of performance bonus is a payment made to a sales consultant on the occasions when that consultant exceeds his or her targeted sales figures.

13th cheques are not linked to performance but are instead a payment recognising continued (and presumably loyal) service. These types of bonuses are usually paid at year end or on the anniversary of the commencement of employment.

Discretionary or an Entitlement?

The fundamental issue that employers must consider when implementing an employee bonus program is whether they intend the payment of bonuses to be at their discretion, or if they are content for the bonus to be an entitlement for the employee, in the same manner as the payment of wages.

Employers often consider that the payment of an employee bonus is at their discretion; this is not always the case. In many instances an employee has a lawful entitlement to a bonus. There are three common circumstances whereby the bonus can be an entitlement:

1. If employers include provision for a bonus in an employment agreement, the payment of that bonus usually becomes a contractual entitlement for the employee. This can be the case even in circumstances where the employer has specified in the agreement that the payment of the bonus is at their discretion.
2. Where employers provide for the payment of employee bonuses in a workplace policy, the bonus can become a contractual entitlement if

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company policies are incorporated (whether expressly or implicitly) into the employment agreement.

3. Employers can also be caught because of 'custom and practice' within their organisation. In circumstances where an employer has continually paid an employee a bonus (particularly if the quantum of the bonus, or the formula for determining the quantum, is the same on each occasion), the law may deem it to be the custom and practice of the employer to pay the bonus and it becomes an implied term of the employment agreement.

The lesson for employers is to carefully consider what information is communicated to employees and in what format. If an employer wishes to retain discretion to pay bonuses, it should not make provision for a bonus in employment agreements. Instead, employers should (at the very most) convey the payment of bonuses in a workplace policy that clearly details the discretionary nature of the bonus and specifically excludes the incorporation of that workplace policy into employment agreements.

In the event that an employee's bonus is a contractual entitlement, the employer must pay the bonus otherwise they are in breach of the employment agreement (giving rise to a breach of contract claim in the Courts). Alternatively, in some circumstances, the employer could also be found to have committed an unfair labour practice pursuant to the terms of the Labour Relations Act.

The 13th Cheque - What Should Employers Do?

Given the imminence of Christmas shutdown, particular attention will be given to the payment of 13th cheque bonuses.

If you are an employer that has not paid 13th cheques in the past, and have not agreed employment terms to pay bonuses (whether oral or in writing), you retain a discretion to pay a 13th cheque.

If you have paid 13th cheques in the past and intend doing so again this year, it would be a worthwhile exercise to review employment agreements and workplace policies to determine whether you retain a discretion to pay bonuses or whether the 13th cheque is a contractual entitlement for employees.

Of course the most problematic situation is reserved for employers who have paid 13th cheques in the past but have decided not to do so this year. The first step for these organisations is to also review the basis of the payment; if the 13th cheque is a contractual entitlement, the employer is obliged pay the bonus.

If the employer retains the discretion to pay a 13th cheque, but is opting not to do so, the issue becomes one of fairness rather than legalities. We suggest that you that consult with the affected employees as a matter of urgency. If you commence a period of consultation and can substantiate the reasons for not paying the 13th cheque, the decision is likely to be more palatable for employees and certainly preferable to being advised on the last trading day before Christmas that 13th cheques will not be paid.

For further assistance with the payment of employee bonuses, please contact us at info@workplacestrategies.co.za or phone Paul Cooley on 076 299 7807.