CLYDE&CO

## UK Update

# Can a verbal promise made at a staff meeting be contractually binding?

The High Court and, most recently, Court of Appeal decisions in the "banker bonus" litigation stemming out of the Commerzbank/Dresdner merger in 2008 (*Dresdner Kleinwort Limited v Attrill & Others*) have received extensive media coverage. As the case concerns whether verbal promises made to staff amounted to contractual obligations, the decision could potentially impact on any business which makes verbal commitments to its employees.

The litigation involved claims made by 104 employees of DKIB, the investment banking division of Dresdner Bank, who, under their employment contracts, were entitled to be considered for a discretionary annual bonus.

The timeline of events leading to the claims:

**March 2008** – Dresdner Bank announced the separation of investment banking and commercial banking divisions from each other. Uncertainty over the future of DKIB led a large number of investment bankers wanting to leave. To retain staff, and because the bank had been put on the FSA's 'watchlist' due to the risk of substantial staff defections, the Dresdner Board agreed:

- to create a guaranteed minimum bonus pool for DKIB of EUR 400 million, allocated to individuals on a discretionary basis according to individual performance
- that staff could and should be told about this

**18 August 2008** – The new bonus pool was announced to DKIB's employees by the DKIB's CEO at a staff meeting which employees could watch via a video link on screens or on their computers.

**31 August 2008** – The sale of Dresdner Bank to Commerzbank was announced. Days later, Lehman Brothers collapsed and several banks accepted substantial state funding, including Commerzbank. Commerzbank's position regarding the payment of bonuses changed.

**19 December 2008** – Employees received letters confirming their provisional bonus award. The letters said that the award was subject to a clause which made provisional bonuses subject to DKIB's performance. However, at a staff meeting the same day, the CEO reassured employees that it was very unlikely that the bank would seek to rely on this clause.

**January 2009** – After the sale of Dresdner Bank was completed, DKIB's CEO was replaced and in February 2009, the employees were informed that, in reliance on that clause, their provisional bonuses had been reduced by 90%.

## What the Courts decided

The case was first heard by the High Court where the employees succeeded in their claims. DKIB appealed to the Court of Appeal and lost. In short, the Court decided that the CEO's promise made at the staff meeting in August 2008 created a contractual obligation to pay discretionary bonuses from a guaranteed minimum bonus pool of €400m, dependant only on individual performance. Even if it was not legally binding, it was a promise to pay the bonus from a guaranteed pool, "no matter what", that was made in good faith by the bank and that was intended to be honoured.

The key questions were:

**Can a promise constitute a binding contractual obligation?**
There is no reason why in principle an announcement made to the workforce could not give rise to contractual obligations, provided that:

- the terms were sufficiently certain to create legally binding obligations
- the intention to create legally binding obligations could be inferred
- the announcement amounted to an offer capable of acceptance, without requiring for that acceptance to be communicated
- consideration was given, such as the incentivisation and retention of staff

Furthermore, the promise to employees that they were entitled to a share in a bonus pool amounted to a contractual commitment to individual employees entitled to be considered for a discretionary share of that pool.

The Court of Appeal agreed with this, adding that as the change was introduced in an existing contractual relationship, the onus is on the employer to establish that there was no intention to create legal relations. The Court also said that there was a very strong presumption that a promise like this would be intended to be legally enforceable.

**Unilateral changes to employees' terms - do they work in practice?**
They can do in some circumstances. The promise that was made on 18 August was a valid change to the employees' contracts of employment. The Staff Handbook provided that unilateral changes to employment terms were only valid if made by a member of HR and that, if the change affected a group of employees, it must be notified by display on notice boards or on the company intranet. The High Court decided these conditions had been met by the transmission over the intranet using a live video link.

The Court of Appeal agreed, adding that the clause in the Staff Handbook permitting unilateral variation in terms should be interpreted objectively, to give it a sensible and workmanlike construction. Where a clause in a contract allows the employer to make unilateral changes adverse to the employee (as could be the case here), the clause should be construed strictly – but this would only apply if there was genuine ambiguity – which, in this case, there was not.

**Did the "get out" clause in the Dec 2008 letters make any difference?**
No. Even if DKIB hadn't had a contractual obligation to pay the full bonuses, the introduction of the clause would have undermined the obligation of trust and confidence between DKIB and the employees. DKIB had not shown it had reasonable and proper cause to introduce the clause – in fact the evidence showed Commerzbank's sensitivites to public perception was the real reason why the clause was introduced – and was a way to get out of the earlier promise.

## Implications for employers

This decision is potentially a valuable support for employees who are given an verbal promise by their employer. Verbal promises will only amount to a variation of employment terms if the announcement is couched in sufficiently certain terms, with the demonstrable intention of creating legally binding obligations. It will often be difficult on the facts for employees to show that their employer really intended to create binding legal obligations: but employers should still ensure that the precise phrasing of any verbal assurances or promises to staff is considered as carefully as written communications.

Further, on such changes to group company contracts, it is worth noting that despite a requirement in the Handbook that any unilateral variation should be made by a member of HR, the Court of Appeal said that it did not consider it necessary for them to be made or notified by a member of the HR Department if the notice board or Intranet option is used. It felt that, beyond the communication made with the approval of the Board of the Remuneration Committee, it would be artificial to require any other formal approval or endorsement by HR, and that it did not read the clause as requiring HR actually to make the notification on the intranet. This is also important for employers to be aware of: while on the one hand a broader interpretation of such a clause in the Handbook might make life simpler for HR and employers, on the other, it demands careful consideration when publicising on those forums.

## Further information

If you would like further information on any issue raised in this update please contact:

**Adam Lambert**
E: adam.lambert@clydeco.com

**Ruth Bonino**
E: ruth.bonino@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

Further advice should be taken before relying on the contents of this summary.