



Bonus Time!

Bonuses have been in the spotlight in recent times and they are certainly not disappearing under the radar of the divorce Courts.

The decision of Mrs Justice King in the High Court appeal case of P v P¹ sets out useful clarification on the appropriate approach for dealing with spousal maintenance orders in circumstances where the family income is made up of discretionary bonus as well as salary.

The Facts

At the time of the original hearing before District Judge White, the husband was 43 and the wife was 55 years of age. The parties had been cohabiting for approximately 19 years. They had been married for around 14 years of that. They had a daughter who, at the time of the hearing, was 19 and no longer in education. She was still living at home with her mother, but the Court made it clear that the wife was not entitled to any provision in respect of the daughter as she was no longer a dependent in the eyes of the Court.

The husband was a managing director of a Russian bank who was used to receiving his income by way of a salary plus a discretionary bonus. In the financial

year up to April 2011 his income was £250,000 gross plus a bonus of £225,000 gross, of which £67,500 was deferred, giving him a net income of £214,467 for that year (i.e. £17,872 net per month). In the financial year up to April 2012, the husband's income was again £250,000 gross, plus a bonus and deferred cash award of £195,750, plus £18,000 worth of shares which vested over three years from April 2013.

Whilst the husband was initially pessimistic as to the likelihood of his bonuses continuing at this level, his concern was not borne out and during the course of the proceedings they were sustained at that level.

¹ [2013] EWHC 4105 (Fam), judgment dated 20 December 2013

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The wife had been a legal secretary in the 1990s but had not worked for 15 years thereafter. In the circumstances the judge assumed she was able to earn a salary of just £500 per month (if she were minded to) and that figure was therefore assumed to be available to her.

The Court's First Instance Decision

The court had decided that there were sufficient capital assets to achieve a capital "clean break" (i.e. no further financial recourse for either party against the other in terms of capital). The wife was to receive generous capital provision consisting of the majority of the net proceeds of sale from the former matrimonial home (which would enable her to re-house mortgage free) plus an 81.3% share of the husband's pensions. The husband was to retain an American property (which was in negative equity) and an investment property in the UK.

To start with, District Judge White had determined that an appropriate distribution of finances upon divorce would include an order for spousal maintenance to be paid by the husband to the wife on a "joint lives" basis (i.e. until the husband or wife died) at the rate of £3,750 per month. In addition, the judge ordered that the husband should pay the wife a sum equal to 25% of his annual bonuses each year (net of tax and national insurance) also on a "joint lives" basis.

This was in fact significantly lower than what the wife had sought. She had originally argued that she needed £12,154 per month to live on but had lowered this to £6,352 per month as a concession. In fact she had ultimately sought a monthly cash payment of £4,500 per month from the husband plus 35% of all of his (net) annual bonuses for "joint lives".

The Husband's Appeal

The husband appealed the fact that the maintenance was payable on a "joint lives" basis (instead he wanted it to cease when he turned 60) but the Court refused to re-open this. He also sought to exclude the wife having any share of his bonuses going forward and

the Court allowed this to be re-examined on appeal.

Was the judge right to award a share of the future bonuses?

It was argued on behalf of the husband that the Court could only share future bonuses where "needs" justified this (i.e. where, without the bonus, there was insufficient money to meet the basic needs of the wife) which was not the situation in this case, the wife being provided for by the maintenance funded from the husband's salary.

The judge at first instance had released a supplementary judgment in which he had made it clear that, had the husband's monthly salary been higher, he certainly would have made a higher periodical payments order in favour of the wife. He felt that, whilst the maintenance order he had made met the wife's basic needs, it was far from being a generous interpretation of "needs". In circumstances where the judge was forced to order a smaller monthly maintenance payment than he felt the wife was entitled to (with reference to all the factors in the case and in particular the standard of living during the marriage and available income in the foreseeable future), then it was appropriate to order a share of future bonuses to the wife.

Historically, the family's standard of living was dependent on the husband's bonus and it had played a significant role in the family finances, roughly doubling the husband's income. The judge commented that, "Had the proportions been different, (more income less bonus), he would have made the basic maintenance award higher"². In the circumstances, he had instead made a "fair" order of maintenance for the wife which met her basic needs. As the level of future bonuses was unknown, the "top up" of the basic maintenance was expressed as a percentage.

However, on appeal Mrs Justice King felt the lower court had been wrong to not place a cap on the wife's entitlement from the bonuses. Taking into account all the circumstances of the case, and without applying a mathematically exact calculation, Mrs Justice King felt that an appropriate maximum amount for the

² Paragraph 34 of the judgment



wife to receive from the bonus would be £20,000 per annum. The historical level of bonuses was taken into account when reaching this figure. She estimated that this would provide the wife with approximately £1,666 per month on average. This, together with her regular maintenance of £3,750 per month, would give the wife a total of £5,416 per month (excluding any income that the wife could earn herself) which is in the region of £66,000 per annum. This was considered a fair figure, particularly taking into account the fact that the wife would not have a mortgage and legally was not financially responsible for the adult child.

It was considered fair that the wife should receive 25% of the bonus (at the capped level) across the various elements of the bonus. This meant that the wife could not receive her capped “top up” from the immediately available cash element of the bonus only. It would be unfair for the husband to be left with more of the stock/share options and deferred cash payment for example, than readily available cash. Any deferred or risk element to the bonus had to be shared. The wife’s percentage of the bonus would be applied to any cash element and any stock/share option element. This is in line with the Court’s general approach to sharing assets that carry risk, and are not simply “cash in hand”, between parties.

This, together with the fact that the wife’s share of the bonus would be capped, would mean having to agree a method by which the value of the wife’s share of the bonus would crystallise, so the cash element could be calculated and paid out and the wife’s share of the risky assets identified (with the wife then bearing the risk of any change in value on her share of any stock/share options). The logistics of implementing this, as well as addressing the way in which the wife’s share of any stock or share options would be held, would need careful consideration by practitioners.

Maintenance Variation

It is worth noting that it is within the Court’s power to review maintenance upon an application of one party or the other, should circumstances change and

the original maintenance Order be rendered unfair in the circumstances.

The judgment does not go into detail about the circumstances which justified the wife having a joint lives spousal maintenance order in her favour whilst also having such a large share of the husband’s pension. It may be that, by the time the pension income was payable, circumstances may have changed such that the husband could consider whether an application to bring the payments to an end would be appropriate.

Alternatives to Court

Mr Justice Mostyn (the judge who allowed the appeal to proceed), directed that the parties attend mediation to see if they could agree on whether there should be a cap on the wife’s share of the husband’s bonus. In fact, the parties were unable to agree even the identity of a mediator! So mediation did not take place, but this reflects the current trend of the Courts to endorse alternative means of resolving disputes without involving the Courts.

Mediation involves the couple sitting down together and discussing the issues and areas of dispute with a mediator who is an independent third party. Mediators are specially trained to facilitate discussion and assist couples to reach agreement. Many mediators are practising family solicitors so are well aware of both the legal position and non-legal issues which often characterise separation on divorce. If the parties can work in this way (and not every divorcing couple can) then mediation can mean that costly and stressful Court proceedings are avoided.

As the mediator does not represent the interests of one party over the other, it is advisable for each party to receive independent legal advice on any settlement that is about to be agreed in mediation. In this way, each party can make an informed decision on how much compromise, if any, is appropriate in the circumstances, having been advised of the legal position and what their entitlement is/may be.



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Collaborative law is another option available to couples who want to try and work towards achieving a settlement without Court proceedings. It involves a series of meetings with each party having their own collaborative trained solicitor present (so there is support and legal advice throughout) and with everyone working through the areas of dispute and towards a suitable settlement.

Conclusion

Love them or loathe them, bonuses are ubiquitous, in the financial and banking world especially. They are often discretionary and made up of different elements, but these unknown elements pose no obstacle to the divorce Court.

The decision in P v P reflects the Family Court's ability to take a pragmatic approach in order to achieve what it regards as a fair result. The main

income provider in a marriage should be aware that his/her income is available for distribution, not only at the time of the divorce but going forward, and that the Courts are willing to be robust, should circumstances justify it and fairness require it, when deciding how to treat that future income.

Of course it is by no means every divorce case where it is appropriate or justifiable for an ex-spouse to receive a share of future bonuses, not least where there is also a joint lives maintenance order, a significant share of the pension and generous capital provision in his/her favour! But where bonuses play an instrumental role in funding the family's lifestyle during the marriage and where resources are insufficient to achieve a clean break between the parties on divorce, then P v P is a helpful reminder of the appropriate way to deal with the discretionary element of any future bonuses.



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Alternative dispute resolution services, including collaborative law and mediation, are offered by the Family Team at Forsters LLP.

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This article offers general guidance only. It reflects the law as at October 2014. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

