

# Legal update: avoiding the remuneration and contract minefield

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# Overview of session

## Part one:

- Changing benefits of employment – what can be changed
- Options for reducing wage costs
- How to go about changing benefits

## Part two:

- Focus on executive pay
- No fault termination provisions
- Bonuses and incentives – key considerations
- Bonding agreements

# Recent environment

- Goal: keeping people employed, so reducing wage costs is key
- Plan B - redundancies

# Part one

- Court decisions about wage freezes, pay cuts and the removal of benefits
- No unilateral changes to terms and conditions allowed – consent required

# Employment policies

- What is contractual and what is not?
- Benefits of comprehensive policies

# Options for reducing wage costs

- Reducing hours of work
- Varying duties, secondment, enlarging roles
- Salary freezes
- Requiring annual leave to be taken
- Unpaid leave
- Reducing discretionary benefits
- Hiring freezes
- Changes to remuneration

# How to vary contractual terms

- Provide objective information
- Consult
- Get agreement
- Record agreement

The image shows a modern office interior with a large window overlooking a body of water and hills. In the foreground, there is a long, light-colored desk. On the left side of the desk, there is a blue rectangular sign with the text "BELL GULLY" in white, uppercase letters. To the right of the desk, there are four office chairs arranged around a small table, facing the window. The overall scene is bright and professional.

BELL GULLY

# 9-day fortnight

- Government sanctioned variation – 9-day fortnight

# Part one summary

## Managing the process for change:

- What does current employment documentation allow?
- Openness
- Consultation
- Agreement
- Recording that agreement

# Part two

What should be included in employment agreements?

# Executive pay

- Executive pay recently in the spotlight, particularly bonuses
- ‘No-fault termination’

# Bonuses and incentives

- Ability to participate usually contained in employment agreement but the terms of scheme may sit outside employment agreement
- Prescriptive schemes currently less popular than discretionary schemes
- But, discretionary schemes are not completely discretionary
- UK cases

# UK case law

## *Clark v Nomura, 2000*

- The Court of Appeal held that the test was whether the employer's actions were “perverse and irrational”
- Employer would be in breach of contract if no reasonable employer would have exercised its discretion in the same way

# UK case law

## *CommerzBank v Keen, 2006*

- Employee must show employer acted irrationally – high burden

# Tips for bonuses

- Be clear about how bonuses are calculated – individual or group profit? Market conditions? When money is received?
- Include a range of criteria
- Be clear about the timing of payment and whether employee has to be employed/not serving notice, or not subject to disciplinary action

# Tips for bonuses

- Provide for what will happen if employee leaves part way through bonus year
- Ensure decision making is transparent and justifiable
- Draft with sufficient flexibility to change/withdraw scheme

# Bond agreements

- Bond agreements are lawful in certain circumstances
- Need a “payback clause” if employee leaves before end of bonding period
- Payback amount must be a genuine pre-estimate of loss
- Bond agreement must be well worded

# Bonding agreements - practical issues

- Step one – decide whether a bond arrangement is appropriate
- Step two – prepare bond agreement before costs incurred
- Step three – give employee a copy of bond agreement and opportunity to seek independent advice before signing

The image shows a modern office interior. In the top left corner, there is a blue rectangular logo with the text "BELL GULLY" in white, uppercase letters. The office features a long, light-colored wooden reception desk on the left. In the background, there is a large window with a view of a body of water and hills. Four dark brown leather office chairs are arranged around a small, round, light-colored table. The floor is made of large, light-colored square tiles. A dark blue horizontal band is overlaid on the middle of the image, containing the text "Questions?".

**BELL GULLY**

**Questions?**

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