Bonus agreement in contravention of The Equal Treatment Act and The Equal Remuneration Act

On 8 January 2008, the City Court in Glostrup ruled in a case in which the Danish Insurance Association brought charges against an insurance company on behalf of a member, in that the association claimed that the insurance company's bonus agreements were in contravention of the Equal Treatment Act and the Equal Remuneration Act. The court decided in favour of the association.

The case in brief

An insurance company had concluded agreements with the company's staff association on bonuses. It was stated in the agreements that the bonuses were partly based on a team bonus which took as a starting point the stores' sale and booking of visits and an individual bonus based on the employee's sale.

The provisions stated that employees who were granted shorter hours due to pregnancy troubles or long-term illness had their team and individual bonuses reduced in accordance with the new employment level. Furthermore, it was stated that payment took place for employees who were employed in the stores per 31 December and that this, in connection with retirement and shift to other employment in the insurance company, took place in relation to the employment within the statement period in question and (pro rata). The same applied to employees who stopped working during this period for other reasons, such as maternity leave.

The employee whom the case concerned had been covered by the bonus agreement for a long period of time and had received bonus payments in connection with her work in one of the insurance companies' stores and, thus, considered bonus payment a part of her normal salary.

Rules applying in discrimination legislation

Pursuant to Section 4 of the Equal Treatment Act, any employer who employs men and women must treat them equally as regards working conditions. Moreover, it is stated in Section 16(a) of the Equal Treatment Act that if a person who considers him-/herself violated is able to prove actual circumstances which may lead to the assumption that direct or indirect differential treatment has taken place, it is incumbent on the counterpart to prove that the principle of equal treatment has not been violated.

Furthermore, Section 1 of the Equal Remuneration Act states that no differential treatment based on gender must take place with regards to payment. This applies to direct as well as indirect differential treatment. Any employer must remunerate his/her employees on equal terms, as regards all parts of payment and payment terms, for the same work or for work which is ascribed the same value.

The evaluation of the value of the work must take place according to an overall evaluation of relevant qualifications and relevant factors. If a person, who considers him-/herself violated, proves actual circumstances which lead to the assumption that direct or indirect differential treatment has taken place, it rests with the counterpart to prove that the principle of equal treatment has not been violated, just as was the case according to the Equal Treatment Act.

The City Court's statement
The city court found that the employee had been covered by bonus agreements for a number of years and had been disbursed bonuses of varying sizes for performance of the work which she was employed to perform within her normal working hours for the employer. Therefore, the court found that bonuses had become a regular part of her normal remuneration. The agreements contained (except for one) a provision saying that bonuses are not paid out to employees who were absent due to maternity leave, parental leave or due to long term illness, including pregnancy troubles, even though the employee was entitled to full salary during these periods according to collective agreements and the Employers' and Salaried Employees' Act. Thus, the court determined that the provisions were drawn up in a way which affected a larger part of the female employees than of the male employees, just as the female employees' absence due to pregnancy troubles and maternity and parental leave would normally be of a longer duration than the sickness absence and absence in connection with short paternity and parental leave would be for male employees.

The city court stated that the employee had proven actual circumstances which supported the assumption that indirect differential treatment based on gender had taken place and that the insurance company had not satisfied the burden of proof in the case.

Subsequently, the court found that the provisions in question were in contravention of Section 4 of the Equal Treatment Act and Section 6 of the Equal Remuneration Act. The consequence hereof was that the insurance company was ordered to disburse full payment to the employee during sickness absence, including absence caused by pregnancy troubles and full payment during part of the maternity leave in accordance with the collective agreement covering the employee. Full payment included the normal employee income and a fixed payment part as bonuses.

If you have questions regarding the above or require additional information on the Equal Treatment Act and the Equal Remuneration Act, please contact attorney Dan Moalem (dmo@mwblaw.dk) or attorney Christina Lund (clu@mwblaw.dk).