CENTRE DE DROIT
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A bank manager's bonus

The difficulty of contesting a bonus calculation several years after the fact

Par Aurélien Witzig le 30 November 2023

In a recent ruling, a bank manager was unsuccessful in his bid to obtain back pay, when he demanded a recalculation of his bonus based on assets under management that he claimed to have contributed to his employing bank (TF 4A_519/2022 of October 12, 2023).

The facts were as follows : in 2009, a manager had organized a meeting between a business introducer, whom he knew, and a member of a bank's executive committee. Shortly afterwards, a second meeting was organized by a third party between the same business introducer and the member of the comex ; the customers presented were entrusted to the bank. According to the business introducer, the second meeting was decisive in the bank's acquisition of these new customers.

The manager was hired by the bank in 2010. His contract stipulated a fixed salary and a variable salary, calculated by means of a formula applying a percentage to the profitability of the assets under management of the clients managed by the employee. Employee-managed customers" were defined as those who had entered into a relationship with the bank through a business introducer known exclusively to the employee. The adverb "exclusively" was deleted by an amendment in 2012.

The previous year, in 2011, the bank had informed the manager that the business introducer's clients were not credited to him, and that the corresponding assets under management would not be included in the formula for calculating his bonus. An amount of 50,000 francs, according to the bank as a "final settlement", was paid to the manager.

The employee then received his bonus for several years, calculated each time without the assets of the business introducer's clients. The bonuses were not contested. In fact, the contract provided for a period of ten days following delivery of the variable salary calculation statement for any dispute to be lodged. It was only in 2018 that the manager again demanded that the assets under management of the business contributor's clients be taken into account when calculating his bonus.

After resigning in 2019, the manager proceeded to recalculate his bonus, ultimately claiming back pay of almost CHF 2.5 million from his former employer.

The three courts that heard the case (TPH de Genève, CJ and TF) ruled against the manager.

The Geneva Court's arguments were, firstly, that the customers had been brought to the bank by several sources, namely the employee and then a third party, a hypothesis not provided for in the bonus regulations. The deletion of the word "exclusively" from 2012 did not allow the bonus regulations to be interpreted as now including the business introducer's clients, since an agreement had been reached between the parties on this subject in 2011, recording the exclusion of the corresponding assets under management, in return for the payment of CHF 50,000. Secondly, the manager had never objected to the variable salary statements sent to him over the years, and only in 2018 did he raise the issue of the inclusion of the assets under management of clients brought in by the business contributor.

The Federal Court considers that this reasoning complies with federal law. It criticizes the employee for wanting to impose a subjective view of the situation. Concerning the temporal priority of the first meeting between the business introducer and the member of the comex, organized by the manager, it was not arbitrary to consider that the second meeting had been materially decisive for the acquisition of the customers. With regard to the manager's request in 2018 to reopen the issue discussed in 2011 concerning the benefit to be derived from the arrival of new customers, the TF refused to see this as proof that the dispute had never been settled between the parties. Instead, it criticizes the employee for not having contested the statements immediately, as and when they were sent to him.

From a legal point of view, we believe there were two questions of interpretation. Firstly, a textual interpretation : should the deletion of the adverb "exclusively" lead to the inclusion of the business introducer's customers in the bonus calculation base, despite the 2011 agreement ? Secondly, an interpretation of the parties' conduct : was the manager's failure to contest the bonus upon receipt of the statements proof of his acceptance of the calculation method excluding the business provider's customers ? These two questions could have led to the application of the rules of objective rather than subjective interpretation, as the cantonal judges did. However, the result would certainly have been the same : it is settled case law that a co-contractor must express his disagreement promptly upon receipt of a payment made in performance of the contract. Admittedly, in employment relationships, silence on the part of the employee must be treated with leniency, as long as the claim is not time-barred. In this case, however, the manager should have justified his silence after the 2011 agreement and at the time of payment of the annual accounts. Would the fear of losing his job have been considered a sufficient reason, in a context where remuneration was very high and the manager had finally dared to raise the subject, even before resigning ? This is doubtful, given the case law.

The lesson to be learnt from this case is for banks to carefully specify the transactional nature of the points settled in agreements reached during the course of the relationship to settle specific disputes. For their part, asset managers are advised to report any outstanding claims at least once a year, if only by means of a reminder in response to the payment of remuneration.
