

Is The Bonus Part of The Salary or a Gratification? Swiss Federal Supreme Court Sets Threshold Amount

In its decision 4A_653/2014 dated 11 August 2015, the Swiss Federal Supreme Court confirmed its most recent case law on bonus entitlements (ATF 139 III 155) and introduced a threshold to distinguish between salary and gratification in cases where the bonus amount is neither determined nor objectively determinable but lying in the employer's discretion. To the extent that the employee is a high income earner, that is a total compensation in excess of CHF 354,000 per year, a bonus will remain a gratification and does not qualify as salary, irrespective of the ratio between the employee's base salary and bonus.

The rationale of the Swiss Federal Supreme Court is that employees with high income are not in need of specific employment law protection. As a consequence, such employees might for instance lose their bonus entitlement if their employment ends before the bonus payment date.

The present briefing aims at providing a short overview of the most recent case law on this issue, with a particular focus on the new criteria developed by the Swiss Federal Supreme Court.

Factual Background

The case was brought to the Swiss Federal Supreme Court by a managing director of a Swiss bank, whose compensation in 2008 consisted of a base salary of CHF 300,000 and a bonus of CHF 1,750,000. In January 2009, the bank enacted a new retention policy, encompassing a so-called clawback clause providing for partial reimbursement of the bonus, should the employee resign within the two years following payout date.

In February 2009, the employee gave notice of termination per the end of June 2009 and the bank, as a consequence, asked him to reimburse $\frac{3}{4}$ of the bonus received. The employee refused and

the dispute was escalated up to the Swiss Federal Supreme Court, with the employee arguing that the bonus amount exceeded (by far) the amount of the base salary and therefore was part of his salary. Thus, the bonus could not be made subject to conditions and was owed to him despite the termination of his employment.

Recent Case Law

Swiss legal doctrine distinguishes between bonuses that form part of the salary and gratifications.

Bonuses are considered part of the employee's salary where the amount of the bonus is clearly

determined or at least objectively determinable, which is the case where the remuneration does not fall within the employer's assessment (ATF 139 III 155, cons. 3.1). In such cases, the Swiss Federal Supreme Court has repeatedly stated that the bonus cannot be made subject to conditions, in particular that of a continued employment on the bonus payment date. It is questionable whether this argumentation convinces in every case, in particular as the employee can validly waive salary claims under Swiss law.

If, on the other hand, the payment of the bonus and its amount largely depend on the appreciation of the employee's work by the employer, bonuses are considered not to form part of the salary but qualify as gratifications (ATF 139 III 155, cons. 3.1). Other than salary, the payment of gratifications can, as a general rule and subject to certain restrictions, be made subject to conditions.

Whether or not a bonus forms part of the salary or qualifies as gratification can be difficult to establish and depends on the particular circumstances of each case.

In an older decision, the Swiss Federal Supreme Court had ruled that independent of the parties' intention, a bonus could only qualify as gratification if it was accessory, that is to say lower than the base salary. However, in case it was higher and notwithstanding the parties' agreement that the bonus payment should be discretionary, such bonus, at least in part, was seen as a salary and no longer a gratification (ATF 129 III 276, cons. 2.1).

Many legal scholars have disputed this interpretation and local courts started to render contradicting judgments.

In its decisions ATF 139 III 155 and 4A_721/2012 dated 16 May 2013, the Swiss Federal Supreme Court eventually clarified that the criteria of accessoriness should not apply in cases of a high income.

Until recently, however, it remained unclear what the Swiss Federal Supreme Court considered to be a

"high income". Cantonal courts have taken different views. In Zurich, for instance, the courts have affirmed the existence of a "high income" in cases of base salaries of, respectively, CHF 335,000 *p.a.* (decision NP120018 of the High Court of Zurich dated 17 September 2012) and CHF 280,000 *p.a.* (decision 4A_721/2012 of the High Court of Zurich dated 16 May 2013).

Latest Development and Comments

In its decision 4A_653/2014 dated 11 August 2015, the Swiss Federal Supreme Court clarifies the situation as follows: an employee is regarded as earning a "high income" to the extent that his total annual compensation (*i.e.* base salary, plus bonus paid in relation to the year preceding the year in respect of which a bonus is claimed) is five times higher than the Swiss median income in the private sector. The latter being currently at CHF 5,900 per month, *i.e.* CHF 70,800 per year, the threshold set by this latest case law is reached as soon as the total annual compensation exceeds CHF 354,000.

When the employee's total annual compensation exceeds this threshold, the criteria of accessoriness does no longer apply and the bonus will be considered as a gratification, even if its amount is higher than the base salary.

The above threshold introduced by the Swiss Federal Supreme Court applies to the entire private sector, irrespective of the branch of activity concerned.

However, for the avoidance of doubt, it should be emphasized that the reasoning of the Swiss Federal Supreme Court is not relevant for bonuses of which the amount is either determined or objectively determinable and thus do not fall within the sole assessment of the employer. Those bonuses continue to qualify as part of the salary that is due in all circumstances, irrespective of the amount of the employee's total annual compensation.

In light of the above, employers are advised to be very careful when discussing or drafting contractual

provisions on employee's compensation, in order to limit as much as possible the risk that an amount meant to be a discretionary bonus in fact constitutes a salary that cannot be subject to any payment conditions.

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