



EMPLOYMENT TRIBUNALS

Claimant: Mr D Jones

Respondent: Sanipex Ltd

Heard at: Leeds (CVP)

On: 8 February 2022

Before: Employment Judge A.M.S. Green

Representation

Claimant: In person

Respondent: Mr R Nicholls – Managing Director

REASONS

1. For ease of reference, I refer to the claimant as Mr Jones and the respondent as Sanipex.
2. Mr Jones has requested written reasons for an oral judgment I gave on 18 January 2022.
3. Mr Jones presented his claim form to the Tribunal on 17 November 2021 following a period of Early Conciliation which commenced on 23 September 2021 and ended on 3 November 2021.
4. Mr Jones has claimed breach of contract/unlawful deduction of wages in respect of an underpaid contractual redundancy payment and car allowance owed under his employment contract. He claims that the payment should have been made to him on 31 August 2021, being his last pay date. His employment ended on 3 August 2021. He has subsequently settled his claim for payment of his car allowance. This leaves the contract/unlawful deduction from wages claim to be determined by the Tribunal. Mr Jones claims that the total sum agreed for his enhanced contractual redundancy payment was £3000. However, when he received his final payslip, he noted that he was only paid £1500. Consequently, he is claiming the unpaid balance of £1500.

5. Sanipex denies liability. They say that Mr Jones was not entitled to an enhanced contractual redundancy payment. Instead, the sum in dispute relates to the payment of his Q1 bonus which they allege was conditional upon Mr Jones completing his agreed handover tasks before leaving the company. They say that he asked for his bonus to be paid on an ex-gratia basis without deduction of tax and National Insurance. They further allege that Mr Jones failed to complete those tasks and, consequently, was not entitled to payment of £3000. He was only entitled to be paid £1500 which corresponded to the extent to which he had completed his handover tasks.
6. The issue which I must determine is whether Mr Jones was entitled to a contractual enhanced redundancy payment of £3000. As there is no dispute between the parties that he has received £1500, if I find that Mr Jones was contractually entitled to £3000 without any handover completion conditions, then, it follows that Sanipex must pay him the remaining £1500.
7. Mr Nicholls' witness statement was filed and served on 14 January 2022, in breach of the Tribunal's directions for the timetable. Mr Jones wanted the statement to be excluded from evidence. Whilst I had some sympathy with his application, I refused it as he told me that he had read the statement and was ready to proceed with cross examining Mr Nicholls. The balance of prejudice lay with Mr Nicholls as he is Sanipex's sole witness, and his evidence was relevant to the issues.
8. I conducted a remote CVP hearing. We worked from a digital bundle. We had sporadic connection issues during the hearing. Mr Jones and Mr Nicholls adopted their witness statements and gave oral evidence. They both then made brief closing submissions with Mr Jones having the last word.
9. Mr Jones must establish his claim on a balance of probabilities. In reaching my decision, I have carefully considered the oral and documentary evidence. The fact that I have not referred to every document produced in the hearing bundle should not be taken to mean that I have not considered it.
10. Having considered the evidence, I make the following findings of fact.
11. Sanipex provides bathroom accessories and furniture which they import from overseas. The business is based in Birstall. At the time when Mr Jones was dismissed, the business had a total workforce across the United Kingdom of 23 employees. Mr Nicholls has been managing director since April 2021. Prior to that, he was the marketing director.
12. Mr Jones was initially employed as a finance manager. His employment started on 30 May 2017. He subsequently became Head of Finance. A copy of his unsigned contract of employment was produced in the hearing bundle. There is no dispute between the parties that he was employed on the terms set out therein.

13. On 8 March 2021, Mr Nicholls wrote to Mr Jones to confirm what he would be paid by way of his bonus for the financial year February 2021. His bonus earning potential would be £3000 per quarter. This was based on the Sanipex receiving their UK Quarterly Gross Profit target against budget. When that was achieved, payments would be made quarterly in arrears. The letter invited Mr Jones to acknowledge his acceptance by counter signing it. Mr Jones did this on 26 March 2021.
14. On 14 April 2021, Mr Nicholls wrote to Mr Jones inviting him to a redundancy consultation meeting. The letter referred to a discussion on the same day which identified the need to restructure the business. To support the realignment, Mr Jones' position had been identified as being potentially at risk of redundancy. The meeting was scheduled for 15 April 2021 and was to be conducted remotely because of the Covid guidelines. The letter expressly stated that the purpose of the meeting was to explain why the business was proposing to make redundancies, any ideas that he might have for avoiding redundancy or reasons why he thought the business should not select him for redundancy and possible alternative employment within the business. The letter went on to say that following the meeting, the business would consider any submissions that he made at the meeting. There would then be a subsequent meeting to discuss the business' response. Mr Nicholls stressed in his letter that, at this stage, it was only a proposal, and Mr Jones was not under notice of redundancy. The business would continue to try to identify ways in which redundancies could be avoided.
15. The consultation meeting took place on 15 April 2021. Although Mr Jones had been notified of his right to be accompanied, he chose not to exercise that right. The meeting was chaired by Mr Nicholls and Sarah Gibbens, Sanipex's Commercial Manager, took notes. The notes state amongst other things:
 - a. The purpose of the meeting was to give Mr Jones an opportunity to put forward his thoughts on ways to avoid the role of Head of Finance being identified for redundancy.
 - b. Mr Jones set out his views on the proposal and it is clear that he believed that the business was getting value for money with him and would be in danger of losing good people. He believed that the company would only be making a small saving when it considered recruitment costs and job overlap. As far as he was concerned, there was nothing else to discuss at that stage.
 - c. Ms Gibbens is noted to have said that the business would consider Mr Jones' comments and meet again with him in the following week.
16. On 16 April 2021, Mr Nicholls wrote to Mr Jones to invite him to a second consultation meeting on 21 April 2021 to discuss the proposed redundancy.
17. On 19 April 2021, Mr Jones emailed the business requesting further details on the business case for identifying the Head of Finance as being potentially at risk of redundancy. Ms Gibbens responded by email on 20 April 2021. She

referred to the fact that Mr Jones' role had changed significantly during the previous 12 months with the reduction of the finance team headcount and the introduction of line management responsibility for Inventory. She referred to the fact that in January 2021, Mr Jones created a role content matrix for his role and had identified the tasks which were re-assigned to the finance department in Dubai and the Customer Support team in the United Kingdom. She referred to the discussions that Mr Jones had with Mr Nicholls the previous week when Mr Jones recommended that financial elements remain the responsibility of Dubai Finance and Customer Support. Ms Gibbens goes on to say later on in her email:

When you were reviewing with Richard the role content and the level of transactional tasks that had already been assigned to other areas of the business, my understanding was that you both agreed that the remaining financial tasks did not equate to a full-time senior management position, and that the tasks would be more aligned with an entry level financial position, with a focus on transactional responsibility.

I am not aware of any discussion regarding this consultation process being driven by cost savings, more around aligning roles with business requirements and although you discussed with Richard your career aspirations of achieving Finance Director and to have your salary reviewed. Richard explained during your meeting on 13th April that although he felt positive when he had these initial discussions with you last year when he was first appointed MD, he explained that the business is still not in a strong enough position to consider a pay review for the role within Finance and with the size of the business there isn't a need for an FD. The business is unlikely to be in a position to require a senior financial position to sit on the UK board for another 2-3 years.

Therefore based on the above, we entered into a period of consultation.

18. The second consultation meeting took place on 17 April 2021. Mr Jones was not accompanied by a companion at that meeting. The meeting was chaired by Mr Nicholls and Ms Gibbens took the notes. A copy of the notes has been produced in the hearing bundle. The notes state, amongst other things, that the purpose of the meeting was a formal redundancy consultation to discuss potential redundancy of the role. Mr Jones is recorded as having no comments or amendments for the notes of the meeting on 15 April 2021. Once again, Mr Jones was given the opportunity to put forward any thoughts that he had on ways of avoiding the role of Head of Finance being identified for redundancy. He is recorded as wanting to express his views on the business proposal because he was struggling to understand whether cost savings would be made, and he did not understand the rationale. Mr Nicholls is recorded as explaining that there had been a change of focus on the business and to support that change it was necessary for a process/input type finance role and not a senior strategic role. The business did not need a

director. They needed something more akin to a bookkeeper. Mr Jones is recorded as indicating that he was adaptable. Mr Nicholls is then recorded as saying:

Please be assured that this is not about you, it is about the role and what the business needs. The business needs a functional, this is not the role of a Head of Finance. It's more of Finance clerk, we are going back to basics.

Mr Jones is recorded as having understood that there would be financial savings in doing this. Ms Gibbens is recorded as offering to send a copy of a role specification for alternative deployment within the business in the role of transactional finance with a view to reconvening the meeting on 4 May 2021.

19. On 22 April 2021, Ms Gibbens emailed Mr Jones attaching the job description for the position of a Management Accountant.
20. On 23 April 2021, Mr Nicholls invited Mr Jones to attend a reconvened consultation meeting on 4 May 2021 to discuss the proposed redundancy. The letter specifically referred to the reason for adjourning the meeting so as to enable Mr Jones to consider the job specification for the transactional position within the finance function.
21. The reconvened consultation meeting took place on 4 May 2021. Once again, Mr Jones attended without a companion. Mr Nicholls chaired the meeting and Ms Gibbens was the notetaker. From the outset, Ms Gibbens explained that the purpose of the meeting was a formal redundancy consultation to discuss the potential redundancy of the Head of Finance role. The meeting was adjourned briefly to enable Mr Jones to read and review the notes taken at the meeting on 21 April 2021. He had no comments to make about those notes. Mr Jones indicated that he was not interested in the alternative role. Ms Gibbens indicated that the business would be issuing a notice of redundancy with effect from 4 May 2021. She is recorded as saying that the letter would outline the redundancy payment that he would be entitled to and that he would be working his three months' notice. At this point, Mr Jones is recorded as saying that others had left for conduct issues and had been paid in lieu of notice. He expressed some discontent about that fact, and he is also recorded as saying that an ex-gratia payment would be made for his bonus. This is the only reference to the bonus in the consultation notes and nothing is mentioned about conditions for payment. Ms Gibbens is recorded as saying that the business would confirm the payment details in the letter. There was then some discussion about announcing Mr Jones' departure from the business.
22. On 7 May 2021, Mr Nicholls wrote to Mr Jones notifying him that his employment was to be terminated. At the beginning of the letter he stated:

As you know, a redundancy situation has arisen in the business and we have been consulting with you following your provisional selection for redundancy. During the consultation process, we have been unable

to find any suitable alternative roles that we can offer you. In the circumstances, I am sorry to inform you that we have taken the difficult decision to issue a notice of termination of your employment.

The letter goes on to refer to the requirement that Mr Jones should work his three months' notice and that the effective date of termination of employment would be 3 August 2021 "by reason of redundancy". He would receive his normal pay and benefits up to that date in the normal way. The letter then goes on to deal with the payments that he would receive. These would include a statutory redundancy payment of £2448 and it then says:

Under our Company Redundancy Policy, you are eligible for a Company redundancy payment of £3000.

Redundancy payments up to are process [sic] without PAYE deductions. Redundancy payment will be paid to you with your final salary 31 August 2021.

23. On 31 August 2021 Mr Jones received his final payslip. The total amount that he received net of deductions was £5182.58. Various payments are itemised in the payslip including two payments of £750 for "Redundancy" totalling £1500 and a "Statutory Redundancy" payment of £2448.
24. Mr Jones telephoned Ms Gibbens to query the payment that he had received in his final payslip. Ms Gibbens emailed Mr Jones on 31 August 2021 to say that she believed that his eligibility to receive a tax-free payment was conditional upon him completing all the elements of his handover and that this had been discussed with Mr Nicholls at the time of agreeing to the payment being administered tax-free. The prorated payment of £1500 reflected the completion rate of the handover.
25. Mr Jones emailed Ms Gibbens on 31 August 2021 highlighting the fact that his termination letter had stated that following termination of employment he would receive a redundancy payment plus the company redundancy payment of £3000. He goes on to say that there were no further discussions or conditions to that payment and alleged that Mr Nicholls had changed the agreement. He put Sanipex on notice that they had contravened the termination agreement and he was taking legal advice regarding the recovery of the outstanding £1500.
26. Ms Gibbens did not reply to that email which prompted Mr Jones to write to her on 7 September 2021. He reiterated his request that the £1500 outstanding should be paid to him promptly and asked for confirmation when that would happen. He also asked for a copy of the company's redundancy policy. He reiterated his belief that the termination letter set out that he would be eligible for a company redundancy payment of £3000.
27. Ms Gibbens acknowledged the letter in subsequent email correspondence and on 23 September 2021 Mr Nicholls wrote to Mr Jones setting out his understanding of the payments made. He referred to the company's

redundancy policy and stated his belief that the business did not have a Company Redundancy Payment Scheme in that policy. He went on to say:

Following the Final Redundancy Consultation meeting with you on 4 May 2021, you raised that the business had achieved Q1 targets and that the Commission Bonus scheme payments would be included in the next payroll, you highlighted that you were eligible to be included in the Commission Payment calculations for the UK. The calculation for all employees was based on days worked during Flexible Furlough. Payment for the Q1 Commission Scheme was scheduled for inclusion in the payroll processed 28 May 2021.

You asked me to consider processing Q1 commission payment in your final salary and requested that we pay this as an ex-gratia payment, this would enable you to avoid deductions for PAYE and National Insurance Contributions. This did come as a surprise to me, especially as you had previously vetoed a request of this type from the management accountant on their exit.

As Head of Finance, I took your guidance, and against my better judgement agreed to your request and included the full commission earning potential figure in your notice of termination letter. Payments to avoid PAYE and NI is not something that I had previously agreed to do during my time at Sanipex. The caveat for adopting this unorthodox approach was to enable you to achieve payment of the full Commission payment (without deductions) you fully complete the handover, ensure that the business was not at risk financially and that all statutory undertakings had been actioned. You reviewed the handover document and provided feedback on the elements that you had no involvement in and the elements that you would not be providing handover i.e. Purchase Ledger and Credit Control. At no point during the following three months of your work notice did you say you would be unable to achieve the remaining handover elements.

On your final day of employment, unfortunately I was not on site to be able to talk through the handover process, or discuss what if any tasks were outstanding, although you did send me one email regarding the accruals process which you were unable to complete. The following were subsequently identified as also outstanding.

[Mr Nicholls then lists the outstanding handover elements].

I am truly disappointed that I was put in the situation that I had to adjust your final commission payment to reflect the above outstanding items. I wish you had spoken to me about what restrictions there were to you completing these tasks. When we created and agreed the handover schedule it was felt that the three months would be sufficient for you to complete this, and at no time did you flag any of the above as items that would be left unresolved. The above outstanding, I would not have

approved the annual leave that you took during your last week of employment, you lead me to believe that everything was resolved, so again I am disappointed that you felt unable to discuss this with me.

28. Mr Jones replied to Mr Nicholls in a letter dated 30 September 2021. He disputed what Mr Nicholls said as the basis for non-payment. He referred to the conversation that he had with Ms Gibbens on 31 August and her subsequent email on the same day which suggested that the £1500 payment was commensurate with the proportion of the handover completed. He then went on to say that Mr Nicholls' letter seems to suggest that the actual reason for non-payment was because he had agreed to an ex-gratia Company redundancy payment and now regretted it. He invited Mr Nicholls to confirm that the calculation that led to the payment of £1500 was in relation to Company redundancy. Regarding the bonus scheme, he pointed out that this was not referred to in the termination of employment letter. He did not regard it as relevant. He also referred to the fact that the company had precedent for making ex-gratia lawful payments as part of redundancy and settlement agreements. This was not referred to in his termination agreement and there were no subsequent amendments to that agreement. He also disputed the completion of the handover was a condition for payment. Had this been so, they would have been included in the termination letter. He then stated for the sake of completeness what had been done regarding the handover.
29. On 11 October 2021, Mr Nicholls responded to Mr Jones refuting any suggestion that at any stage during his employment first as sales and marketing director and subsequently as managing director had he tried to avoid paying PAYE. He reiterated his position that Mr Jones had requested that the Q1 bonus payment should be made ex-gratia. He felt there was no further need to discuss the matter and the best course of action was to put the matter to ACAS.
30. I now turn to the law. The Tribunal has jurisdiction to hear a contractual claim brought by an employee. However, that claim must arise or be outstanding on the termination of the employee's employment and must seek one of the following:
- a. Damages for breach of a contract of employment or any other contract connected with the employment.
 - b. The recovery of a sum due under such a contract; or
 - c. The recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.
31. In this case, Mr Jones has a contractual claim. He alleges that he is entitled to a contractual redundancy payment which was payable on termination of his employment. Indeed, he says that the sum is outstanding after termination of employment. Such claims must be raised within three months of the date on which payment must be made with the time limit being extended by the period of ACAS Early Conciliation. In this case, the claim must have been presented

on or before 9 January 2022. Mr Jones presented his claim on 17 November 2021. The claim was brought in time.

32. The Employment Rights Act 1996, section 13 (1) (“ERA”) provides that an employer shall not make a deduction from wages of a worker employed by him. It goes on to say that the prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deductions. ERA, section 27 (1) defines “wages” as “any sums payable to the worker in connection with his employment”. This includes any “fee, bonus, commission, holiday pay or other emolument referable to the employment”. These may be payable under the contract “or otherwise”. ERA, section 27 (2) and (5) excludes certain payments by employers to workers from the definition of wages and these cannot be recovered by bringing an unlawful deduction from wages claim under section 13. These include redundancy payments whether statutory or not. Consequently, the Tribunal does not have jurisdiction in respect of an unlawful deduction from wages claim of the type made by Mr Jones as he is claiming payment of a contractual redundancy payment. The Tribunal can, however, hear his separate breach of contract claim.
33. Having considered the oral and documentary evidence, I am satisfied that the purpose of the consultation meetings in April and May 2021 between Mr Jones and Sanipex was to discuss the proposed redundancy of the role of Head of Finance. That is how Mr Jones approached it and he engaged with the process. He was sent a job description for an alternative position and was asked to consider it. He rejected that. At that point, his redundancy was confirmed and the terms of his termination of employment were clearly set out in the termination letter of 7 May 2021. Sanipex clearly and unequivocally said that his employment was being terminated for reasons of redundancy and that he would receive various payments. He would receive a statutory redundancy payment of £2448 and a Company redundancy payment of £3000. There is absolutely no reference to the payment being conditional upon completing a satisfactory handover as suggested by Mr Nicholls. Nor is there any suggestion that the payment was being made ex-gratia and without deductions in relation to his Q1 bonus. Nothing could be clearer about the nature of the £3000 payment as set out in the letter. The £3000 was a contractual redundancy payment over and above the statutory redundancy payment of £2488. Mr Jones was only paid £1500 of that as his payslip of 31 August 2021 shows. Indeed, the label applied to the £1500 payment was “redundancy”. This, in my opinion firmly puts the matter beyond dispute.
34. Mr Jones’ claim for breach of contract is well founded. He was contractually entitled to an enhanced redundancy payment of £3000 which was payable on 31 August 2021. Sanipex breached the contract by paying him £1500 on that date. They are liable to pay the balance of £1500 to Mr Jones.

35. By way of observation and not forming any part of my decision, there may well have been outstanding handover matters as at the last day of Mr Jones' employment which could have caused inconvenience to Sanipex. That is a separate matter and is not relevant to the issues of this claim.

Employment Judge Green

Date 8 February 2022