



# EMPLOYMENT TRIBUNALS

## Claimant

Mr M Sliwiniski + 32 Ors

v

## Respondent

(1) Photobox Limited;  
(2) Precision Proco Group Limited

**Heard at:** Bury St Edmunds

**On:** 19 April 2022

**Before:** Employment Judge K J Palmer

## Appearances

**For the Lead Claimant:** In person

**For the First Respondent:** Miss I Cernis, Solicitor

**For the Second Respondent:** Miss G Churchhouse, Counsel

## JUDGMENT

### Pursuant to an Open Preliminary Hearing

It is the Judgment of this Tribunal that all 33 remaining claims be struck out pursuant to the Respondents' Application under Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

## REASONS

1. The Claimant and 39 others presented a claim to this Tribunal under cover of an ET1 dated 10 August 2021. The claim included a number of potential claims, but Employment Judge R Lewis accepted only that part of those claims which related to a claim for unpaid bonus by the Claimants pursuant to a Contract of Employment the Claimants entered into with the First Respondent.
2. All Claimants were at one time employed by the First Respondent and some of those Claimants were subsequently transferred under the Transfer of Undertakings Regulations 2006 to a company called Precision Printing Company Limited. More of that shortly.
3. During the course of these proceedings 7 of the original 40 Claimants have withdrawn their claims and Judgments have been issued dismissing their claims pursuant to those withdrawals. There therefore remains before me

today 33 claims. I had before me Mr Sliwiniski who is the Lead Claimant and represents all 33 here today and I had before me a Solicitor representing the First Respondent a Miss Cernis and Counsel representing the Second Respondent Miss Churchhouse.

4. During the course of these proceedings the Tribunal joined in of its own accord the Second Respondent, Precision Proco Group Limited. It now emerges that that was possibly done in error as there is a company called Precision Proco Group Limited, but on Hearing submissions from those representing the First and Second Respondents it is clear that the Group company is simply just that a Group company and does not and has never employed any individuals. In fact, there was a transfer of an undertaking which took place on 1 August 2020 and that was a transfer of an undertaking pursuant to a sale by the First Respondent to a company called Precision Printing Company Limited and it is that company that should have been joined in as a Second Respondent.
5. It is very plain that the joining in of the company Precision Proco Group Limited was simply an error. Accordingly, I therefore dismiss Precision Proco Group Limited from these proceedings and I substitute as the Second Respondent Precision Printing Company Limited.

### **The Claims**

6. The claims can be broken down into a number of tranches. The Respondents addressed me today on the basis that they seek a strike out of all remaining 33 claims for reasons submitted to me, with which I will deal with shortly. Essentially, the remaining claims are against the First Respondent Photobox Limited and the substituted Second Respondent Precision Printing Company Limited.
7. All 33 employees were at one time employed by the First Respondent and all enjoyed a similar Contract of Employment, a copy of which I had before me. All of those 33 claims relate to a bonus payment pursuant to the annual bonus provisions contained in the Claimants' Contract of Employment and in a Guidance Note that accompanies it, which I also had before me.
8. The pertinent clause in the contract is at paragraph 8 and is headed
9. 'Annual Bonus'. It reads as follows:
  - “8.1 You are eligible to be considered for a bonus of up to 10% of your salary per annum under the company's discretionary bonus scheme. The company will determine in its absolute discretion your entitlement to participate in this scheme, the conditions of the scheme and the amount of any bonus payable. For the avoidance of doubt the amount of any such discretionary bonus may be zero. Any discretionary bonus will not form part of your basic salary, will not be pensionable and will not be taken into account in calculating any benefits which are calculated with reference to basic salary.

- 8.2 In order to receive any bonus payment you must be employed and not under notice of termination (given by you or the company) at or prior to the date when the discretionary bonus might otherwise have been payable. The discretionary bonus will not accrue, nor will you have any legitimate expectation as to the size or form of any discretionary bonus until the company pays it to you. Moreover, payment of a discretionary bonus in at least one year does not give rise as to a legitimate expectation as to the receipt of size or form of discretionary bonus in the next year.
- 8.3 The company reserves the right to vary or withdraw the discretionary bonus arrangement referred to above, at any time without prior notice and without entitling you to compensation other than any benefits already earned and declared by the company in writing as payable to you on a particular date in accordance with the above clauses at the date on which the arrangement is varied or withdrawn.
- 8.4 Any bonus payments or other awards made to you, whether under this Clause 8 or otherwise, will be subject to all lawful deductions such as tax and employee's National Insurance contributions. You will be responsible for any taxes that may be payable in any jurisdiction in respect of any such payments or awards to the extent permitted by law.
10. The Claimants were used to receiving bonuses in previous years and those bonuses were calculated by reference to the company's performance and the Guidelines that the company relied upon in exercising its discretionary bonus and amounted to a maximum of 10% of salary. Mr Sliwiniski explained to me that in years prior to 2020 the pattern was that half of the bonus that related to the preceding financial year which terminates on 30 April would be paid in December of that year, with the balance, the remaining 5% being paid in June of the following year. He said that pattern was essentially changed so that no bonus was paid in December of 2020. The expectation being that all 10% of the bonus would be paid in June of 2021.
11. In fact, that did not happen and in June 2021 on 17 June 2021, the company distributed through its employee Mark Grice an email explaining that despite the company's good performance in the financial year to which the bonus relates, i.e. the year ended 30 April 2020, that the entire bonus would be withheld and it went on to explain the reasons for that and also explained that it was the intention of the company not to withhold the bonus permanently from those employees, but to pay it in December 2021. It explained the reasons for seeking to exercise its discretion under Clause 8 of the Employment Contract by reference to the Covid-19 pandemic, the lockdown and the difficulties that all businesses that had experienced as a result of the lockdown and the attendant issues that accompanied such lockdowns and explained that there had been a decline in trading performance due to the Covid-19 pandemic and that had affected cash flow. Despite the fact that profits for the financial year in question were extremely good.

12. It was on that basis that the bonus was not paid and was deferred until December 2021. In fact, in December 2021 the bonus was paid and was paid to those individuals who remained employed at that time.
13. Part of the history is that prior to the payment of the bonus in December 2021, there occurred a Transfer of Undertakings when the business assets of Photobox Limited were sold to the now Second Respondent Precision Printing Company Limited and that sale took place on 1 August 2021 and that constituted a transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006.
14. Before me today I have 33 claims and the purpose of today's Hearing was to determine who should be the true Respondents in this claim and to hear the Respondent's arguments for strike out of all the claims that remain in this action. It should be remembered that 7 of the original 40 have withdrawn their claims, leaving 33.
15. I have before me a Strike Out Application, part of which was explained in the First Respondent's and in the then Second Respondent's ET3, but which was more properly set out in an email from the Respondents' Solicitors dated 1 April 2022. Essentially, in that Strike Out, the number of remaining Claimants being 33 is broken down into three tranches. Numbers 1 to 26 which include the Lead Claimant Mr Sliwiniski all actually received their bonus in December 2021. They received the same bonus that they would have received in June of 2021 had the company not made the decision to delay payment communicated in the email I have already referred to.
16. Those 26 Claimants all received their bonus and those 26 had all, it is common ground, transferred to the now Second Respondent pursuant to the transfer which took place on 1 August 2021.
17. Those numbered 27 to 30 in the Strike Out Application, case numbers: 3314566/21, 3314567/21, 3314579/21 and 3314605/21 have not received their bonus. The reason being that they chose to resign prior to the bonus being paid in December 2021. It is accepted by both Respondents that those four individuals Mr Kalanyos, Miss Szymczak, Miss Wolniak and Mr Csatari had all transferred to the now Second Respondent pursuant to the transfer of 1 August 2021.
18. However, they were not paid their bonus because they did not remain in employment at the time the bonus was paid. In that respect the Second Respondents would seek to rely upon the Clause 8 in the Contract which states that bonus payments would not be made to individuals who were not employed or who were under notice of termination at the time when the bonus would otherwise have been payable.
19. As for the remaining three individuals, number 31 – 33 in the Application before me under claim numbers: 3314575/21, 3314591/21 and 331461/21, Miss Szekely, Mrs Dajcz and Mr Piti, it is the Respondent's position that they did not transfer under the transfer that took place on 1 August 2021 due to

the fact that they resigned their employment prior to that date. In fact, I had before me details of their resignation and their resignation letters and emails, all of which indicated that they were simply moving on and expressing gratitude for having worked at Photobox Limited. On the face of it therefore, they chose not to transfer and that is perfectly within their election to choose not to do so and did not transfer to the Second Respondent.

20. Arguably, should their claims go forward then their claims would go forward against the First Respondent and maybe the Second Respondent. That might be for a Tribunal to determine in due course.
21. However, prior to arriving at that issue I have to consider the Respondents' Application to Strike Out. The Respondents ask me to consider a strike out of all 33 claims and they ask me to consider this under Rule 37 of the Employment Tribunal (Constitutions and Rules of Procedure) Regulations 2013 Schedule 1.
22. In particular, I was referred to Rule 37(1)(a). Rule 37 states as follows:

“At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds:-

  - (a) that it is scandalous or vexatious or has no reasonable prospect of success

...”
23. It is under that ground, Rule 37(1)(a) that I am being asked to strike out these claims.
24. I heard both from Miss Cernis and from Miss Churchhouse and it seems that the principal submission before me is on the basis that the claims have no reasonable prospect of success. When considering whether to strike out, it is a high bar for me to determine on the documents in front of me, that a claim has no reasonable prospect of success. My deliberations and decision have to fall into three categories because there are three categories of claim before me.
25. The first category are those Claimants numbered 1 – 26 in the Claimant list as part of the Strike Out Application before me, including the Lead Claimant Mr Sliwiniski who is in front of me today, all of whom actually received their bonus in December 2021. Mr Sliwiniski himself admits that he would have withdrawn his claim as would all of the other 25 who have received their bonus but that they continued to proceed with their claim purely on the basis of wishing to support those numbered 27 – 30 and 31 – 33 in the list in front of me of Claimants who have not received their bonus.
26. Dealing with those first, it is a relatively easy process for me to determine that having received the bonus which is the subject matter of their claim, those 26 have no further claim to pursue before this Tribunal. They have received their bonus and they have been paid. It is therefore a very easy

decision for me to make that those 26 have no reasonable prospect of succeeding in pursuing a claim for monies that they have already received.

27. Therefore their claims are all struck out under Rule 37(1)(a).
28. It is a more difficult decision for me to consider whether I should strike out those numbered 27 – 30. I heard from Mr Sliwiniski but of course I do not have any of those Claimants in front of me. I did ask those representing the Respondent here before me today to produce such evidence as they had as to why those individuals did not remain employed post transfer up to the point when they would have received their bonus in December. Miss Churchhouse having sought instructions, explained to me that all of those four individuals had decided to resign post transfer but pre-payment of the bonus in 2021 and that in no instance had they indicated that the reason for their resignations was that they had not received their bonus. Originally it was indicated to me that those resignations had been communicated verbally, but I am grateful to Miss Churchhouse for confirming that in fact there were written resignations and I accept entirely her submission that those resignations did not mention the reason for leaving as being the delayed bonus payment.
29. Even if they did, it is of course the Respondent's argument that by virtue of resigning and leaving the employment of the now Second Respondent prior to the bonus being paid in December 2021, falls fairly and squarely under Clause 8.2 of the Contract of Employment. That is, that no one should be entitled to receive any bonus payment if they are no longer employed or indeed serving out notice of termination whether given by themselves or by the company.
30. Miss Churchhouse and Miss Cernis directed me to that Clause and remind me that it is an express clause in the Contract of Employment and that in those circumstances it is very plain and well drafted and in the circumstances were I to allow these claims to proceed, there would be no reasonable prospect of them succeeding on the basis of that clause.
31. I am bound also to consider the law in this area. Over the years there has been a line of cases where the Courts have considered discretionary bonuses in contracts of employment, that is express clauses which have then been exercised by an employer to exercise a discretion either not to pay a bonus or to vary the bonus. There is a long line of cases and Miss Churchhouse referred me to the most recent of those cases. One of the key of the most recent is the case of Braganza v BP Shipping Limited & Anr [2015] ICR 449. In that case the Court approved an earlier decision of Associated Provincial Picture Houses v Wednesbury Corporation, which was a 1948 case, but it approved a test in that case which had two limbs.
32. The argument in such cases is that employers should not be entitled to exercise a discretionary bonus clause perversely or irrationally. In fact, the use of the word irrational was more readily adopted in the latter line of cases whereas capricious or perverse was more readily adopted in the earlier

cases. In the more recent cases the Courts have looked at whether any rational exercise of a discretion in a clause such as that amounts to a breach of the implied term of trust and confidence between an employer and an employee. The test, which was approved in the Braganza case, which was originally put forward in the Wednesbury case, is a two stage test and it is this.

33. The first focus is whether the correct matters have been taken into account in reaching the decision, that is the decision to exercise the discretion, and whilst the second is concerned with whether the result is so outrageous that no reasonable decision maker could have reached it.
34. In this case, what we have is an exercise of the discretion to delay the bonus. The bonus was ultimately paid to all those who remained, but also we have an exercise of the express Clause at 8.2 that those who do not remain employed or under notice at the time that the bonus is ultimately paid, cannot be entitled to it. Looking at that Clause and applying the current legal thinking pursuant to that line of cases, I have to determine what is the likelihood of numbers: 27 – 30 succeeding in an argument that by delaying the bonus payment from June to December 2021 and by informing those employees in the email dated 17 June 2021, there was an irrational exercise of that express term.
35. If that argument is a runner essentially, what the likelihood is then of a Court or Tribunal determining that the delayed payment of the bonus also amounted to an irrational exercise of the term.
36. I am really persuaded by the fact that the Respondents here really just need to rely upon Clause 8.2 which says that if you are not employed at the time the bonus is paid, then you are not entitled to it. It seems to me that that is plain on its face and that is not in essence an exercise of a discretion. Therefore, I conclude that based upon that, it is very plain that those four individuals numbered 27 – 30 on the Application before me have no reasonable prospect of succeeding in a claim for that bonus when they chose to leave at a time when they knew that in doing so they would disentitle themselves to that bonus, when they had been told that it was going to be paid in December.
37. I cannot therefore consider that their claim has any reasonable prospect of success and any prospects would, on the basis of that analysis, be witheringly small.
38. For those reasons I strike out the claims 27 – 30.
39. Moving on to the final three claims, that is those employees who resigned prior to the transfer. My reasoning and rationale must be the same. The difference only is who they would be pursuing would I allow their claims to proceed. Arguably their claims would remain against the First Respondent, albeit that there may be arguments about whether those resignations were in some way transfer related, not that there is any evidence to suggest that

they were. Either way, those claims would proceed against the First and / or now Second Respondents.

40. However, they must be struck out for precisely the same rationale that I have just applied in my analysis of claims numbered: 27 – 30. They were not employed at the time that the bonus was paid. Clause 8.2 is very plain; it is an express Clause and they are not entitled to the bonus as a result of it. It would seem to me that any argument that they were would be very, very unlikely to succeed before a Tribunal.
41. For that reason I consider that in my judgement the threshold of no reasonable prospect of success is crossed and that their claims must also be struck out.
42. In summary, therefore, all 33 remaining claims in this case are struck out.

11 May 2022

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Employment Judge K J Palmer

Sent to the parties on: 1 June 2022

For the Tribunal Office





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35. If that argument is a runner essentially, what the likelihood is then of a Court or Tribunal determining that the delayed payment of the bonus also amounted to an irrational exercise of the term.
36. I am really persuaded by the fact that the Respondents here really just need to rely upon Clause 8.2 which says that if you are not employed at the time the bonus is paid, then you are not entitled to it. It seems to me that that is plain on its face and that is not in essence an exercise of a discretion. Therefore, I conclude that based upon that, it is very plain that those four individuals numbered 27 – 30 on the Application before me have no reasonable prospect of succeeding in a claim for that bonus when they chose to leave at a time when they knew that in doing so they would disentitle themselves to that bonus, when they had been told that it was going to be paid in December.
37. I cannot therefore consider that their claim has any reasonable prospect of success and any prospects would, on the basis of that analysis, be witheringly small.
38. For those reasons I strike out the claims 27 – 30.
39. Moving on to the final three claims, that is those employees who resigned prior to the transfer. My reasoning and rationale must be the same. The difference only is who they would be pursuing would I allow their claims to proceed. Arguably their claims would remain against the First Respondent, albeit that there may be arguments about whether those resignations were in some way transfer related, not that there is any evidence to suggest that

they were. Either way, those claims would proceed against the First and / or now Second Respondents.

40. However, they must be struck out for precisely the same rationale that I have just applied in my analysis of claims numbered: 27 – 30. They were not employed at the time that the bonus was paid. Clause 8.2 is very plain; it is an express Clause and they are not entitled to the bonus as a result of it. it would seem to me that any argument that they were would be very, very unlikely to succeed before a Tribunal.
41. For that reason I consider that in my judgement the threshold of no reasonable prospect of success is crossed and that their claims must also be struck out.
42. In summary, therefore, all 33 remaining claims in this case are struck out.

11 May 2022

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Employment Judge K J Palmer

Sent to the parties on: 1 June 2022

For the Tribunal Office