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THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs M Patel

v

Structadene Limited

Heard at: London Central

On: 21 April 2017

Before: Employment Judge Glennie

Representation:

Claimant: Ms G Leadbetter, Counsel

Respondent: Mr G Baker, Counsel

JUDGMENT having been sent to the parties on 8 May 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this matter the Claimant Mrs Patel makes a complaint of unlawful deduction from wages and the Respondents oppose that complaint.
2. I heard evidence from the Claimant herself, from Ms Helen Crawford, an HR Consultant; Mr Matthew Davis, IT Manager; Mr Nick Watson, Director and the Claimant's Line Manager; and I read a witness statement from Mr Phillip Colvin, also a Director. Had it been material to take into account the contents of that I would have given it less weight than would be appropriate had Mr Colvin attended to give oral evidence, but in the event I did not have to decide upon the matters that he dealt with in relation to the hearing of the grievance appeal. There was a bundle of documents and page numbers that follow in these Reasons relate to that bundle.
3. The short background is that the Claimant began work for the Respondent on 1 February 2007 and by the time of the material events to this case she was head of commercial credit control. I will make further reference in due course to the statement of terms of her employment.

4. The Claimant suffers from a condition of work related depression and anxiety. It is not necessary for present purposes for me to make findings about how and when and why that arose.
5. I am concerned with events in 2016. In summary, I find that the material events as follows. On 7 April Ms Crawford met the Claimant to discuss a grievance. That meeting led to an email of 8 April at pages 48 – 49 in which Ms Crawford expressed concern about the Claimant's emotional state and recorded that the Claimant had said that she was taking medication for depression. Ms Crawford said that they had spoken about the need for an Occupational Health referral and said that although the Claimant had declined this, she would like to revisit that. The Claimant did not in fact visit Occupational Health at this point.
6. Then on 14 April the Claimant was signed off sick from work. This was evidenced by a fitness to work note at page 458, which simply recorded that the Claimant was not fit for work by reason of an acute stress reaction.
7. There was a further fit note on 19 May at page 459. This referred to the same diagnosis and had ticked the second of the two available boxes, which reads: "you may be fit for work taking account of the following advice". The Doctor, Dr Suarez, had then ticked altered hours and workplace adaptations and wrote "she would benefit from starting late and leaving early as travelling during rush hour causes stress, query 10am to 4pm. She feels anxiety amongst people so she would like to work in a closed office for up to 2 months". That certificate, which is dated 19 May, said that this would be applicable as from 23 May, with no end date being specified.
8. The Claimant then remained absent from work until 23 May and during this period she was paid her normal salary in full. On 25 May the Claimant raised a grievance and then on 26 May there was a meeting between the Claimant, Ms Crawford and Mr Watson. Ms Crawford expressed concern that the Claimant was still not well enough to be at work. The Claimant was due to see her GP on the following day, 27 May. She went home early on the afternoon of 26 May.
9. Then on 31 May, it seems that there was a somewhat similar situation and that again as shown by a letter of that date, Ms Crawford suggested that the Claimant should go home, saying that at that point she seemed to be suffering from flu.
10. There was then on 6 June a return to work meeting attended by the Claimant and Ms Crawford. That led to a letter at page 105 of the same date which referred to the 19 May fit note and the suggestions that were made in it. The letter recorded that there had been mutually agreed a work plan which involved the Claimant working from 10am to 4pm with an hour for lunch and being paid pro rata. Secondly, the Claimant would have access to working at a spare desk on the third floor of the Respondent's premises. This was in response to the suggestion about working in a closed office, it being believed that that would be a quiet space in which the Claimant could work. With

respect to working from home, the letter records that it was agreed that this was permissible only on an ad hoc basis with prior approval from the Line Manager, Mr Watson, and the letter concluded that it was now possible to move forward with a referral to Occupational Health.

11. There then followed some exchanges over the OH appointment which showed there was some difficulty about that. Moving to 13 June, there was a further fit note at page 460. This again was from Dr Suarez and the second box, "you may be fit etc" was ticked. The box for amended duties had been ticked and Dr Suarez wrote "in addition to her previous fit note she would benefit from spending two days a week working from home" and then recorded that this would be the case until further notice.
12. Then on 18 June, at pages 125 – 126, there was an email from the solicitors acting for the Claimant to the Directors of the Respondent. This was headed "without prejudice and subject to contract" but all disputes about that matter have been dropped in this hearing and I have simply taken this letter at face value. Its relevance is that the Respondent says that it contains assertions about the Claimant's condition, which it does. It says that the Claimant has for some time been suffering from severe work related stress and depression and is heavily medicated and says that the condition is so severe that it is considered to be a disability for the purposes of the Equality Act. It said that the medical evidence suggests the working environment had caused psychiatric injury, and there was a comment on the effects of that, and then the letter said: "this involves her suffering from emotional outbursts, panic attacks, sleep deprivation and consequently high level of exhaustion and an inability to focus amongst other matters, she is now uncomfortable with socialising and nervous amongst large crowds of people."
13. The letter also asserted that the Respondent was at risk in that "if my client's condition deteriorates further she may suffer a catastrophic breakdown and may not be able to work" and then there were observations about what the consequences of such a breakdown might be.
14. There was a further meeting on 20 June, with notes at pages 129-130. This was attended by the Claimant, Ms Crawford, Mr Watson and Mr Davis. There was reference to the 13 June fit note and to adjustments. The conversation, which is recorded in bullet points and so is not a verbatim account of everything that was said, was that Ms Crawford asked about whether the adjustments had helped and the Claimant said "working wise, fine". Ms Crawford enquired about stress and the Claimant said sleep was still an issue, headaches, panic attacks, lots going on. Ms Crawford asked whether the Claimant was still stressed and she replied "just needs to end, this is too much" and added that she had to see the doctor every two weeks, more if she had a panic attack. In answer to Ms Crawford's question as to whether the doctor was saying she was not fit for work, the Claimant replied "I am fit for work". She asserted that other people work from home and Mr Watson said "not on a regular basis". Then Ms Crawford said "we do not feel that you are fit for work", that the requests could not be accommodated, and she added "strongly disagree with the fit note".

15. Then there was further discussion about work related stress. Ms Crawford said that this was the reason why the Respondents did not feel that the Claimant was fit and that they should wait for the OH report. Mr Watson made a comment that he could not understand why the GP was saying that the Claimant was fit if she was not sleeping, to which she made the observation that she was working and not making mistakes.
16. That meeting then led to a letter the following day, 21 June, at page 141, from Ms Crawford. This referred to the adjustments that had been agreed upon on 6 June and then in the third paragraph read as follows: "Under our duty of care taking into account your feedback relating to your health, we believe we need to act in the best interests of yourself and the Company. As such we will refrain at this point from progressing with any further adjustments, two days working from home, until we are in receipt of a medical opinion via Occupational Health and/or a GP Report. To this end under the terms of our sickness policy you will remain on sick leave."
17. Thereafter, the situation about the Claimant's pay, which is the subject of the claim to the Tribunal, is that she was paid on the basis of the adjusted hours, so a reduced pro rata payment until the end of June. Then for the first half of July she was paid statutory sick pay. The Claimant went to an OH appointment on 30 June, and that led to a report of the 1 July at pages 186-187. In this report the background was set out and the condition was again referred to in terms which seem to me to be not materially different from those noted previously by the GP and indeed by the Claimant herself. The OH doctor said that in her opinion the Claimant was fit to carry out her duties with adaptations and then set out what those would be, including matters such as being informed about clear goals of her role and the workload being achievable within normal working hours.
18. The doctor expressed the opinion that the Claimant was currently fit to work her normal hours and was able to carry out the tasks of her role, but to support her in coping with her symptoms it would be beneficial if distractions at work could be avoided as far as possible. This would include such things as noise exposure, uncomfortable temperatures and involvement in office politics. The doctor said that consideration might be given to the Claimant working in an office with significantly fewer people and lower noise levels or working from home, all matters that had been canvassed before. The doctor said that there were currently work related issues impacting on the relationship between the Claimant and her team members and that until these issues had been resolved it would be helpful not to work closely with them at all times and that the Respondents might wish to consider a physically different location in the interim.
19. That report was in fact released to the Respondent on 11 July, that being the date on which the Claimant gave her consent to this being done. That led to a meeting on 14 July which gave rise to a letter of 25 July at pages 224 – 227, again from Ms Crawford. This referred to the OH report, the symptoms and trigger factors that were identified in the report, and discussed the

options pointed out, including moving to an office with significantly fewer people, lower noise levels and/or working from home. The letter said that the decision was that the Claimant would move office. There was then reference to the pay situation, to the Claimant's general approach to the matter and to the ongoing team issues that it was said needed to be resolved.

20. Those then are the facts. Section 13(1)(a) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker unless the deduction is required or authorised to be made by virtue of a statutory provision or relevant provision of the worker's contract.
21. It is agreed by the parties that this is a contractual question and I have to then consider whether I am looking at an express term of the contract or an implied term, the implied term being that identified in **Betheridge v KLM UK Limited EAT/1044/99**.
22. I turn then to the provisions that are relied on in the Claimant's contract, the Respondent relies on provisions at page 42 and page 40. Clause 3 on page 42 provides under "sickness payment" as follows: "Absence due to sickness during the probation period and from the date of resignation to the leave date will be paid in line with current SSP Regulations". Outside these periods any payment made in addition to SSP is entirely at the discretion of the Directors". I am concerned with the second sentence as this was not the probation period and there was no resignation involved here. Then at page 40 under "absence from work", the following appears "sickness is defined as an incapacity to carry out the duties and responsibilities which the employee is contractually obliged to do because of their own illness or accident."
23. I find that this is an express term that is applicable to the circumstances of this case. Although Ms Leadbetter argued that it is more common for matters of sickness to be notified by the employee to the employer rather than the other way around, I find that it is possible for that to occur in a different way and that the Respondent's argument that this is an applicable express term is correct.
24. The Respondent's case in short is that the Claimant's absence was due to sickness as defined, i.e. an incapacity to carry out the contractual duties and responsibilities. The parties agree that, whatever else, the Claimant's situation did not change over the period with which I have been concerned. That agreement in a sense disguises a profound and fundamental disagreement as to what that unchanging situation was, or more particularly how it should be understood. I have to make findings about that, but significantly what both parties are saying is that there is no reason for me to find that the Claimant's condition changed over the material period, and I find that they are right in saying that.
25. Looking at all of the following, namely the Claimant's evidence, the solicitor's letter, Ms Crawford's impression from her meetings with the Claimant, the fit notes and the OH report, I find they all convey substantially the same picture of the Claimant's health. She was suffering from a stress-related mental

health condition that produced symptoms of emotional outbursts, panic attacks, sleep deprivation with consequential exhaustion and headaches. I also noted that, putting to one side 20 June where the circumstances are disputed, the Claimant had gone home from work on 26 May and had been absent from 31 May to 6 June, an absence said to be attributable to flu.

26. I also find that as at 20 June the correct interpretation of the fit note of 13 June was that the Claimant was not then able to fulfil her contractual duties. In saying that I have in mind the provision in the contract about the Claimant's normal place of work, which is in a familiar format, and the point that in terms of working at home, the Respondent did not agree to that proposed adjustment. This, I find, means that the practical effect as at 20 June was that the medical advice was that the Claimant could not fulfil her contractual duties, as the advice included a recommendation that she should work from home 2 days per week. I find that at that point the Claimant was not capable of carrying out her contractual and so when she then became absent from work, she was absent by reason of sickness under the express term.
27. If I am wrong about the express term then I find that the position would be the same under the common law implied term as explained in **Beveridge**. The report of that case does not put the term in plain terms in a single place. The Employment Appeal Tribunal said that at common law an employee who is offering his or her services to his or her employer is entitled to be paid in that. It is clear that there is a little more to it than that because earlier the EAT said that in the instant case, the employer was presenting herself as fit for work and willing to work, which is more than simply offering services. Later the EAT said that the employee could do no more in respect of her side of the mutual contract than proffering her services against a background of a certificate of good health. Ms Leadbetter has summarised or paraphrased the implied term as one that depends on the employee being ready and willing to work, or able and willing to work, and I agree with both of those formulations of what the implied term really is. Ready or able to work includes in my judgment being fit to work and the Claimant was not, as I have found, fit to work as at the 20th June. She was not fit to carry out her duties in the manner and at the location that the Respondent required (i.e. full time at the office).
28. Having said that, I return to the point that the Claimant's condition did not in any material way change over the period with which I am concerned with. The advice about how to deal with that condition did change somewhat. The OH report of 1 July referred to working from home as an alternative to different arrangements at work rather than as a straightforward requirement as such, and it did not support the notion of reduced hours, both of those having appeared in the earlier fit notes.
29. I am satisfied that this did not reflect any improvement in the Claimant's condition, but rather a change of advice about what adjustments might reasonably be proposed. It would not be right to say that the Claimant somehow became fit for work by 1 July in some way that she had not been

before. As I have said, I am satisfied that her condition did not change materially over this period. Nor would it be right to argue backwards from the fact that the Claimant was able to return to work with adjustments to say that she was therefore fit at all times. I find the correct position to be that under the express term, the Claimant's absence was in the first instance due to sickness as defined and it only ceased to be so once a way of enabling the Claimant to return to work had been identified and agreed upon. Then, of course, she was no longer absent, she was back at work and so the notion of sickness absence fell by the wayside.

30. Alternatively, I would find with regard to the implied term that the Claimant was only ready or able to work once the same process had been carried out and ways and means had been identified and agreed upon to enable her to return to work.
31. Therefore I am satisfied that after 1 July and until the Claimant returned to work, whether viewed under the express term or the implied term, there has been no unlawful deduction, as the deductions made were authorised by a relevant provision of the contract.
32. Finally, I emphasise that I have approached the matter, as I have been asked to do, purely as a contractual question arising under Section 13 of the Employment Rights Act. I have not gone into any other matters that might be canvassed. The outcome however is that the complaint of unlawful deduction from wages fails.
33. After I had delivered these reasons, Mr Baker intimated an intention to make a costs application. It was apparent that it would not be possible to hear and conclude that application in the time available. Therefore I have noted that the application has been made and it is therefore a matter for the Respondent to consider whether to pursue that in the light of the reasons for my judgment when they are promulgated. If the Respondent does decide to pursue the application then I invite the parties to liaise over whether a hearing is required before me at some future point or whether that application can be dealt with on paper.

Employment Judge Glennie
25 August 2017