



# EMPLOYMENT TRIBUNALS

***Claimant***

***Respondent***

Mr I ROBERTS

**AND**

SECRETARY OF STATE FOR JUSTICE

**Heard at:** London Central

**On:** 26 September 2018

**Before:** Employment Judge Oliver Segal QC

**Representation**

**For the Claimant:** Did not appear

**For the Respondent:** Mr S Tibbitts, of Counsel

## JUDGMENT

The claim of breach of contract is dismissed.

## REASONS

### Introduction

1. Following preliminary hearings in this case, the outstanding issue was limited to whether, in breach of contract, the Respondent failed to pay the Claimant a Sick Excusal Payment (SLE) amounting to half pay for the six month period March to September 2016.
2. The Claimant's health has not been good for some 3 years, with cardiac and/or vascular problems being the primary issue. He was diagnosed most recently (2017) with microvascular disease. The Claimant was unfortunately not well enough to attend today.

### Evidence

3. The Tribunal had a bundle prepared by the Respondent of 162 pages and one prepared by the Claimant of 68 pages. Most of the documents were common to both; I ensured I read all of those which were only in the Claimant's bundle and all of those the Claimant referred to in his witness statement. The Claimant had provided the Tribunal with a written statement of 11 pages.
4. The Tribunal heard oral evidence on behalf of the Respondent from Mr Jason Swettenham. Although the Claimant was not present or represented, I cross-examined Mr Swettenham by reference to the Claimant's written statement and to the material documents for about 1.5 hours.

Facts

5. The Claimant had been employed as Head of Operations, responsible for the workshops in prisons across the country since April 2014. He was at the material time in his mid-50s.

6. From April 2015 his line manager was Stephen O'Connell. At that time Mr Swettenham worked for the Respondent at a similar level to the Claimant and sat near to him when in the office (as generally), though had little to do with the Claimant's day to day work. He says that during this period he was unaware that the Claimant was suffering from any stress (if indeed he was); he seemed relaxed and affable, played golf socially, though was rather overweight.

7. The Claimant says that from about mid-May 2015, Mr O'Connell was very critical of his work and effectively forced him to accept an alternative role as Capability and Capacity Lead, effectively project work. This was a much lighter workload than in the Claimant's original role and the Claimant himself later confirmed that any stress he had was not caused by workload issues.

8. With effect from July 2015 Mr O'Connell was promoted and Mr Swettenham became acting head of the Claimant's team and thus his line manager.

9. I accept Mr Swettenham's evidence (corroborated by the Claimant as to the first month or so) that he was supportive of the Claimant; but that the Claimant's work was consistently disappointing, in particular an important presentation at a national conference he made in August 2015.

10. Mr Swettenham met with the Claimant to discuss his performance in respect of this presentation in particular and expressed concern about the Claimant's

effective communication, leadership and most worryingly his understanding of the manufacturing processes needed in prison workshops. The Claimant (I assume) refers to that meeting in his statement when he says that Mr Swettenham *“totally trashed my level of work and work ethic ... I realised that his actions were unfair and realised that I was stressed and always physically tired and confused”*.

11. I note in passing at this point that the Claimant's physical tiredness and confusion are most unlikely to have been caused by any management deficiencies of Mr O'Connell over 2 months earlier and were obviously not caused by the Claimant's workload. They are much more likely to have been the result of poor underlying health issues, later diagnosed as cardiovascular.

12. The Claimant went off sick the next day (15 September 2015) and never returned to work, eventually being dismissed in May 2017.

13. The Claimant was entitled to and was paid full pay for 6 months and then half pay for 6 months. He was also entitled to apply for SLE in respect of that latter 6 month period, which, if successful, would have restored his salary to full pay for that period.

14. The relevant policy document reads: *Someone who contracts a disease or is injured or assaulted whilst on duty may qualify for [SLE] ... Eligibility for [SLE] .. a member of staff must satisfy the qualifying conditions for injury benefit under the Principal Civil Service Pension Scheme [CSPS]. To determine whether there is a qualifying injury a referral to the CSPS Medical Advisor must be undertaken. In no circumstances can an absence be determined as not [sic] qualifying without referral and support of the CSPS Medical Advisor”*.

15. The Claimant was sent a link to guidance documentation by Mr Swettenham, included in his bundle at [1-4] which is consistent with the above (albeit strictly applicable to probation not prison service staff) and I note that “work-related stress” is given as an example of a condition which might amount to a qualifying injury in that document.

16. The Claimant was assessed by the Respondent’s OH provider, OHAssist, and reports provided to Mr Swettenham dated 2 November 2015 and 5 July 2016 (the latter from a Dr Milne). Those reports record the Claimant saying he was suffering from work-related stress and detail symptoms of anxiety/low mood and *“a history of heart disease/angina .. for which he has various medications”*. The authors of the Reports do not express their own opinion on the cause of those symptoms, but suggest that the Claimant ought to recover at some point.

17. On 30 May 2016 the Claimant applied for SLE, claiming that the actions of his line management resulted in his suffering work related stress, which caused the development of heart disease.

18. After he had been off sick for some months, Mr Swettenham proposed to move to a capability hearing to discuss the Claimant’s future employment. The Claimant sought a delay to that while he applied for Ill Health Retirement (IHR), which was agreed. His application for IHR was initially rejected and the capability hearing then took place and the Claimant was dismissed. In the meantime, both in the context of his IHR application and his application for SLE, the Claimant was referred to the relevant Medical Advisor, at the time Health Assured.

19. In the context of the SLE application, this was referred to Health Assured on 12 July 2016. They saw the Claimant and provided to him a report which did not support his application. The Claimant stated that the report was flawed and did not consent to its release to the Respondent (Mr Swettenham). He tried to rectify that and obtain a more favourable report, but failed in that attempt in or by January 2017, following which Health Assured closed their file.

20. As a result, in the absence of supportive medical opinion from the relevant Advisor, Mr Swettenham could not support the SLE application and on 17 January completed the manager's section of the application form saying that *"Ian has not given consent for me to see his Health Assured Report, and with no medical guidance identifying his stress/health problems as a work related injury I am not supporting this application for [SLW]"*.

21. In the context of the IHR application Health Assured provided a report dated 20 March 2017 (which Mr Swettenham did not see) which does not explore the causes of the Claimant's condition(s), but notes that various medical reports from cardiologists, etc., suggest he suffers from coronary atheroma, coronary artery spasm and subendocardial hypoperfusion.

22. The Claimant brought a grievance that, inter alia, Mr Swettenham had not supported and/or had not properly progressed the SLE application. That part of the grievance was not upheld, nor upheld on appeal. The Claimant also complained about Health Assured, which complaint was not substantively addressed and in the end "died" (in November 2017) when a new company took over the Medical Advisor role and could not access the relevant documents.

Discussion

23. I do not consider this claim is made out, for two independent reasons.

24. First, the Claimant would need to show that the relevant period of absence (in effect permanent ill health from September 2015) was caused by pressures at work – which he accepts did not include excessive workload. There is simply no sufficient evidence to support that analysis – and much evidence which undermines it:

24.1. The Claimant's heart problems were clearly "historic".

24.2. The Claimant's underlying health does not seem to have been very good and he was overweight.

24.3. The Claimant was only managed by Mr O'Connell for a short time (2-3 months).

24.4. The Claimant enjoyed the management of Mr Swettenham for nearly all the 3 months or so that it lasted, only feeling stressed and going off work sick when significant concerns were raised about his performance in September 2015.

24.5. It is inherently most unlikely that the short periods of what the Claimant criticises as bad management would have led to significant and permanent cardiovascular conditions, such as are referred to above.

24.6. Even now there is no evidence before the tribunal, in the form of GP records or medical reports, other than the Claimant's assertions, to support the cause of his ill health being bad management.

25. Secondly, the Respondent cannot be in breach of its contractual obligations under the SLE provisions if the relevant Medical Advisor does not provide supportive medical evidence for the application. The Policy provisions I have quoted above (para 14) are clear on that point. In this case, it appears that the medical evidence from Health Assured was positively un-supportive of the application, but in any event it was the Claimant's decision not to permit his employer to obtain that evidence. In its absence the application for SLE had to fail.
26. It was thus proper, and inevitable, that Mr Swettenham should decline to support the SLE application when and as he did.
27. In the circumstances, I do not need to go on to consider the Respondent's other submission that the SLE payments were discretionary rather than a contractual entitlement.
28. I therefore dismiss this claim.

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Employment Judge Segal

Dated: 26 September 2018

Judgment and Reasons sent to the parties on:

28 September 2018

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For the Tribunal Office