EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100359/2017

Held in Glasgow on 6 December 2018

Employment Judge M Whitcombe

Mr L MacIntyre	**Claimant** **Represented by:** **Mr C Edward** **(Advocate)**
South Lanarkshire Council	**Respondent** **Represented by:** **Mr S O'Neill** **(Solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent made an unauthorised deduction from the claimant's wages contrary to section 13 of the Employment Rights Act 1996 in the gross sum of £1,931.22. The respondent is ordered to pay that sum to the claimant.

Oral reasons for the judgment were delivered in the presence of the parties on 6 December 2018. Neither party requested written reasons at the hearing, but both subsequently requested them. These written reasons have been prepared in response to those requests.

REASONS

Introduction

1. At all relevant times the claimant was (and still is) a maths teacher employed by the respondent local authority. This claim concerns alleged unlawful deductions made from his wages in respect of a period of sickness absence which ran from 25 August 2016 to 16 November 2016.

2. The main reason why this case has taken so very long to reach a hearing was the joint hope of both sides that it could be resolved internally. However, three stages of grievance procedure failed to reach an outcome acceptable to both sides so the dispute now comes before the Tribunal for a decision. It is extremely regrettable that the matter is now being resolved more than 3 years after the sickness absence giving rise to the claim.

Relevant contractual background

3. This claimant asserts that he was entitled to a payment in respect of the above sickness absence under the terms of the SNCT Handbook. It was common ground that the Handbook gave rise to individual contractual rights. No issue was taken regarding the incorporation of those terms into individual contracts of employment or their enforceability by individual employees.

4. The relevant page appears at [130] in the file of documents (internal page 3 of 7). Clauses 6.20. 6.21 and the next unnumbered paragraph must be read together.

5. Clause 6.20 provides as follows: "*Where an employee is absent due to sickness or disablement as a result of a work related injury or illness, the employee shall be entitled to a separate allowance. It will be calculated on the same basis as the sickness allowance provided for in paragraphs 6.6 and 6.7 above. This allowance and sickness allowance are entirely separate.*"

6. In practice, this means that an employee will be paid during the specified types of sickness absence without it counting against the maximum limits on contractual sick pay.

7. Clause 6.21 provides as follows: "*Normally an injury caused by an accident at work will only qualify for payment if the accident book (Form BI 510) has been completed. Where there is good reason for the entry not to have been made (by the employee or other party) the council should not refuse the allowance.*"

8. It is not suggested in this case that the claimant suffered an *accident* at work, so it was agreed at the hearing that the above paragraph has no application. I note in passing that it was nevertheless relied upon by the respondent to justify its decision at one stage of the internal grievance process.

9. However, the unnumbered paragraph which follows is of relevance: "*All other cases of injury or illness that are work related must be confirmed by both the employee's medical practitioner and the medical officer appointed by the council. For this allowance to be applied, the medical officer appointed by the council must confirm that the injury or illness is work related.*"

10. That paragraph therefore sets out the evidential preconditions in order for the allowance to become due in "all other cases of injury or illness that are work related". The claimant submits this is such a case.

11. I was not referred to any other instruments or to any other part of the SNCT Handbook. Both representatives agreed that the claimant's entitlement, if any, was defined by the express terms set out in the above paragraphs.

12. Neither side argued that those express terms were qualified by any implied terms, or that the express terms had been varied.

Issues

13. What follows reflects a preliminary discussion and agreement of the issues with the parties. The respondent's position changed during the hearing as indicated below.

14. It was agreed that, in broad terms, the sole factual issue was whether the reason for the claimant's absence was work related illness or injury. That could be sub-divided into two questions:

(i) **Was there illness or injury at all?** This was initially very firmly disputed by Mr O'Neill on behalf of the respondent. However, the only witness called by the respondent eventually took no issue with the genuineness of the claimant's illness or injury and Mr O'Neill accepted prior to closing submissions that he could not dispute that the claimant had been unwell. Despite that concession, Mr O'Neill then went on to make submissions to the effect that although the claimant suffered from "stress", stress was not an illness. I treated that as a late revival of the original dispute.

(ii) **What was the cause of the illness?** The respondent maintained that the claimant's illness was caused by a pending disciplinary matter (a failure to report driving offences and a conviction for assault) and argued that illness caused by disciplinary procedures did not trigger the relevant contractual entitlement. The respondent said that in this case, the illness was not caused by work but rather by misconduct (perhaps more properly, allegations of misconduct).

15. What I have called the "evidential preconditions" in the unnumbered paragraph were not identified as a separate issue at the outset, but it was increasingly clear by the end of the case that they should be, given the submissions made.

Evidence

16. I was provided with a joint pack of treasury tagged documents running to 135 pages (including some added during the hearing). Some pre-reading was identified before the oral evidence began. In the normal way, I only took into account documents to which I was referred by the parties in evidence or submissions.

17. I also heard oral evidence from the claimant and, on behalf of the respondent, from Ms Elaine Maxwell, a personnel advisor. Both of them gave evidence on oath and were cross-examined.

Observations on the witness evidence

18. I found the claimant to be an honest and straightforward witness. His credibility was not harmed in cross-examination and I was left with the firm impression that he was doing his best to assist to the best of his recollection.

19. I would make the same general comments about Elaine Maxwell with just one *caveat*. At some points her answers became rather evasive under pressure and she adopted such a defensive and agitated tone that I was left with the impression that on certain issues she was tailoring her evidence to suit what she understood to be the respondent's case.

20. However, that evidence was not always consistent with the case outlined by Mr O'Neill in a preliminary discussion of the issues and in cross-examination. For example, Mr O'Neill had put in issue whether the claimant was ill at all, whereas Elaine Maxwell emphasised that she did not dispute that the claimant's illness was genuine, a concession eventually adopted by Mr O'Neill prior to closing submissions. That vacillation in the respondent's case caused me some concern, given that Mr O'Neill took his instructions from Ms Maxwell.

Findings of Fact

21. Having heard the evidence and the parties' submissions I made the following findings of fact on the balance of probabilities. The claimant has the burden of proving that the amount of wages properly payable was not paid. As with all matters in the Employment Tribunal, he must prove those matters on the balance of probabilities.

22. At the relevant time, the claimant was not working in a classroom environment. Since June 2015 he had been working at headquarters in a quality improvement and development role. That temporary relocation and redeployment arose from concerns about criminal allegations which were then outstanding and also the possibility that the Scottish Ministers might "list" the claimant with the consequence that he would no longer be able to teach in the classroom. Given that possibility it was thought prudent that he should work at headquarters.

23. Those two issues, the potential listing by Scottish Ministers and the criminal allegations, had both been resolved by around May 2016 and the claimant therefore wished to return to a classroom-based role. However, he did not return to the classroom and carried on working at headquarters. The school summer holidays (which the claimant's working pattern continued to follow) then intervened and the claimant returned to work at headquarters at the start of the new school year in August 2016.

24. Both before and after the school summer holiday the claimant had little meaningful work to do and little direct contact with management. Although the respondent submitted that the claimant had produced no evidence to demonstrate a lack of work, that effectively requires him to prove a negative. The claimant is quite entitled to give oral evidence on the point and has done so. That oral evidence is not contradicted by any documentary or witness evidence adduced by the respondent. That is significant given that the respondent ought to be in a position to demonstrate what the claimant was doing in the relevant period, if he really was engaged in useful activity. No

documentary evidence of the work required of the claimant has been produced by the respondent, nor has any witness been called who might have been in a position to give first hand evidence of the claimant's workload. In those circumstances I accept the claimant's uncontradicted evidence.

25. Later in August 2016, the claimant was informed that he would face internal disciplinary proceedings. The relevant period of absence commenced shortly, but not immediately, after that. On 25th August 2016 the claimant emailed his employer saying that he felt unfit for work.

26. I accept the claimant's uncontradicted oral evidence of his medical history. The claimant has a long history of depressive illness, for which he takes medication. With that assistance he is usually able to manage the condition fairly well and his attendance at work has generally been good. However, the structure and routine provided by work is an important factor in maintaining good health, good sleep, and combatting anxiety. The lack of work in the period leading up to 25th August 2016 aggravated the claimant's anxiety and a pre-existing stomach condition. He experienced stomach cramps, sweats, palpitations, broken sleep patterns and a fear of going into work.

Applicable Law

27. I have already set out the key contractual provisions and the issues arising from them. Against that background, the law I have applied comes from section 13 of the Employment Rights Act 1996. It is not necessary to set it out in full.

28. Section 13(1) provides that: *"An employer shall not make a deduction from wages of a worker employed by him unless – (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction."*

29. In this case, it is not so much those procedural requirements which are in issue but rather, as is usually the case, section 13(3): *"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."* The search for the "amount of the wages properly payable by [the employer]" gives rise to the issues and questions set out earlier in these reasons.

30. I was not referred to any authorities except for the respondent's reliance on the first instance decision of an Employment Tribunal sitting in London East, ***Sawyer v East London NHS Foundation Trust*** (Case no. 3200021/2017, EJ Prichard, Ms Long and Mr Rowe) on claims of unfair dismissal and disability discrimination. It was not concerned with the SNCT terms or a claim for deductions from wages and I could not see that it had any bearing on the issues I had to decide.

Reasoning and conclusions

31. I will deal first of all with the respondent's argument that the claimant's illness (if any) was caused by disciplinary proceedings, or the threat of them, rather than by anything "work related". I reject that argument for two alternative reasons.

(i) First, on the evidence I have heard, the absence was work-related regardless of the notification of disciplinary proceedings.

(ii) Second, as a matter of contractual construction, illness caused by disciplinary proceedings or the notification of them is properly regarded as "work related" for the purposes of the terms derived from paragraphs 6.20 and 6.21 of the SNCT Handbook.

32. While I accept that some additional stress must have been caused by the news that the claimant would face internal disciplinary proceedings, I regard

that as something likely to have aggravated pre-existing difficulties which were on any view work related. I have already set out my findings in relation to the aggravation of symptoms of pre-existing depression and anxiety caused by a persistent lack of work. I have no hesitation in finding that those aggravated symptoms persisted for that reason at the date the claimant went off sick and during the subsequent period of sickness absence. It is to that extent a work-related absence because it derives from events in the workplace. More specifically, it relates to a lack of meaningful work.

33. If the threat of disciplinary proceedings had been the only issue then I find on the balance of probabilities that the claimant would not have gone off sick at all. That is borne out by the fact that the claimant had carried on working when faced with a comparably serious and stressful threat of regulatory proceedings. There were mixed causes for his absence: pre-existing depression and anxiety, aggravation of those conditions by a persistent lack of work in the period immediately preceding the absence, and a further aggravation by the additional stress of internal disciplinary proceedings.

34. I accept the respondent's submission that stress is not itself an illness, but rather a state of affairs. However, it is beyond dispute that exposure to stress may be a *cause* of illness, or a *cause* of aggravation of pre-existing illness. While the terminology may be loose, it is common to find references to "stress", "workplace stress" or similar phrases as recorded reasons for sickness absence. The meaning of the phrase is nevertheless tolerably clear.

35. I am quite satisfied on the balance of probabilities that the claimant was ill. Even if Mr O'Neill's concession on that issue is treated as withdrawn by the terms of his closing submissions, there are three sources of evidential support for my finding.

(i) I note that the respondent recorded the claimant's absence type as "sickness" and for that reason paid him sick pay. I would have some difficulty accepting in those circumstances that the claimant was not in fact ill. Ms Maxwell objected very strongly to my question whether the

respondent would allow someone to receive or retain sick pay who it believed was not really ill.

(ii) The claimant's uncontradicted oral evidence.

(iii) The medical evidence, to which I turn next.

36. I will start with the fit notes [34-39]. I reject the suggestion made in Ms Maxwell's evidence that some GPs might certify a reason for absence which was not necessarily an illness. A conscientious GP can be taken to know the purpose and effect of a fit note - it is concerned with fitness for work, or the lack of it. While it is true that the loose phrase 'work related stress' is used, it must be read fairly and in context, having regard to the terms of the form. A cross is clearly entered in the box indicating "you are not fit for work". Adopting the language of the form that was "because of the following conditions: Work Related Stress". A GP would simply have no business offering a gratuitous opinion on a reason for absence if it was not a *medical* reason for absence, in other words a reason related to illness. I am therefore quite satisfied that the reference to "work related stress" refers to a work-related illness.

37. I turn now to the occupational health evidence.

38. The respondent submits that occupational health did not give the necessary information to trigger an entitlement to the relevant allowance, in that occupational health did not say there was a work-related illness. I reject that submission for the reasons set out below, but it should be noted in passing that the respondent failed to make any referral to occupational health asking that specific question. That is clear from the terms of the only referral made, dated 6th September 2016 [unnumbered additional bundle pages]. That is a significant failure of HR processes given the claimant's lengthy pursuit of an entitlement which the respondent now says (correctly in my judgment) was conditional on a supportive occupational health opinion. The respondent is effectively relying on its own failure to make an appropriate referral.

39. That said, I find that it is possible to discern from the existing occupational health evidence from Dr Herbert dated 16th September 2016 [41-43] that the

reason for absence was a work-related illness, even if the expert had not been asked that specific question.

40. There are really two key parts, section 1A and section 4 but I will start with section 4. The question posed in the referral and repeated in bold in the proforma report form is this: "*Is there an underlying health condition that may be contributing to the employee's absences and is this likely to continue?*" The spotlight was therefore on the question whether there was an underlying health condition. It might have been better if an option from the [yes]/[no] alternative tick boxes had actually been selected but the meaning of the words which follow is clear enough. Dr Herbert says that "*there is the stress associated with work related circumstances and this is the cause of his absence*". While the respondent might observe that stress is not itself an illness, it must be remembered that this answer is in response to a question about underlying *health* conditions. Further, it goes on to say that the condition is work-related. Box 1A confirms fitness to work in general, but also refers to a specific "focus difficulty" when working at HQ where the claimant felt side-lined, unrecognised and not given significant work. That aligns closely with the claimant's oral evidence at this hearing.

41. For those reasons, I find that the medical evidence supports a finding on the balance of probabilities that the claimant's absence was caused by work related illness, and that this was confirmed both by his GP and by occupational health such that the entitlement to the disputed payment was triggered.

42. Even if, as the respondent submitted, the claimant's illness had been wholly caused by the prospect of disciplinary proceedings, then I would have found that the situation fell within the definition of "work-related illness" regardless. Workplace discipline is necessarily work-related, and an illness resulting from it is accordingly a work-related illness. The employer's power to discipline and the employee's liability to disciplinary processes and sanctions each derive from the employment relationship, from workplace rules, policies and procedures and sometimes also from contractual terms. Discipline is

accordingly an aspect of work. No specific exception for illnesses caused by disciplinary proceedings is carved out from the scope of clause 6.20, and on the ordinary meaning of those words I find that they cover a situation in which someone is absent as a result of an illness wholly caused by disciplinary processes or the threat of them. That would also be work-related. However, I emphasise that in this case the claimant's illness was not wholly caused by disciplinary processes anyway, it had mixed causes including other work-related ones.

43. In conclusion, I find that the claimant was contractually entitled to the "separate allowance" described in paragraph 6.20 of the SNCT Handbook. It was properly payable for the purposes of section 13(3) ERA 1996. My finding is that the respondent made an unlawful deduction from wages in the agreed gross sum of £1,931.22 and is ordered to pay that sum to the claimant.

Employment Judge: Mark Whitcombe
Date of Judgment: 08 January 2019
Entered in register: 08 January 2019
and copied to parties