EMPLOYMENT TRIBUNALS

Claimant: **Mr D Glowgowski**
Respondent: **ASDA Stores Limited**

Heard at: **Ashford** **on:** **23 January 2019**

Before: **EMPLOYMENT JUDGE CORRIGAN**
Sitting Alone

Representation
Claimant: In Person
Respondent: Mr A Johnston, Counsel

REASONS FOR THE TRIBUNAL'S JUDGMENT

Sent to the parties on 23 February 2019 and provided at the Respondent's request

Claim and issues

1. The Claimant brought a complaint of unlawful deduction of wages for the period from 26 May 2018 to 1 September 2018, a period when the Claimant was not paid contractual sick pay. The relevant period and sum were agreed.
2. The sole issue between the parties was whether the Claimant was contractually entitled to sick pay during that period.

Hearing

3. I heard evidence from the Claimant on his own behalf and evidence from Mr Darren Coker, General Manager and Mr Jon Dennis, General Manager on behalf of the Respondent.
4. There was an agreed bundle of 227 pages. The parties made oral submissions.

Facts and Conclusions

5. The Claimant has worked for the Respondent since 11 June 2012 and remains in the Respondent's employment.

6. The absence and sickness policy which applied to the Claimant is at page 49 of the bundle. The purpose of the policy is to provide those who are genuinely sick with support but where an employee is found to have abused that trust or the benefits in the scheme then the Respondent will take the reasonable steps outlined in the policy to manage the situation.

7. The starting point is that employees with three years' service are entitled to 26 weeks' of sick pay (page 54).

8. There is a section on withholding sick pay (page 55). It states that managers must not withhold sick pay except in the circumstances listed on page 55 of the bundle. One such circumstance is where there is "reasonable belief of abuse of the Company Sick Pay Scheme". The policy goes on to say (page 56) that the Respondent also reserves the right to withhold sick pay if there is genuine belief that the employee was not sick and that employees suspected of claiming sick pay fraudulently may be subject to gross misconduct and dealt with under the disciplinary policy. It also states that a decision to withhold sick pay would only be in exceptional circumstances (page 56). "Abuse of the policy" is therefore wider than fraudulently claiming sick pay, but the policy is not clear on whether this is so wide that it covers genuine injury related to lifestyle choices.

9. At the very end of the policy at page 61 there is a separate section entitled "Other Types of Sickness Absence". These are listed as pre-planned operations, cosmetic surgery and sporting injuries. In respect of cosmetic surgery it states expressly that where surgery is elective and based on lifestyle choice sick pay may be withheld, but where the absence is extended because there are subsequent complications it is recognized it may be appropriate to pay sick pay.

10. Under the heading sporting injuries the policy states:

    "As part of Healthy Living, we encourage…. [employees] to lead a healthy lifestyle and also provide the opportunity to take part in sporting events through some of our….events. Where a sickness absence is related to a sporting event this should be managed on a case by case basis taking into account the colleague's overall sickness absence history".

11. The policy does not state that sick pay should be withheld if a sickness absence relates to a "sporting event" though I accept that as a result of joint training for Respondent's management and GMB that is their shared understanding of what was intended by this part of the policy. The Claimant and his union representative were not contesting that in principle in the Claimant's appeal meeting (page 107, for example). I accept therefore it is within the policy to withhold sick pay for absences "related to a sporting event".

12. From the evidence before me there is not a shared understanding between

Management and the union of whether this amounts to "abuse of the policy" or what counts as a "sporting event". Mr Dennis accepted in the Claimant's appeal process that "sporting event" is open to interpretation (p115). The Respondent managers proceeded on the basis sporting injuries could be considered abuse of the policy and that an event can be any occasion. The Claimant's union representative argued in the appeal that the "policy refers to sporting injuries only if an individual participates in a sporting event and the meaning of event is either a public occasion or social occasion arrange [sic] for purpose of competition." He distinguished this from going to gym as part of healthy living and referred to the fact there was a gym provided on site. The union representative's comments also do not support the interpretation that links genuine injury related to sporting events to abuse of the policy. Indeed he emphasized the policy is intended to "look after the genuine".

13. The Claimant works out regularly at the gym and has participated in body building competitions in the past. He had participated in the season before (page 84). The season runs from May to October. In the appeal meeting he said it was normal for him to lift 100kg in weight.

14. On 14 May 2018 he tore a muscle whilst weight lifting at the gym. It was described by Occupational Health as a "sporting injury whilst bench pressing" (Occupational Health report, page 99). Page 86 gives the Claimant's account of what had happened and said he had been lifting 170kg. This was the reason for the relevant absence.

15. Mr Coker authorised withholding sick pay until the Occupational Health review for reason of "reasonable belief of abuse" of the sick pay scheme. The reason initially given was that it was a sporting injury after he had also had 8 weeks off for an ingrown toenail (pages 69-70) for which sick pay had been paid. After the Occupational Health report he confirmed his decision to withhold pay by letter dated 19 June 2018 (p100). He referred to the sporting injury extract cited at paragraph 10 above and said it was due to the Claimant's previous absence history and length of time off for the ingrown toenail which also could have been due to excess weight lifting. The Claimant appealed. This was dealt with by Mr Dennis. The appeal outcome is dated 23 July 2018 (pp114-116) and upheld the decision to withhold pay on the basis that although the gym was part of the Claimant's routine it could be interpreted as an event and he willingly put his body under severe pressure that could, and did, result in his being absent from work. His recent overall absence had also been poor.

16. The Respondents' witnesses expanded on their view in evidence. Their view was that the Claimant's gym routine was an excessive body building training regime. Mr Coker had looked at the Claimant's Instagram account (pages 83-91) of the bundle (which include the reference to 170kg) and took the view he competes in body building events and that his injury was related to preparing for a sporting event. The Claimant denied that he was preparing for any particular event. He said in the appeal he did not plan to do any more competitions.

17. Mr Coker saw it as an abuse of the sick pay policy as the Claimant had created his own injury. The Respondent relied on both reasonable belief of abuse of the sick pay scheme and the cause being a sporting injury to withhold sick pay.

18. As said above the policy does not state that sick pay can be withheld when absence is due to an injury related to a sporting event, though I accept that it is the understanding of both management and the union that this is the intention. The policy is not clear as to whether any sporting injury justifies withholding sick pay or just those related to taking part in a sporting event, namely a competitive or social event, as the Claimant's union representative submitted. It is the Respondent's policy and the Respondent that seeks to rely upon it. In my view, in the absence of an agreed view with the union, it should therefore be given the more restrictive interpretation that pay can be withheld by absences related to "sporting events" in the sense of particular competitive/social events and not the wider interpretation of any kind of fitness activity or going to the gym.

19. The Claimant's injury was related to lifting excessive weight as part of a body building lifestyle. Even if this was in preparation for the body building season, which is disputed, I find it too remote to be said it was related to a sporting event. The Claimant's training routine is part of his lifestyle as a body builder, and not a particular event. It might be different if he had been injured during an actual body building event.

20. The policy is clear that absences due to elective cosmetic surgery can be excluded from sick pay (though not necessarily if it then leads to genuine complications). If the Respondent intended to exclude from sick pay genuine absences related to lifestyle choices then the policy should have been explicit about this, as it is for elective cosmetic surgery. In the absence of that clarity I do not find the Claimant's situation falls into one of the exceptions for paying sick pay, and he is contractually entitled to that pay.

21. For the avoidance of doubt there were other issues between the parties relating to other absences but these were not relevant to my decision and I have not taken them into account. They relate to a decision on 5 September 2018 which post-dated this claim.

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Employment Judge Corrigan
10 July 2019