EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs K Kaur	**v**	Travelodge Hotels Ltd

Heard at: Reading **On:** 15 July 2019

Before: Employment Judge Milner-Moore

Appearances
For the Claimant: In person
For the Respondent: Ms N Evans (Employee Relations Manager)

JUDGMENT

1. The claim for breach of contract fails and is dismissed.

REASONS

1. I received two bundles of documents – one from the Claimant with a covering note and one from the Respondent. The Claimant gave evidence but had not produced a witness statement and so she affirmed the matters set out in the note accompanying the bundle and in her ET1 and confirmed that the information contained in these documents was true to the best of her knowledge and belief. It became apparent that the Claimant had not provided a copy of her bundle to the Respondent and so the hearing was adjourned for a brief period during which the Respondent had an opportunity to look through the Claimant's bundle and to request copies of any additional documents and to have a copy of the note that the Claimant had produced to accompany the bundle.

2. It was common ground between the parties that the Respondent had, in December 2018, made a deduction from the Claimant's pay in the sum of £760.67 which represented the sum of £880.20 (the company sick pay due for the period of absence at issue) less a payment of £73.64 for statutory sick pay for the same period. It was therefore necessary to determine whether the Respondent was entitled to make a deduction from pay in all the circumstances.

3. Having considered the documentary and oral evidence, I made the following factual findings.

4. The Claimant was employed by the Respondent as a manager at the Feltham Travelodge. In 2018, she booked to take annual leave for a three week period from 15 October to 7 November 2018 and travelled to India to visit family. The Claimant has been employed by the Respondent since July 2012 and, on starting employment, signed a contract which set out the entitlement to sick pay in the following terms:

*"**xxxxxx**You will receive Company Sick Pay provided that:*

a. You followed the procedure defined in Clause 13 above. [This is an error – it should be a reference to Clause 17, which sets out the provisions relating to reporting sickness absence.]

b. The Company is satisfied that your absence is due to sickness or injury.

c. You have completed the requisite length of service with the Company.

18.6 The Company will withhold Company Sick Pay or SSP if the Company believes there has been abuse, misrepresentation or fraud."

5. In or around December 2018, the Claimant was sent a further contract which dealt with sickness absence in the following way:

"If you are unfit for work, you must follow our sickness absence policy available from your manager or the HR department. Subject to satisfying relevant requirements you will be paid SSP. Entitlement to Company Sick Pay starts after six months' service. Further, subject to satisfying the requirements of our sickness absence policy, you will be entitled in any rolling period of 12 months to four weeks' Company Sick Pay for service between six months and two years. Eight weeks' sick pay for service between two and four years and 12 weeks' sick pay for service over four years. Such payments will include any SSP payment."

6. Both contracts dealt with the question of recovery of overpayments in the same way. The relevant provision reads:

"The Company reserves the right to recoup any overpayment made to you, or to meet the cost of settling any outstanding debts to the Company for which you are personally liable (including revenue owed to the Company and retained by you), by appropriate means including deductions from pay."

7. The company sickness and absence policy requires employees to report sickness absence to their line manager by telephone, to provide fit notes where absence is likely to exceed seven calendar days, and states in relation to company sick pay:
"If an employee fails to provide proper notification of absence or medical certificates where required, they may not be paid Company Sick Pay or

statutory sick pay. Furthermore, if there are reasonable grounds to doubt the reason provided for this absence, this may also result in non-payment."

8. On 7 November 2018, the Claimant emailed her line manager, Darren Hunter, to inform him that she was unable to attend work on 8 November 2018 and attaching an undated doctor's letter from a medical practitioner in Jalandhar city which states that she was suffering at the relevant time from sciatica pain and was advised bed rest and medication for the period 8 – 16 November. It was a breach of the Respondent's policy to have notified her sickness absence by sending an email rather than by telephoning but the Claimant had said that she had access to the internet but no ability to make a telephone call. Emails from the Respondent advised her that she needed to call in and so she made attempts to call by telephone to speak to her line manager.

9. The Claimant returned to work on or around 17 or 18 November and made enquiries as to whether or not she would be paid her company sick pay for the period of absence. She was told that she needed to supply a dated sick note and asked to supply evidence as to her flight details. The Claimant supplied a dated sick note on 10 December 2018. However, she proved unable to provide the Respondent with evidence as to her flight details. On 3 December 2018, the Respondent's employee relations department wrote to her stating:

"Unless you are able to provide us with more information in respect of your changed flights, we can only assume that the flight details were not changed and as such we will not pay for this absence."

10. On 11 December 2018, Darren Hunter wrote to her stating:

"I still do also require your flight ticket to confirm your original flight was booked to return on the day that you had originally booked off work. If you have been able to gain a new/duplicate sick note from India, I am confident you will be able to get hold of your flight provider or ticket agent and be able to confirm your original flight detail also."

11. The Claimant protested at being required to provide flight information and on 12 December 2018, the employee relations support team wrote to her again to say:

"I understand that you have not retained the flight tickets, which we understand, but you were due to be back at work and as you were unwell, your holiday had to be extended. On that basis, you would have needed to change your flight dates. We just need confirmation of this from your travel provider. I understand that this may require you to make a phone call to them to obtain this but all details will be held on the file and should therefore be a relatively straightforward process. Our policy does not request flight information but we are entitled to request additional evidence for company sick pay to be paid. You will still receive sick pay for that period. The

difference between SMP and CMP will be paid upon received of the relevant information."

12. In fact, the Claimant had already been paid in full for the period of sickness absence in her November pay. However, as the Claimant failed to provide any satisfactory information regarding her flight details, the Respondent subsequently decided to deduct the balance of company sick pay in relation to the period from her December pay. In her written evidence to the Tribunal, the Claimant said that she had only first been asked for flight details a week after her return and that by this point she had thrown them away and she had tried to get copies of her tickets but the company in question had gone into liquidation and so she had been unable to produce it. In oral evidence, the Claimant confirmed that the reference to a company in liquidation was a reference to Jet Airways. The Claimant gave the following evidence regarding her travel arrangements.

13. She had originally booked to travel to and from India with Qatar Airways and she had done this via a travel agent. She had had an e-ticket setting out dates of travel. When she had become unwell, she had had to book a further ticket to return with Jet Airways but had not retained the ticket and had been unable to obtain any further copy of it. In evidence, the Claimant said that she had shown Darren Hunter the outbound e-ticket but that he had said that he was not interested in this. When asked why she had been able to produce the e-ticket for the outbound journey but not for the planned return journey, she said that in fact the e-ticket had covered both journeys and she had shown him both tickets. That was surprising as it appeared to be contradicted by the email from Darren Hunter dated 11 December 2018 which states:

"I still do also require your flight ticket to confirm your original flight was booked to return on the date you had originally booked off from work. If you have bene able to gain a new/duplicate sick note from India, I am confident you will be able to get hold of your flight provider or ticket agent and be able to confirm your original flight detail also. This was my original request in our return to work in order to sit alongside your sick note."

14. Had the Claimant shown Darren Hunter her e-tickets, then one would have expected her to have made reference to this in the emails that she sent subsequently to the employee relations support team protesting at the proposal that a deduction should be made from her pay.

15. I adjourned the hearing for a brief time today to enable the Claimant to look through her phone to see whether she could find the e-ticket but she was unable to do so saying that it had been a screenshot and she had too many photos on her phone.

THE LAW

16. **Section 13 of the Employment Rights Act 1996 provides**:

1. *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.

17. **Section 14 – Excepted deductions**:

    1. *Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –*

       (a) An overpayment of wages, or …

CONCLUSIONS

18. I have concluded that the Claimant's claim to be paid company sick pay in relation to her period of absence in November 2018 fails for the following reasons.

19. Under both versions of the contract and under the sickness absence policy, the Respondent was entitled to withhold company sick pay in circumstances where it was not satisfied that the evidence showed that absence was genuinely attributable to sickness. I consider that in all circumstances the Respondent did have reasonable grounds to be concerned as to the genuineness of the Claimant's absence. Although the Claimant had supplied a medical certificate, it is not unheard of for individuals to seek to extend their holiday by a period of sickness absence by obtaining a medical certificate. It was not therefore inherently unreasonable for the Respondent to request evidence that the Claimant had in fact intended to return on 7 November 2018 and that she could produce evidence showing that the flights that she had booked showed her intent to return on the 7th. The Respondent requested that evidence shortly after her return. The Claimant has been unable to supply any evidence as to the return date which she had originally fixed when booking flight with Qatar Airlines. She has been able to advance no good explanation for that failure. Although the Claimant has said today that she did in fact show her e-tickets to Darren Hunter, that seems unlikely given the terms of his emails to her and given her failure to produce the original e-ticket in evidence either then or now. Instead, the Claimant has belatedly relied on the insolvency of Jet Airways as an explanation for not being able to produce a ticket but that does not in any way explain her inability to produce evidence as to the travel arrangements that she had arranged with Qatar Airlines either from the airline itself, or by retrieving the e-ticket or by contacting the travel agent that she made the booking arrangements through.

20. In the circumstances, I conclude that the Respondent did have reasonable grounds to be suspicious as to the Claimant's ill health and to conclude that the Claimant should not receive company sick pay in relation to that period of absence. The Respondent having given the Claimant the benefit of the doubt and made the CSP payment in her November pay was entitled to regard this as an overpayment and to rely on its contractual power to recover overpayments and to make a deduction in the December pay.

21. The Claimant has suggested that she had no need to fabricate sickness absence in order to extend her holiday because she had a further week's annual leave available to her but it is apparent from the Respondent's leave policy that the Respondent's expectation is that staff will usually take no more than two weeks, and that three weeks' leave (which is what the Claimant had been granted on this occasion) was the maximum. The Claimant would not therefore have had any reasonable expectation of being able to take four weeks' leave.

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Employment Judge Milner-Moore

Date: **12 August 2019**

Judgment and Reasons

Sent to the parties on: 22nd August 2019

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For the Tribunal Office

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