

REASONS

1. By a claim form presented on 1 March 2019 the Claimant brought a complaint of unauthorised deduction from wages on the basis of a failure to pay her Company Sick Pay (“CSP”). The Respondent resists this complaint.

The Issues and the Law

2. The right not to suffer unauthorised deductions is set out in section 13 of the Employment Rights Act 1996 (“ERA”), which, so far as material, 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

...

(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 workers’ wages on that occasion.”

3. The following facts are agreed:

3.1 The Respondent’s Attendance Policy gives rise to a contractual right to CSP for all eligible employees.

3.2 The Claimant took sick leave from 2 October – 24 December 2018.

3.3 The Respondent withheld CSP for this period.

4. The Claimant says that in consequence of the foregoing the Respondent made a series of unauthorised deductions on 26 October 2018, 23 November 2018, 21 December 2018 and 18 January 2019 in the total gross amount of £3,263.04.

5. The Respondent says that it exercised its discretion to withhold CSP under the Attendance Policy lawfully so that these payments were not properly payable to the Claimant.

6. Mr Kohanzad invited me to apply the test approved in **Clark v Nomura International Plc [2000] IRLR 766** to the effect that I could only uphold the Claimant’s complaint if I found that the exercise of the Respondent’s discretion to withhold CSP was irrational or perverse. I am not persuaded that this is the correct approach to take. The facts of the present case are distinguishable from those in **Clark** in which the employer had unfettered discretion to award a discretionary bonus scheme that was dependent on

individual performance. In the present case, there was a contractual right to CSP and the Respondent had a fettered discretion to withhold this payment.

7. The correct approach is to establish the following:
 - 7.1 Was the Claimant eligible for CSP?
 - 7.2 If so, did any of the circumstances entitling the Respondent to consider withholding CSP apply?
 - 7.3 If so, did the Respondent act reasonably when it exercised its discretion to withhold CSP?

The Facts

8. Having heard evidence from the Claimant and from Parviz Ozary, Customer Trading Manager, for the Respondent, having reviewed the pages in the bundle I was taken to, and having considered the closing submissions from both parties, I make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.
9. The Respondent is a grocery and retail business operating a chain of supermarkets across the UK.
10. The Claimant has been employed by the Respondent since 6 August 2007 as a Retail Assistant. She is based at the Cromwell Road store in Kensington, London. She is line managed by Mr Ozary.
11. Following a customer complaint made against the Claimant she attended an investigation meeting with Mr Ozary on 1 September 2018. A decision was taken to apply the disciplinary process and the Claimant attended a disciplinary meeting on 15 September 2018, with Misbah Hoque, Operations Manager. This meeting was adjourned as further investigation was required. A date for a follow-up meeting was not agreed at this stage.
12. On 1 October 2018, Mr Hoque approached the Claimant when she was operating a till on the shopfloor and handed her a witness statement relating to his investigation. He asked the Claimant to come upstairs where HR was situated. Mr Hoque told her that Sanjida Mishu, Customer Trading Manager, would also be in attendance. The Claimant went upstairs and before going to see her managers took a photocopy of this statement in the general office. Ms Mishu came to find where the Claimant was and there followed a heated discussion between them that was interrupted by Mr Hoque. He then told the Claimant to return to the shopfloor with the intention that there would be a further discussion when tempers had calmed and Ms Mishu had left work for the day.
13. The Respondent says that it had intended to conduct a reconvened disciplinary meeting on 1 October 2018. This was not the Claimant's understanding and the Respondent did not write to her to invite her to such a meeting. It is notable that the Respondent's Disciplinary & Appeals Policy provides that "You will be given at least 24 hours' notice of the meeting and

this will be confirmed in a letter with the date, time, location, allegation or situation". Mr Ozary said that written notice was not required in circumstances where a disciplinary meeting was being reconvened, however, the Respondent conceded that there was no provision for this in the policy. I find that the Respondent did not clearly convey to the Claimant that the disciplinary meeting was being reconvened on 1 October 2018.

14. Later that evening Mr Hoque found the Claimant on the shopfloor and handed her a sealed envelope on his way out of the store. He told her to read this at home. Before leaving work the Claimant spoke to a colleague and intimated that she might not be at work the following day. She told the Tribunal that she was feeling "very bad". She did not open Mr Hoque's letter until she returned home later that evening at some time around midnight. This letter made no reference to an attempt to reconvene the disciplinary hearing earlier that day. It said that the reconvened hearing would take place on 15 September 2018. This was self-evidently an error. The Claimant read this and assumed that the correct date was 15 October 2018. She looked at her diary saw that it fell on Friday and knew that she would be available to attend. Feeling unwell she took some sleeping medication.
15. At around 3am the next morning, she called the sickness reporting line to say that she was unwell and would not be at work. She spoke to the night manager.
16. The Respondent accepts that the Claimant continued to report her sickness in this way throughout the period of her sickness absence, although it takes issue with the times when she called, as will be seen.
17. The Claimant continued to take this medication and it is reasonably likely that it affected the quality and pattern of her sleep.
18. Later that morning Mr Ozary saw that the Claimant had called the sickness reporting line via a WhatsApp group. He made three unsuccessful attempts to call the Claimant that day. He says that his calls went straight to answer message and he assumed that the Claimant had turned her phone off. The Claimant says that she left her phone switched on in her kitchen following her call at 3am but she was unable to recollect whether she had switched off her phone later that day. I find that it is likely that she switched off her phone.
19. Mr Ozary says that because the Claimant called the reporting line in the early hours he was concerned that she was avoiding him as her line manager in breach of the Attendance Policy. It was not clear to me when Mr Ozary formed this view.
20. The Respondent's Attendance Policy provides that staff will be eligible for CSP if they do the following:
 - a. Follow the correct absence reporting procedures
 - b. Maintain regular / agreed contact with their manager
 - c. Provide fit notes (if applicable) to cover their sickness period in a timely manner

This policy also sets out the following four circumstances “where we may decide not to pay CSP”:

- a. Failure to follow the three steps above
- b. If the absence is immediately after a request to attend a meeting (e.g. investigation, disciplinary, absence)
- c. A failure to attend a scheduled Occupational Health appointment without good reason or without giving the required notice
- d. An unreasonable refusal of an offer of suitable alternative duties or workplace adjustments

As the policy makes clear, none of these circumstances are an automatic bar to CSP so that any decision to withhold CSP on any of these grounds will be discretionary. No doubt for related reasons the policy also provides that “In all cases your manager will advise you if the decision is made not to pay sick pay and they will explain why. This will also be confirmed in writing”.

21. Mr Ozary wrote to the Claimant on 3 October 2018 when he recited the three conditions for eligibility for CSP and he wrote “I am writing to inform you that in line with our Attendance policy your CSP has been withheld between 2/10/18 and 9/10/18”. He accepts that in breach of the Attendance Policy he failed to confirm the reasons for this decision.

22. The Claimant says that her focus in reading and therefore understanding this letter was the action she was required to take to safeguard her entitlement to CSP. She says that she did not pick up the fact that Mr Ozary had decided to withhold CSP. I accepted that this was the Claimant’s genuine belief, not least because of the absence of any written reasons for this decision. I find that if she had believed otherwise and understood that Mr Ozary had already made this decision she would have made representations to challenge this decision. No such representations were made by her at this stage.

23. I was taken to a “Withholding of Company Sick Pay Form” also dated 3 October 2018 in which Mr Ozary provided the following justification for his decision:

“Genute is currently under investigation for a conduct, which caused a lot of tensions and aggravation on her behalf. The disciplinary meeting is booked for today, 03/10. On Monday 1st of October, while working, Genute told Craig Kennedy that she is not coming and will call in sick.”

This appears to have been an internal document and it is accepted this this document was not disclosed to the Claimant prior to these proceedings. She was therefore never given the reasons for this decision in writing, at the material time, in breach of the Attendance Policy. This document noted that CSP would be withheld from 2 – 9 October 2018.

24. The Claimant vested her GP on 8 October 2018 but was unable to secure an immediate appointment. Later that day she received a call from the practice confirming an appointment on 23 October 2018. She then called the store and spoke with Mr Ozary. She says that this was a brief call when she had difficulties hearing and the line was not clear. She says that her only concern was to report her delay in obtaining a fit note. This was

because she was concerned that this delay could impact on her eligibility for CSP. She also told Mr Ozary that she was feeling stressed. Mr Ozary says that he told the Claimant that he did not dispute her sickness and he would agree to pay her CSP but only if she agreed to attend a 1-hour disciplinary hearing. He says that the Claimant refused to do this as she believed that management were trying to “get rid” of her. The Claimant denies this and says that there was no discussion about a disciplinary hearing or about CSP during this call.

25. Mr Ozary says that because of the Claimant’s refusal to take part in a disciplinary hearing he decided to continue to withhold CSP. He did not write to Claimant to confirm this decision or the reasons for the same. This was in breach of the Attendance Policy. I was not taken to any other Withholding of Company Sick Pay Form completed in respect of any period after 9 October 2018.
26. On a date between 8 and 15 October 2018 the Claimant called the sickness reporting line and then asked to speak to Mr Ozary. She was told that he was on leave. It is clear that by this date the Claimant understood that the disciplinary hearing was being reconvened and that she been mistaken in her assumption that this meeting would take place on 15 October 2018. She says she waited to receive a letter confirming the date of the reconvened disciplinary hearing. It is accepted that none came.
27. The Claimant saw her GP on 23 October 2018 and again on 26 October 2018, 2 and 20 November 2018, and on each of these occasions she was signed off from work because of anxiousness, with the last of these fit notes expiring on 24 December 2018.
28. Mr Ozary wrote to the Claimant on 14 December 2018 to invite her to attend a sickness absence review meeting. She attended this meeting on 19 December 2018 when Mr Ozary told her that the disciplinary process was being closed. It was agreed that she would return to work when her current fit note expired.
29. In an email the Claimant sent on the same date to the Respondent she wrote “the mobile phone constantly makes very loud noises and vibrations, and also changes colours all the time, including during the night time. That makes me extremely annoyed, irritated and nervous...” she noted that because of this she had switched her phone off and she reminded the Respondent that it could contact her by email at any time.

Conclusions

Was the Claimant eligible for CSP?

30. To be eligible for CSP the Claimant was required to do the following:
 - a. Follow the correct absence reporting procedure
 - b. Maintain regular / agreed contact with her manager
 - c. Provide fit notes (if applicable) to cover her sickness period in a timely manner

31. The Respondent accepts that the Claimant complied with the first and third of these conditions. I find that she also met the second condition. She contacted Mr Ozary on 8 October 2018 and she attempted to contact him again between this date and 15 October 2018, and she responded to the invitation to attend the sickness absence review meeting on 19 December 2018. There were no other dates when it was agreed that she would be required to contact Mr Ozary.

32. I therefore find that the Claimant was eligible to receive CSP.

If so, did any of the circumstances entitling the Respondent to consider withholding CSP apply?

33. The Respondent relies on two grounds to justify its decision to withhold CSP.

33.1 The Claimant failed to follow the three steps above at paragraph 30.

33.2 The Claimant's absence was immediately after a request to attend a disciplinary meeting.

34. Dealing with its second ground first, which is that the Claimant failed to follow the three steps above, given my findings above this is not made out. The Claimant did not fail to comply with these steps and she was therefore eligible to receive CSP.

35. Dealing with the first ground, I do not find that the Claimant was absent immediately after a request to attend a disciplinary meeting for the following reasons:

35.1 In Mr Ozary's view, the Claimant was absent immediately after she had received a request to attend a meeting on 3 October 2018. He accepted that there was no letter referring to such a meeting. In fact, Mr Hoque's letter of 1 October 2018 referred to a meeting on 15 September 2018. I do not find that the Claimant was invited to a reconvened disciplinary meeting on 3 October 2018.

35.2 I also find that the Claimant did not refuse to attend a disciplinary meeting during the telephone discussion with Mr Ozary on 8 October 2018. I accepted her evidence that this was a short call and her main concern was to report the delay in obtaining a fit note. I note what Mr Kohanzad says in his closing submissions that the Claimant did not and does not listen. However, it is notable that Mr Ozary did not write to the Claimant following this discussion to invite her to a reconvened meeting. I find that there was no actual request to attend a reconvened disciplinary meeting on this date or any subsequent date.

35.3 I also take account that the Claimant attended the investigation meeting on 1 September 2018, the disciplinary meeting on 15 September 2018 and the sickness absence review meeting on 19 December 2018 and she therefore attended all meetings she was required to attend.

36. I therefore find that neither of the two grounds relied on by the Respondent to withhold CSP applied so that there were no circumstances entitling the Respondent to consider withholding CSP.

If so, did the Respondent act reasonably when it exercised its discretion to withhold CSP?

37. It is not necessary for me to make findings on this. However, even had I found that the Claimant was invited to attend a reconvened disciplinary meeting on 3 October 2018 I would have found that the Respondent's decision to withhold CSP on this basis was unreasonable for the following reasons:

37.1 The Claimant was clearly unwell and anxious.

37.2 Mr Ozary did not consider whether the Claimant was unable to attend the disciplinary meeting because of her anxiousness and he did not investigate this by writing to her GP or by making a referral to Occupation Health.

37.3 There was no documentary evidence to confirm the date of a reconvened disciplinary meeting.

37.4 Mr Ozary did not investigate or take account of the fact that Mr Hoque's letter of 1 October 2018 referred to a meeting on 15 September 2018.

37.5 Mr Ozary breached the Attendance Policy as follows:

a. His letter of 3 October 2018 did not set out his reasons for withholding CSP.

b. This letter confirmed that CSP would be withheld for the period 2 – 9 October 2018 and no further letter was sent to the Claimant to confirm his decision to continue withholding CSP or the reasons for this decision.

38. The Claimant was therefore entitled to receive CSP in respect of the period of her sickness absence of 2 October – 24 December 2018. This CSP was properly payable to her and the Respondent made a series of unauthorised deductions from her wages when it withheld CSP in respect of this period.

Employment Judge Khan

30th August 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
02.09.2019

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FOR EMPLOYMENT TRIBUNALS