IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT GLASGOW

Judgment of the Employment Tribunal in Case No: 4102739/19 Heard at Glasgow on 22 May 2019

Employment Judge J G d'Inverno

Mr David Ross	**Claimant** **Represented by** **Mr Byrom, Solicitor**
RHL Direct Limited trading as Kura (cs) Ltd	**Respondent** **Represented by** **Miss Mulholland, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

(First) On the claimant's representative's confirmation, made at the bar, that the complaint of unauthorised deduction of statutory sick pay from wages said, in terms of the initiating Application ET1, to have been made on 31 October 2018 is withdrawn, that complaint is dismissed.

(Second) On the claimant's representative's confirmation, made at the bar, that the claimant's claim for "personal damages" given notice of at page 8 of the initiating Application ET1 is withdrawn, that claim is dismissed, and separately for want of jurisdiction.

(Third) At the material time, the claimant had no entitlement in law, whether in contract or otherwise, to receive payment of company sick pay and no deduction from his wages contrary to the provisions of section 13(3) of the Employment Rights Act 1996 having been established, in the regard, that complaint is dismissed.

Employment Judge **J d'Inverno**

Date of Judgment **14 June 2019**

Date sent to parties **18 June 2019**

REASONS

1. This case called for final hearing at Glasgow on 22 May 2019. Both parties enjoyed the benefit of legal representation; for the claimant Mr Byrom, Solicitor and for the Respondent Company, Miss Mulholland, Solicitor.

2. In the course of Case Management Discussion conducted at the outset of the Hearing the claimant's representative withdrew the complaint of unauthorised deduction of statutory sick pay said to have occurred on 31 October 2018 and the claim for "personal damages" given notice of at page 8 of the initiating Application ET1. Those claims are accordingly dismissed, the latter, separately and in any event, for want of jurisdiction.

The Issue

3. The residual claim and the issue requiring determination by the Tribunal at the hearing was confirmed by parties representatives in the following term:-

Whether, in the period September 2018 to May 2019, the respondents, contrary to the provisions of section 13 of the Employment Rights Act 1996, made unauthorised deduction from the claimant's wages by reason of non-payment of Company sick pay in a net sum (that is after deduction of tax and National Insurance contribution etc, in an amount) the arithmetic value of which was agreed by parties on an *esto* basis in the sum of £6,645.36.

Documentary Evidence

4. Each party lodged a Bundle of Documents bound together within a single folder and to some of which reference was made in the course of evidence and submissions.

Oral Evidence

5. The Tribunal heard evidence on oath or affirmation from the following witnesses:-

For the claimant

The claimant gave evidence on his own behalf

For the respondent

The Tribunal heard evidence from

- Ms Senga Kane, Operations Manager and Decision Maker
- Ms Grace Knox, HR Business Partner who spoke to the policy and its application
- Ms Lydia McKinnon, Senior Operations Manager, Decision Maker in the claimant's grievance

Adjustments

6. The claimant's representative advised the Tribunal that due to the claimant's current state of health he might experience periods where he lost concentration

and might require a short break. The Tribunal advised that the claimant, or his representative, should inform the Tribunal as and when that circumstance arose and that an appropriate break would be facilitated.

Case authorities

In the course of submissions parties made reference to the following authorities in support of what were largely non-contentious propositions:-

For the claimant

1. **Marks and Spencer Plc v BNP Paribas Security Services Trust Company (Jersey) Limited and another [2015] UKSC72, 2015 WL, 7692966 per Lady Hale at paragraph 15 and paragraph 66**
2. **Braganza v BP Shipping Limited and another Supreme Court [2015] UKSC17 – [2015] 1 W.L.R. 1661 at paragraphs 18, 19, 22, 40 and 123**
3. **Keen v Commerz Bank AG [2006] EWCA Civ 1536 at paragraph 44 and 22, 36 and 37**

For the respondent

1. **Commerz Bank AG v James Keen [2006] EWCA Civ 1536**
2. **Carmichael and another v National Power Plc [1999] UK HL 47 at paragraph 59 per Lord Hoffmann at paragraph Fourth at page 5 of 7**

Findings in Fact

7. On the oral and documentary evidence adduced the Tribunal made the following essential Findings in Fact, restricted to those necessary to the determination of the issue.

8. The respondent operates a contact centre providing an outsourced response service to clients. The respondent has employed the claimant since on or around 3 November 2008 and the claimant continues to work for them in the role of Team Manager.

9. The claimant's employment with the respondent is regulated by a written Contract of Employment which took effect from 1 July 2017 ("the written Contract").

10. The written Contract was signed by the claimant and for and on behalf of the respondent prior to the commencement of the period in respect of which the claimant complains of unauthorised deduction from his wages.

11. The respondent operates a Managing Attendance Policy and Procedure ("Attendance Policy") and a Grievance Policy, which are applicable to the claimant. The Policies are stated, within their terms, to be for guidance only and not to form part of the claimant's Contract.

Company Sick Pay

12. The written Contract, copied and produced at page 59 of the Joint Bundle, provides in the second sentence of the third paragraph which appears under the heading "**SICK PAY**" the following:- "*Company sick pay is discretionary and is not a contractual benefit or automatic entitlement.*" ("The first material sentence founded upon/the first material sentence").

13. The first material sentence is immediately followed by a sentence in the following terms:-

> "*Kura reserves the right to refuse company sick pay on grounds of abuse and/or misuse of the process and related procedure where if applicable may result in disciplinary action being taken against you.*" ("The second material sentence founded upon/the second material sentence")

14. The respondent's Attendance Policy produced at page 83 of the Joint Bundle, although declaring in its own terms that it is for guidance and does not form part of the claimant's Contract, echoes the position set out in the first material sentence founded upon in the Contract vis; where, at section 13, the Policy states:-

"*Eligibility for company sick pay is discretionary and will be assessed on a case by case basis.*"

The Claimant's Suspension

15. On or around 12 September 2018 the claimant's Operations Manager, Thomas Scally, informed the claimant that he was suspended from work on full pay, pending investigations into allegations of gross misconduct. That suspension was confirmed by letter dated 12 September 2018 copied and produced at page 271 of the bundle and which stated:-

"*This letter is to confirm that as of 12th September 2018 you have been suspended from work on full pay without prejudice pending further investigation into the allegations of gross misconduct as detail below:-*

"….."]

16. On or around 24 September 2018, Grace Knox, HR Business Partner within the respondents, received a Fit Note (copied and produced at page 239 of the Joint Bundle) which stated that the claimant was not fit for work due to work related stress. The claimant's status at that point changed from that of being suspended, but available to work and therefore on full pay, to that of being absent from and not available to work due to sickness. The claimant's entitlement to receive full normal pay while on suspension accordingly ceased as at that date. As at the same date the claimant's entitlement to receive statutory sick pay arose.

17. As at the date of Hearing, 22 May 2019, the claimant remains absent from work due to illness.

18. As is expressed in the first material sentence founded upon, company sick pay is discretionary and is not an automatic entitlement.

19. No employee of the respondent receives company sick pay unless and until the respondent, in the exercise of its discretion through an appropriate Manager takes

a decision to pay company sick pay to a particular employee in particular circumstances.

20. Absent the express exercise of its discretion in favour of making payment of company sick pay to the particular employee in particular circumstances, no entitlement to receive payment of company sick pay arises.

21. At the point at which the respondent communicates to a particular employee an express exercise of its discretion in favour of payment company sick pay, a legal entitlement to receive and a reciprocal legal obligation to pay company sick pay arises. That entitlement arises from the unilateral voluntary undertaking on the part of the respondent associated with the exercise of discretion in favour of payment. That right and that entitlement thereafter subsist until and unless the respondent refuses to pay company sick pay, in exercise of the express right which it reserves to so refuse, in circumstances encompassed by the terms of the second material sentence founded upon.

22. In the material time period no such positive exercise of discretion in favour of paying company sick pay to the claimant occurred.

23. No company sick pay was paid by the respondent to the claimant during the period in respect of which complaint of unauthorised deduction is made.

24. Within the relevant period during the claimant's absence due to illness the respondent paid to him only statutory sick pay.

25. On 12 September 2018 the claimant attended an investigation and suspension meeting with Thomas Scally. Minutes of that meeting signed by the claimant are produced at pages 91, 93, 94 and 95. The first sentence appearing in the Minute of the suspension meeting, at page 94 of the bundle states:

> "*Following on from your investigation I have taken the decision to suspend you from the business without prejudice pending disciplinary into the allegations of gross conduct as detail below.*"

At page 95, the page that bears the claimant's signature, the second box discloses a statement by the Manager to the claimant in the following terms:-

> "*I will email and post your invite to disciplinary along with supporting documents by end of day tomorrow.*"

26. The Minute of the suspension meeting is set out on a pre-printed two page form which constitutes a script of pre-typed statements to be made by the Manager and blank spaces for recording the employee's response to each such statement made.

27. In order for a response to be recorded the Manager requires to read out the necessary preceding statement. The direction to Managers given by the respondent's HR function is that they should read out verbatim the pre-printed text of each statement. There is nothing endorsed upon the Minute of Suspension, by the claimant, which would indicate that certain aspects of the pre-scripted statements were not read out or were departed from in some way.

28. The claimant stated in evidence that although he signed page 95 of the Minute of Suspension and at page 93, the Investigation Minute, he did so without reading the relevant wording which appears on them. While he accepted that the Manager Mr Scally did purport to read out the content of pages 4 to 5 to him before passing him page 5 for signature, he stated that Mr Scally in so doing did not specifically refer to the fact that he was progressing matters from the investigation stage to the disciplinary stage and that he the claimant, for his part, did not notice the reference to being invited to "disciplinary" which appears on page 95 in the section above his signature. He stated in evidence that he therefore believed that he had been suspended pending further investigation.

29. The claimant stated that he was confirmed in that belief by the terms of the letter confirming his suspension dated 12 September which he received shortly thereafter and in which Mr Scally, the Operations Manager refers to him having

been "*suspended from work on full pay, without prejudice pending further investigations into the allegations of gross misconduct*".

30. It later emerged that the word "disciplinary" had been omitted through error from the letter of 12 September. The claimant was subsequently advised of the occurrence of that error.

31. The claimant was separately informed, on 30 October 2018 by Kirsty MacIndeor, that he was currently suspended going through disciplinary process and that it was on that basis that the respondent had not decided to make payment to him of company sick pay but that that was a decision which would be reviewed following his return to work.

32. On his return to work, had that occurred, the claimant's status would have reverted to that of "suspended on full pay pending disciplinary process".

33. (In an email dated 19 October 2018 to Grace Knox, Senga Kane and Claire Galloway, Thomas Scally stated that at the suspension meeting the scripted note "*was read verbatim*" and that "*it was clear he was going to discipline him*".)

34. On 19 October 2018 the claimant separately became aware, at the Occupational Health appointment that he was attending on that day, that disciplinary proceedings were being taken forward against him.

35. Separately, the claimant had formed a view, based upon his own construction of the second material sentence founded upon and notwithstanding the terms of the first material sentence, that employees were entitled under the Contract of Employment to receive company sick pay unless the respondents exercised the right to withhold or to refuse paying company sick pay because of abuse of the absence management process. The claimant stated in evidence that he was encouraged in that belief by the training which he had received from the HR Department on the question of sick pay.

36. The respondent's witness Grace Knox, who was the HR Business Partner with responsibility for arranging all such training, stated in evidence that for her part she had never made such a statement in training, either to the claimant or generally. She stated that such a position would be contrary to the clear terms of the first material sentence.

37. No decision, as the claimant described it in his email of 30 October 18 to Senga Kane, "to withhold my pay", was taken by the respondent. Rather, at the point when the claimant's status changed from that of being suspended (on full pay on the basis that he was available for work) to that of being absent due to illness and not available for work, the respondent took no decision to exercise its discretion in favour of paying to the claimant company sick pay.

38. On 2 November 2018 the claimant, by email sent to Anna Kinnear, Head of Human Resources, amongst other matters, raised a grievance concerning the respondent's non-exercise of its discretion in favour of paying to him sick pay. On 23 February 2019, Ms MacKinnon sent an email to the claimant attaching a letter, dated 22 February 2019, advising the claimant of the grievance outcome. The claimant's grievance concerning the non-payment to him of company sick pay was not upheld.

39. The claimant exercised his right to appeal against the grievance outcome.

Summary of Submissions

40. In submission, Mr Byrom confirmed that the claimant's complaint was one which proceeded, in terms of section 13 of the ERA 1996, and was in respect of unauthorised deductions from his wages in the period 25 September 18 to 14 January 2019, of 16 weeks company sick pay at the full net contractual pay rate; and, in the period 15 January 2019 to 6 May 2019, of 16 weeks of company sick pay at contractual pay rate in circumstances where the claimant's entitlement to receive that pay arose in contract.

41. Mr Byrom submitted that the asserted deduction complained of did not fall within the terms of either section 13(1)(a) or 1(b) of the ERA 1996.

42. Under reference to the claimant's written terms of employment ("his contract") and to the section which appears under the heading "**SICK PAY**" copied and produced at page 59 of the bundle, Mr Byrom accepted that in terms of those provisions "*Company sick pay is discretionary and is not a contractual benefit or automatic entitlement*". He separately submitted, however, that the exercise of the respondent's discretion fell to be regarded as contractually constrained by the words in the sentence which immediately follow in the clause namely:-

> "*Kura reserves the right to refuse company sick pay on grounds of abuse and or misuse of the process and related procedure where if applicable may result in disciplinary action being taken against you*"

43. In Mr Byrom's submission the use of the definite article before the word "*process*" falls to be construed as restricting the right to refuse or withhold sick pay to circumstances where the abuse or misuse of process referred to was related to the operation of the absence management policy, and <u>not</u> to any other matter of conduct, which might result in disciplinary action. In the case of the claimant the matters in respect of which he had been suspended pending disciplinary process did not relate to any issue of his absence but rather to other aspects of conduct. That being the case, in Mr Byrom's submission, the respondents should be regarded as not having any right to refuse to pay the claimant company sick pay. The above was his primary submission.

44. In the alternative, under reference to the various authorities cited by him and, let it be assumed that the respondent's discretion was not held to be fettered or restricted in the manner which he primarily proposed, in his submission the exercise of that discretion by the respondents was nevertheless subject to the implied condition that it must be exercised in good faith and honestly and must not be exercised arbitrarily, capriciously, irrationally or perversely.

45. Mr Byrom invited the Tribunal, under this leg of his submission, to find in fact that Senga Kane's decision not to grant contractual sick pay to the claimant was one taken by her vindictively in order to punish the claimant for his alleged misconduct; the same because were that alleged conduct to result in the loss of a customer by the respondents, that loss would impact, or would be perceived by Ms Kane to impact, adversely upon her in her role as Operations Manager. Thus submitted Mr Byrom, the exercise of that discretion by Ms Kane should be regarded as falling foul of the implied condition that it be exercised in good faith, honestly and or rationally.

46. On the above primary which failing on the alternative secondary basis, Mr Byrom invited the Tribunal to find that an unauthorised deduction had been made from the claimant's wages in respect of non-payment of contractual sick pay over the period complained of. In reaching that view he invited the Tribunal to regard the evidence of Ms Kane, including her evidence as to an explanation (rationale) for her decision which she had given, as unreliable. The same because whereas the respondents other two witnesses had spoken of there being an established practice within the respondent's organisation to not grant contractual sick pay to persons suspended pending disciplinary process Ms Kane, for her part, had not spoken to there being a practice but rather had only cited her own reasoning in that regard and the fact that she had applied it equally to another employee who was suspended pending disciplinary process arising out of the same investigation. In the case of that other employee she had likewise not granted contractual sick pay. On the other hand, he invited the Tribunal to accept as both credible and reliable the evidence of the claimant when expressing his opinion that the reason for Ms Kane's decision was a vindictive reason designed to punish him.

47. Mr Byrom also relied upon the delay on the part of the respondents in communicating the decision not to grant company sick pay to the claimant. He submitted that notwithstanding the respondent's explanation that this resulted from an internal administrative mix up, it was something which should be regarded as undermining the exercise of the discretion.

48. In relation to the potential exceptions under sections 13(1)(a) and (b) of the 1996 Act, Mr Byrom submitted, upon his construction of the second sentence of the clause relied upon by both parties at page 59 of the Joint Bundle, that prior authorisation/prior agreement, for the purposes of sections 13(1)(a) and or (b) did not extend to cover the particular circumstances applicable namely, circumstances in which the claimant although suspended pending disciplinary process the suspension and disciplinary process did not relate to abuse of the sick pay system or the absence management policy.

49. Mr Byrom confirmed that by way of remedy, in terms of section 24(1)(a), he sought an order requiring the respondent to pay to the claimant the amount equivalent to the value of the deduction made to be agreed (and subsequently agreed) in the net sum of £6,645.36.

Summary Submissions for the Respondent

50. For the respondent Miss Mulholland submitted that there were two questions which require to be asked and answered sequentially:-

> The first was did the claimant have at the material times, a legal right to company sick pay?
>
> The second, let it be assumed that the claimant did have such a right, did the respondent have a contractual right to withhold any such pay from the claimant?

51. In Miss Mulholland's submission the first question fell to be answered in the negative:-

> (a) In his initiating Application ET1 the claimant asserts a contractual right to receive company sick pay but the claimant's Contract of Employment gave the lie to that proposition. It was not disputed by the claimant that under the heading "Sick Pay" in the Contract (see page 59 of the Joint Bundle) it is expressly provided that:-

> "*The company sick pay arrangements below will be calculated on a rolling 12 month basis.* ***Company sick pay is discretionary and is not a contractual benefit or automatic entitlement.*** (Miss Mulholland's emphasis). *Kura reserves the right to refuse company sick pay on grounds of abuse and or misuse of the process and related procedure where if applicable may result in disciplinary action being taken against you.*"

52. In Miss Mulholland's submission the second of those sentences could not be read in isolation. It had to be read in the context of the whole clause and in particular the immediately preceding sentence which made clear that company sick pay was (a) discretionary, (b) not a contractual benefit nor was it (c) an automatic entitlement. The second sentence had to be read in a manner which was compatible with the first and in the context of the wider Contract of Employment.

53. Under reference to the evidence of all three of the respondent's witnesses all of which mutually corroborated the proposition that no entitlement to company sick pay arose until and unless a relevant Manager took a decision to make the same available to a particular employee in particular circumstances, Miss Mulholland submitted:-

    (a) that in the case of the claimant no such entitlement had ever arisen.

    (b) Accordingly, in Miss Mulholland's submission no entitlement to company sick pay had existed in the period to which the complaint of unauthorised deduction referred.

    (c) Standing the clear and unambiguous terms of the first sentence relied upon, the second sentence in the clause could not be construed as establishing a contractual right on the part of employees to receive company sick pay in all circumstances other than those in which they had abused the absence management process and were subject to related procedure which might result in disciplinary action being taken against them.

(d) Such a construction would be fundamentally incompatible with the first sentence relied upon and there was no requirement, in order to give business or commercial meaning to the whole clause, to read it in that way.

54. In Miss Mulholland's submission there being no entitlement there could be no deduction and she invited the Tribunal to dismiss the claim on that basis.

55. In the alternative, let it be assumed that the Tribunal were to hold that a contractual entitlement was established, the respondent's representative submitted, that the second sentence of the clause should not be read as restricting the respondent's discretion to "refuse company sick pay" specifically to circumstances in which an employee had abused or misused the attendance management/sick pay process in circumstances where disciplinary action may be taken against the employee. Rather, she submitted, that sentence, if it was to be read in a manner which was not incompatible with the first sentence fell to be construed such as to extend the reserved right to refuse to pay to circumstances of abuse or misuse of process and related procedure which may result in disciplinary action being taken against the employee, subsequent to and notwithstanding the taking of an original decision to pay.

56. In the above regard Miss Mulholland invited the Tribunal to accept the evidence of Ms Knox and Ms McKinnon which was to the existence of a practice within the respondents of not granting company sick pay to persons which might result in disciplinary action being taken against the employee, that evidence she submitted was supported by that of Ms Kane, the decision taker and that while Ms Kane did not refer to a practice *per se*, she did confirm that that was her consistent practice. She referred particularly to having equally decided not to grant company sick pay to another employee who had likewise been suspended pending disciplinary process as a result of the same investigation as that which gave rise to the claimant's suspension.

57. In the first alternative, let it be assumed that an entitlement was held to have been established and thus a deduction potentially made, Miss Mulholland submitted that such a deduction would be one which fell within the exception contained in section 13(1)(b) that is to say a deduction:-

> '(b) *the worker has previously signified in writing his agreement or consent to the making of ….*' and or section 13(1)(a) that is:- '(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 ….*'

58. In Miss Mulholland's submission the provision contained in the second sentence of the clause referred to at page 59 of the bundle, appearing as it did in the written Contract of Employment signed by the claimant prior to the period in respect of which the complained of deduction is said to be made, served the purpose of constituting prior authorisation (section 13(1)(a) and or agreement (section 13(1)(b).)

59. Finally, under reference to the authorities cited by the claimant's representative and to the additional authority cited by her, including paragraph 59 of Commerz Bank, Miss Mulholland accepted that where a Contract of Employment declared the granting to or bestowing on an employee of a benefit to be a matter for the discretion of the employer, the law implies into such contracts the condition that the discretion be exercised in good faith and honestly and that it must not be exercised arbitrarily, capriciously, irrationally or perversely.

60. Miss Mulholland went on to submit however as follows:-

    (a) Firstly that the respondent had a discretion in the matter was clear on the face of the first sentence of the clause. It was for the claimant to show that the discretion had been exercised irrationally, perversely or in bad faith etc.

    (b) The burden of establishing that no rational employer in the circumstances pertaining would have exercised their discretion

against the granting of an entitlement to company sick pay was a high one.

(c) There would require to be significant evidence to persuade the Tribunal that the decision not to grant the claimant entitlement to company sick pay where he had been suspended pending disciplinary process, but subject to review at the end of that process were the claimant not to be found guilty of misconduct, was in the circumstances irrational or perverse.

(d) In Miss Mulholland's submission there simply was no evidence that would go to discharge that burden of proof. The claimant's expressed opinion that the decision had been taken to punish him because were a customer to be lost in consequence of the alleged misconduct that would ultimately reflect badly upon the area of the respondent's operation which Ms Kane managed, was no more than speculation. The Tribunal on the other hand had Ms Kane's evidence which was to the effect that that was in no way the reason for her decision and her statement in evidence that the decision taken by her was the same decision that she had taken in respect of another individual whose circumstances were the same and further and in any event, that the decision was one which would be reviewed by her at the end of the disciplinary process in the light of the outcome of that process with the real possibility of company sick pay being granted in retrospect, in the event that the claimant was not found guilty of misconduct.

61. On the above basis Miss Mulholland invited the Tribunal to hold, on an *esto* basis and, let it be assumed that the Tribunal considered that an entitlement had been established, that the respondent's decision to exercise its discretion in withholding company sick pay when the claimant's status changed from that of being on suspension but available to work to that of being absent due to sickness and not available to work, had been exercised in accordance with any express or implied

provision of the Contract of Employment and on that secondary basis to dismiss the complaint.

62. On the question of communication of the decision, while accepting that the communication of the decision not to award company sick pay had occurred after the point at which the claimant's status changed, it was a decision which had clearly been communicated. In Miss Mulholland's submission the delay in communication, such as it was, did not serve to undermine the exercise of the discretion as perverse or irrational.

Applicable Law

63. The claim, in respect of which the Tribunal's jurisdiction is invoked, is one presented in terms of sections 13, 14, 23, 24 and 27 of the Employment Rights Act 1996 which are in the following terms:-

> "**13 Right not to suffer unauthorised deductions.**
>
> (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.
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting

"wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

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

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

(2) Section 13 does not apply to a deduction from a worker's wages made by his employer in consequence of any disciplinary proceedings if those proceedings were held by virtue of a statutory provision.

(3) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.

(4) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of any arrangements which have been established—

(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or

(b) otherwise with the prior agreement or consent of the worker signified in writing,

and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from the worker, if the deduction is made in accordance with the relevant notification by that person.

(5) Section 13 does not apply to a deduction from a worker's wages made by his employer where the worker has taken part in a strike or other industrial action and the deduction is made by the employer on account of the worker's having taken part in that strike or other action.

(6) Section 13 does not apply to a deduction from a worker's wages made by his employer with his prior agreement or consent signified in writing where the purpose of the deduction is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of an amount by the worker to the employer.

23 Complaints to [F1employment tribunals].

(1) A worker may present a complaint to an [F1employment tribunal]—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received

in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an [F1employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

[F2(3A)Section 207A(3) (extension because of mediation in certain European cross-border disputes) [F3and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2).]

(4) Where the [F1employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

[F4(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).]

[F5(5) No complaint shall be presented under this section in respect of any deduction made in contravention of section 86 of the M1 Trade Union and Labour Relations (Consolidation) Act 1992 (deduction of political fund contribution where certificate of exemption or objection has been given).]

24 Determination of complaints.

F1(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,

(b) in the case of a complaint under section 23(1)(b), to repay to the worker the amount of any payment received in contravention of section 15,

(c) in the case of a complaint under section 23(1)(c), to pay to the worker any amount recovered from him in excess of the limit mentioned in that provision, and

(d) in the case of a complaint under section 23(1)(d), to repay to the worker any amount received from him in excess of the limit mentioned in that provision.

[F2(2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.]

27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

(b) statutory sick pay under Part XI of the M1Social Security Contributions and Benefits Act 1992,

(c) statutory maternity pay under Part XII of that Act,

[F1(ca) [F2statutory paternity pay] under Part 12ZA of that Act,

(cb) statutory adoption pay under Part 12ZB of that Act,]

[F3(cc) statutory shared parental pay under Part 12ZC of that Act,]

(d) a guarantee payment (under section 28 of this Act),

(e) any payment for time off under Part VI of this Act or section 169 of the M2Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),

(f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,

[F4(fa) remuneration on ending the supply of an agency worker on maternity grounds under section 68C of this Act.]

(g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,

(h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and

(j) remuneration under a protective award under section 189 of that Act,

but excluding any payments within subsection (2).

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made."

64. Substantial case authority including the cases cited and referred to by parties in submission, provide guidance on the construction of the statutory terms and their application, the majority of which was not regarded by parties representatives as being contentious.

Discussion

65. I consider that Miss Mulholland is correct in submitting that the first question to be asked and answered is that of whether the claimant (has established an entitlement (in law) to the sums in respect of which he complains deduction has been made?

66. It is in my opinion clear from the statutory provisions and the relevant authorities that in order for such a claim to succeed there must be established, by the claimant, for the purposes of section 13(3) of the Act, that the "*total amount of*

wages paid on any occasion by an employer to a worker employed by him was less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) [i.e. normal authorised or consented to deductions] and thus that "*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*".

Definition of Wages

67. Section 27(1) of the Employment Rights Act 1996 ("ERA") defines 'wages' as 'any sums payable to the worker in connection with his employment'. This includes 'any fee, bonus, commission, holiday pay or other emolument referable to the employment' – section 27(1)(a). These may be payable under the contract "or otherwise". According to the Court of Appeal in **New Century Cleaning Company Limited v Church 2000 IRLR 27, CA**, the term "or otherwise" does not extend the definition of wages beyond sums to which the claimant has some legal, but not necessarily contractual, entitlement. In addition to sums covered by section 27(1)(a), statutory sick pay is also counted as wages by virtue of section 27(1)(b). That provision does not extend to contractual sick pay.

Discretionary Payments

68. Following the Court of Appeal decision in **New Century Cleaning Company Limited v Church**, the previously emerging proposition that a non-contractual discretionary payment could fall within the terms of section 27(1) Definition of Wages if there was a reasonable expectation that it would be paid, has been rejected. The majority in **New Century Cleaning Company Limited** held that the section 27(1) definition of wages required some legal, although not necessarily contractual, entitlement to the payment in question to be established. Likewise in **Campbell v Union Carbide Limited EAT 0341/01** the EAT held that the expression 'payable under the contract or otherwise' where it appears in section 27(1)(a) requires a legal obligation to make the payment in question (there is, however, an exception in the case of any payment in the nature of a non-

contractual bonus that has actually been paid to the worker in question – section 27(3). Those circumstances, however, do not arise in the instant case which is concerned with discretionary company sick pay.

69. In the instant case the first of the two sentences in the Contract of Employment relied upon by the parties (produced at page 59 of the Joint Bundle) states "*Company sick pay is discretionary and is not a contractual benefit or automatic entitlement.*" The ordinary meaning of those words is apparent on their face namely that no right to receive company sick pay in any particular circumstances is conferred upon employees by the terms of their Contract of Employment. The clear meaning of that sentence cannot be read as having been nullified or reversed by the terms of the sentence that follows immediately thereafter vis – "*Kura reserves the right to refuse company sick pay on grounds of abuse and or misuse of the process and related procedure where if applicable may result in disciplinary action being taken against you*". The two sentences require to be read together and in such a way that they are not mutually fundamentally incompatible. In my consideration they clearly can be so read. The second sentence, one in which a right to refuse company sick pay is reserved in certain circumstances, implies that an entitlement has first been established. That is to say, read compatibly with the first of the two sentences it can be construed as meaning that once an entitlement in law, albeit not in contract, has arisen by the respondent's exercising their discretion in favour of paying company sick pay to a particular employee, the respondents, notwithstanding the creation of that entitlement, reserve the right to subsequently refuse to pay sick pay on particular grounds which are thereafter described in the remainder of the sentence.

70. Thus, in my consideration, the first of the questions posed by the respondent's representative, that is has the claimant established the existence, at the material times, of contractual entitlement to payment of company sick pay, falls to be answered in the negative.

71. As the only legal entitlement which the claimant offers to prove is one arising out of contract, on one view, that would be sufficient to merit the dismissal of the claim on the basis upon which it is presented. The terms and wording of section 27(1)(a) of

ERA viz; "*Whether payable under contract or otherwise*" clearly envisages that legal entitlement might arise by other mechanism, for example statute. Standing the requirement to read the two sentences founded upon by the parties in a manner which is not mutually incompatible, it is instructive to pose the question what, applying the ordinary rules of construction to the wording of those sentences are the circumstances in which such entitlement might arise. In my consideration, and upon the evidence of all three of the respondent's witnesses, which I accepted as both credible and reliable on this point, the answer to that question is that no entitlement exists prior to a relevant Manager taking a positive decision to award an entitlement to receive company sick pay to a particular employee. On the other hand once such a decision has been taken and communicated to the employee, a legal obligation to pay company sick pay and a legal right to receive it does arise, which obligation and right, however, is qualified by the reserved right to subsequently refuse to pay in circumstances set out in the second sentence founded upon.

Definition of 'Deduction'

72. The same result is arrived at by consideration of the definition of 'deduction'. Under section 13(1) ERA a worker has the right not to suffer unauthorised 'deductions'. A deduction is defined in the following terms:- '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 … as a deduction made by the employer from the worker's wages on that occasion' – section 13(3). It is now a matter of general agreement that the parenthetical 'after deductions' is to be taken as a reference to statutory deductions such as tax and National Insurance etc. It does not mean a deduction in the sense in which that word is used for the purposes of section 13(1) protection.

73. The term 'properly payable' falls to be construed according to the common law and contractual principles. The determination of what wages, in any particular circumstances, are 'properly payable' to the worker under section 13(3) directly impacts upon the determination of whether a deduction (and thus potentially an

unlawful deduction) has been made. Wages will be properly payable by the employer to the worker if the worker can point to and establish some legal, but not necessarily contractual, entitlement to the sum in question. The conclusion reflects the terms of section 27(1) – any sums payable to the worker in connection with his employment … whether payable under his contract or otherwise'.

74. Since **New Century Cleaning Company Limited v Church** it has been clear that the term "or otherwise" does not extend beyond those payments to which the worker has some entitlement in law.

75. Deciding whether or not an employee has legal entitlement to the payment in question involves analysing the factual basis of his or her claim in the context of the normal principles of common law which give rise to legal entitlement and reciprocal obligation.

76. On the Findings in Fact which I have made and upon application of the ordinary principles of common law and contract in the context of considering all of the relevant terms of contract both express and implied, I have concluded that the wages properly payable to the claimant, at the material time, and in terms of his contractual rights did not include Company Sick Pay.

77. Following the withdrawal of the previously intimated complaint of deduction of statutory sick pay, no other alleged entitlement is pointed to by the claimant the non-payment of which is said to constitute an unauthorised deduction. That being so the claimant has not established, for the purposes of section 13(3), that the total amount of wages paid by the respondent to him in the relevant periods was less than the total amount of the wages properly payable by the respondent to him in that period and thus, has failed to establish that a deduction, whether authorised or otherwise, has occurred.

Disposal

78. On the above basis I hold that the claimant has failed to establish, in fact and in law, the occurrence of an unauthorised deduction from his wages during the period complained of and, accordingly, that the claim falls to be dismissed.

79. Standing the above disposal it is not necessary for me to reach a determination of the narrowness or width of the band of circumstances in which the respondents reserve the right to refuse to pay company sick pay contained within the wording of the second material sentence in the clause (let it be assumed that they have first exercised their discretion in favour of granting company sick pay to an employee). I accordingly do not do so. I observe, however, that the use of the definite article by the respondent, where it appears before the word "process", does open the door to a stateable argument that the process to which the reservation refers is that which is described in the preceding two paragraphs which appear under the heading "**SICK PAY**" at page 59 of the Joint Bundle.

Payment during the Suspension

80. For completeness sake I further observe that the absence or the existence of an entitlement in law to payment of company sick pay falls to be distinguished from entitlement to receive normal pay when suspended.

81. In the absence of any contractual right to suspend without pay, an employee's wages are 'properly payable' while he or she is suspended from work, so long as he or she is ready and able to work as required. That that was the position was made clear by the EAT in **Kent County Council v Knowles EAT0547/11** in which it was stated that the fact that a suspended employee had been arrested and even charged, did not remove any right to be paid which he or she would otherwise have. The EAT distinguished the case of **Burns v Santander UK Plc 2011 IRLR 639** in which the employee was suspended "while remanded in custody" pending trial. The EAT held that there was implied into the contract a term to the effect that the employee was not entitled to his wages during that time because he had conducted himself in such a way that he was deprived of his freedom and therefore of his ability to attend work.

Employment Judge **J d'Inverno**

Date of Judgment **14 June 2019**

Date sent to parties **18 June 2019**