



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Glogowski

**Respondent:** Asda Stores Limited

**Heard at:** London South

**On:** 8 November 2019

**Before:** Employment Judge Cheetham QC

## Representation

**Claimant:** in person

**Respondent:** Mr J Wallace (counsel)

## JUDGMENT

1. The claim for unlawful deduction of wages is struck out, as it has no reasonable prospects of success.

## REASONS

1. This was an application to strike out the claim brought by Mr Glogowski, which was for an unauthorised deduction of wages. The claim related to 7 weeks' sick pay.
2. The Claimant brought a first claim to the Employment Tribunal, which was heard in January 2019 and in which he was successful. For reasons that are not relevant to this decision, the wages claim could not be included, so he brought this second claim.

3. The crux of the Respondent's submission was that the sick pay in question was a discretionary payment and, as such, did not fall within the definition of "wages" under the Employment Rights Act 1996 s.27.
4. The Claimant was given a formal warning in September 2018 as a result of absences. As I explained to him, whether or not he considered that a fair sanction was not relevant for the purposes of this hearing. Under the Respondent's policy, a warning allows sickness benefit being withheld for the duration of any warning at the Respondent's discretion.
5. Mr Wallace relied upon *Farrell Matthews & Weir v Hansen* [2005] IRLR 160 in support of the proposition that the sickness payment was therefore not "properly payable", because it was a discretionary payment. So long as that discretion was not exercised irrationally – which was not the case here – the payment was no longer an entitlement. Put in simple terms, it was not a "wage" under s.27.
6. The Claimant did not dispute the facts, nor was he in a position to challenge the legal arguments. However, he had the consolation of having succeeded in his previous claim and no criticism can be made of him for not anticipating this somewhat technical argument.
7. Accepting the Respondent's submissions, my conclusion is that the sickness payments that are the subject of this claim do not amount to "wages" under s.27 of the 1996 Act and, as such, the claim has no reasonable prospects of success and should be struck out.

Employment Judge Cheetham QC

Date 14 November 2019