EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101409/2020 (A)

Preliminary Hearing Held in Chambers
On 25 June 2020

Employment Judge M Robison

Mr M Spence	**Claimant** **Represented by** **Mr D Reid** **USDAW** **Written submissions**
Sainsbury's Supermarkets Ltd	**Respondent** **Represented by** **Mr N MacDougall** **Counsel** **Written submissions**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The decision of the Employment Tribunal is that the respondent's application for the claim to be struck out is refused.

2. This case will be listed for a two day remote final hearing to be heard by video conferencing (subject to parties' views).

REASONS

1. At a case management preliminary hearing by telephone conference call which took place on 27 May 2020, the respondent indicated their intention to make an application for strike out on the grounds that the Tribunal does not have jurisdiction to hear this claim. The claimant resists that application.

2. Following discussion, and in light of the Presidential Guidance on the Covid-19 Pandemic coming into force 18 March 2020, specifically paragraph 11, I decided that the matter could be determined in chambers on the basis of written submissions which parties were ordered to submit.

Background

3. The background facts in this case appear not to be in dispute. The claimant continues to be employed at the respondent's Cameron Toll Shopping Centre in Edinburgh, having commenced employment with the respondent on 1 October 2000. He went on sick leave on 26 August 2019. The claimant received SSP and CSP in accordance with the respondent's attendance policy until 16 December 2019. The claimant attended absence review meetings in September, October, November and December to discuss adjustments which might facilitate the claimant's return to work.

4. The claimant attended for an OH assessment on 4 November 2019. The report confirmed that the claimant was not then fit to return to work and was not expected to return to work for a further 6-8 weeks. The respondent understood this to be that the claimant would be fit to return to work from 16 December.

5. The claimant was advised by letter (dated either 14 or 19 December) that his CSP was to be withheld from 17 December 2019 until the end of his sick line, which was due to expire on 14 January 2020.

6. The claimant returned to work on 16 January 2020.

7. The respondent's attendance policy states as follows:

> "Payment during sickness absence
>
> If you are absent from work due to sickness then you may be eligible to receive statutory sick pay. We may also offer enhanced company sick pay in addition to this to support you during this time off work.

Company Sick Pay

Company sick pay is a benefit that supports you financially if you are unable to work due to sickness. To be eligible for this you must make sure you do the following:

- Follow the correct absence reporting procedures;
- Maintain regular/agreed contact with your manager;
- Provide fit notes (if applicable) to cover your sickness period in a timely manner.

There are circumstances where we may decide not to pay company sick pay, examples include (please note this list is not exhaustive):

- Failure to follow the three steps above when you are absent;
- You are absent immediately after a request to attend a meeting (e.g. investigation, disciplinary, absence);
- You don't attend a scheduled occupational health appointment without good reason or without giving the required notice;
- Unreasonable refusal of an offer of suitable alternative duties or workplace adjustments that would allow you to return to work.

In addition, there may be some cases where further investigation is required in line with our disciplinary and appeals policy. An example of when this might occur includes:

- We have reasonable belief you have falsified your sickness absence reason;
- You have been found to be at fault in regard to an accident at work;
- You develop a sickness absence pattern.

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 to you in writing".

8. The claimant's position broadly is that he was given no explanation as to why company sick pay was being discontinued. His position is that the

alternative/adjusted duties that might facilitate the claimant's return to work were deemed unsuitable (because he had a 34 mile drive to work). The claimant states in his ET1 that, "Admittedly the policy does state that company sick pay is discretionary, however I do not see that gives them the right to withhold company sick pay for no reason at all".

9. It is the respondent's position that the claimant continued throughout the review period to unreasonably refuse the respondent's offer of suitable alternative duties or workplace adjustments that would allow him to return to work. The respondent states in their ET3 that CSP is a discretionary benefit. There is no legal requirement for them to pay this benefit to the claimant. In any event, withholding of CSP in the circumstances was not irrational. The CSP was withheld in line with the respondent's attendance policy.

Relevant law

10. The Tribunal's jurisdiction for claims of unlawful deduction from wages is set out in Part II of Act. Section 23(1) restricts the Tribunal's jurisdiction to the following types of case:

"23.— Complaints to employment tribunals.

(1) A worker may present a complaint to an employment 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)."

11. The law governing unlawful deduction from wages is contained in section 13 of the Act. The relevant sections are as follows:

> "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…
>
> …(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."

Submissions for the respondent

12. The respondent set out section 23, submitting that the relevant provision is section 23(1)(a) which allows claimants to make complaints to an employment tribunal regarding an unlawful deduction from wages under section 13. The respondent submitted that the Tribunal will only have jurisdiction to rule upon a dispute regarding a contravention of section 13 of the Act; any other common law basis must be argued through the civil courts.

13. Relying on *New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA*, the respondent argues that "properly payable" in section 13(3) means that a legal — but not necessarily contractual — entitlement to the sum in question is required.

14. As to discretionary payments, the respondent pointed out that prior to *New Century* it had been sufficient for the worker to have had a reasonable expectation that the payment in question would be made in order for that payment to fall within the definition of wages properly payable. However, that position was changed by *New Century.*

15. The application of *New Century* in cases involving discretionary payments was demonstrated in *Balfour Beatty Power Networks Limited v Tucker and others EAT 182/01*. In that case the EAT allowed an employer's appeal against a Tribunal's decision that a group of employees who received a payment to compensate them for the loss of a discretionary bonus they had enjoyed prior to a change in pay suffered an unlawful deduction of wages when their employer subsequently reduced the amount of the new payment. The EAT accepted that, on the basis of the *New Century Cleaning* case, in order to show that there had been a deduction in the total amount of wages properly payable within the meaning of section 13(3), the employees would have to demonstrate that they had a legal entitlement to the payment in the first place. The only possible basis for a legal entitlement was the contract of employment, since nothing else had been relied upon by the employees. As there was no express or implied term sufficient to create such an entitlement, the EAT concluded that the payment was a discretionary one designed to compensate the employees for the loss of the discretionary bonus that had been removed. It followed that since the employees did not have a legal entitlement to the payment it did not form part of the wages properly payable within the meaning of section 13(3) and, accordingly, there had been no unlawful deduction.

16. The respondent submits that the onus is on the claimant to prove that there has been an unlawful deduction from his wages. To achieve that he must prove what wages were properly payable to him for his periods of sickness absence.

17. The respondent noted that the claimant has pled that the contractual sick pay he is claiming is a discretionary payment by reference to the attendance policy, and specifically the provision that states: "[The Respondent] may also offer enhanced company sick pay in addition to this to support [the claimant] during this time off work."

18. The respondent submitted that the express wording of the policy which forms part of the contract of employment provides that the respondent *may* make payment of contractual sick pay, not *will* make payment of contractual sick

pay. The latter would create an entitlement and the former a discretionary benefit.

19. Given that the claimant does not have an express right to payment of contractual sick pay, the only potential basis he could seek payment would be if he could prove an implied right to payment of it. Terms may be implied into employment contracts if they are regularly (but not necessarily universally) adopted in a particular trade or industry, in a particular locality or by a particular employer. The traditional requirement for the implication of terms under this head is that the custom in question must be reasonable, notorious and certain. However, particular considerations apply where the term sought to be implied relates to discretionary benefits.

20. A fundamental tenet of contract law is that a term will not be implied as a matter of custom when it would be inconsistent with express terms (*Anderson v Commercial Union Assurance Co Plc,* 1998 S.C. 197 at 205). The claimant is seeking to imply a term into his contract (and by application every other employee of the respondent) that contractual sick pay is an entitlement rather than a discretionary benefit. Presumably, he would seek to do so on the basis of custom and practice. Any such argument would be bound to fail as it would contradict the express terms of the parties' contract. Beyond that, such a line is perverse as it would mean that every employee of the respondent was legally entitled to full contractual sick pay for the duration of their absence.

21. For these reasons any argument based upon an implied term is bound to fail. That being so, the claimant cannot prove a legal entitlement to the sums he is claiming. The claimant's claim has no reasonable prospect of success and the respondent motions the Tribunal to strike the claim out.

Submissions for the claimant

22. The claimant confirmed that notwithstanding what was suggested at the preliminary hearing on 27 May 2020 (that he was relying on a term implied through custom and practice) he relies on section 13 of the Employment

Rights Act 1996. The claimant set out the relevant law, the relevant factual background and the respondent's attendance policy.

23. The claimant argues, relying on section 13 (3), that the total amount of wages paid by the respondent is less than the total amount of wages *properly payable* on that occasion.

24. Relying on *Agarwal v Cardiff University [2019] IRLR 657* the claimant submits that the Employment Tribunal has jurisdiction to resolve disputes about the construction of a contract of employment in the context of a claim for unauthorised deduction of wages; and accepts following *New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA* that for an amount to be considered properly payable, there must be a legal entitlement to receive that sum, although that legal entitlement need not be contractual.

25. The claimant also relied on the case of *Scottish Courage Ltd v Mr I Guthrie UKEAT/0788/03/MAA* where, the claimant argues, the facts are comparable to the claimant's case. That was because it is concerned with the construction of a contractual clause that gave employees a conditional right to receive full payment for sickness absence. The judge assessed whether the employer exercised its discretion, by way of the conditional elements of the contractual clause, in a way that contravened section 13 of the ERA. The EAT accepted that a Tribunal is entitled to test whether the employer reached a conclusion about the application of such a conditional clause in good faith, consistent with the implied term of mutual trust and confidence, not displaced by any express wording in the contract of employment. It also found that the Tribunal is entitled to test whether the employer reached a conclusion that was not perverse or arbitrary i.e. one which no reasonable employer could have reached on the evidence before him.

26. In *Hills v Niksun* [2016] EWCA Civ 115 the Court of Appeal held that, in relation to burden of proof, the claimant has to demonstrate that there are grounds for thinking the employer's decision was not reasonable. Once the claimant has done so, the evidential burden then shifts to the employer to show that the decision was reasonable.

27. The claimant argued that the contractual term relied upon (referred to above) is an express term giving the respondent a discretion not to pay company sick pay if the clearly set out criteria are not met. The claimant did not fail to meet the requirements nor did the respondent rely upon any of the listed conditions in its letter to the claimant dated 14 December 2019 informing that sick pay would be withdrawn; this is despite the same policy saying the employer would do so.

28. The fact that the express wording of the policy says the respondent *may* make payment of contractual sick pay as opposed to it saying the respondent *will* make payment does not, in and of itself, downgrade this provision from being an entitlement to a discretionary benefit as argued by the respondent. The policy also uses the same language in reference to statutory sick pay by saying that employees '*may'* be entitled to it, which the claimant argues can only be a reference to this entitlement being subject to certain eligibility criteria being met; statutory sick pay could not reasonably be termed a discretionary benefit.

29. Additionally, the claimant was paid company sick pay for a period before it was stopped, this suggests that it is an entitlement and that close attention must be paid to the purported reasons for that stoppage of pay. The claimant asserts that he was not informed of the decision to withhold his sick pay until receipt of the letter dated 14 December 2019, which did not give a specific reason for doing so. There is in fact no clear or reasonable explanation for doing so in light of the following:

    1. the occupational health report's findings;
    2. the fact that the claimant had informed the respondent during various welfare meetings that he was not able to drive due to his medication;
    3. that none of the conditions set out in the policy that would bring about a decision not to pay were applicable.

30. Furthermore, it would be perverse for the policy to be construed in a way that allows for unlimited discretion.

31. It is the claimant's contention that the evidence shows the decision to stop company sick pay was both perverse and arbitrary resulting in a contravention of section 13 of ERA.

32. There are central facts in this case that remain in dispute and it would be in the interests of justice for this matter to be litigated. For the reasons outlined above, the case has reasonable prospects of success and should not be struck out.

Tribunal deliberations and determination

33. Mr Macdougall indicated during the preliminary hearing that he was arguing that the claim should be struck out for want of jurisdiction. It was not clear however from his written submissions whether he was maintaining that submission, or whether in fact he is arguing only that the claim should be struck out because it has no reasonable prospects of success.

34. The claimant has confirmed that he places reliance on section 13 and argues that the Tribunal does have jurisdiction to resolve disputes on the construction of a contract of employment in the context of a claim for unauthorised wages.

35. I accept the submission of the claimant. Indeed the respondent relies on cases in which the Tribunal was considering the application of section 13 to certain contractual terms. This confirms that the Tribunal does have jurisdiction to consider a claim under section 13 where the interpretation of the terms of a contract, and whether or not they create a legal entitlement, are in dispute.

36. The question whether the interpretation of the clause in question supports a section 13 claim is a different matter, as is the question whether there are no reasonable prospects of success (which matters may be linked).

37. Both the claimant and the respondent agree that for an amount to be considered "properly payable" there must be a legal entitlement to that sum. That could be a contractual entitlement, but it need not be. In this case the

respondent's position is that it could only be based on the contract of employment and I did not understand the claimant to argue otherwise.

38. The question is thus whether the contract of employment in this case gives the claimant a contractual entitlement to sick pay.

39. The claimant's position is that he has a contractual entitlement to a discretionary benefit, that is that he does have a contractual entitlement to company sick pay where he meets the criteria set. The claimant's position is that he has met the criteria.

40. The respondent submitted that the express wording of the policy which forms part of the contract of employment provides that the respondent *may* make payment of contractual sick pay, not *will* make payment of contractual sick pay. The latter, Mr Macdougall argues, would create an entitlement and the former a discretionary benefit. He argues therefore that the claimant does not have an express right to a payment of contractual sick pay, and therefore he has no legal entitlement to such a payment.

41. I preferred the claimant's argument that the claimant has a contractual entitlement to a discretionary benefit. This relates in this case to an ascertainable sum, which could be properly payable. Here company sick pay has been paid over the first three months of the claimant's sick leave, albeit that the payment of that sum was conditional on certain factors being fulfilled.

42. I agree that the use of the terms "will" and "may" do not make the difference between a term creating an entitlement or not. A clause may say that a benefit "will" be paid unless certain conditions are not met, or it may say that a benefit "may" be payable if certain conditions are met. Either way it is an express term with conditions attached. I was of the view that the Balfour Beaty case is not a good illustration of the point at issue: in that case there was no express or implied term to create any contractual entitlement. The same cannot be said of this case.

43. It follows that I do not accept the respondent's argument that the interpretation the claimant calls for would mean that every employee would

be entitled to full CSP for the duration of their absence. The term creates a discretion which requires the respondent to consider in each case whether an employee should receive CSP bearing in mind the criteria listed.

44. Further, and this is the important point for this case, this discretion cannot be said to be unfettered or unlimited. The express term is of course subject to certain universally accepted terms which are implied into all contracts of employment, which include the implied term not to exercise an express term in a manner which might breach mutual trust and confidence or the implied term not to implement a discretionary benefit in a way which is perverse or arbitrary, or irrational or capricious.

45. In the case of *Scottish Courage* case, upon which the claimant relied, the Tribunal's role in assessing the employer's exercise of discretion is expressed thus by HH Judge Peter Clark [20]: "the tribunal is entitled to test whether the employer reached that conclusion in good faith and reached a conclusion that was not perverse, that is to say, was not one which no reasonable employer could have reached on the evidence before him, consistent with the implied term of mutual trust and confidence, not displaced by any express wording in this contract of employment".

46. The question then for this Tribunal to consider is how the employer exercised their discretion, and the claimant's prospects of showing that the respondent has breached these implied terms, that is whether the claimant has any personable prospects of showing that the respondent acted in a manner which might breach mutual trust and confidence or in a way which could be said to be perverse or arbitrary.

47. I take the view that in an application for strike out, I should take the claimant's evidence at its highest. On the claimant's case as pled, does he have any reasonable prospects of proving that any implied terms have been breached?

48. I understand the respondent's position to be that the claimant has not met the criteria, by unreasonably refusing an offer of suitable alternative duties or workplace adjustments. The respondent's position is that it could not be said

that the respondent has acted irrationally (as would be required by the implied term).

49. The claimant in this case offers to prove that the respondent has not taken into account the occupational health report, that no account was taken of the fact that he had to drive, that the fact that he was on medication was not taken into account, and that he was not given any reason for the removal of company sick pay.

50. I appreciate that these matters are disputed by the respondent: but this is the point. There are matters which are in dispute which may support the claimant's claim and in such circumstances it is necessary to hear evidence in order to reach conclusions regarding the law as applied to the facts which are found.

51. I came to the view that I could not say that the claimant has no reasonable prospects of success if he is able to prove what he offers to prove. In regard to the test for strike out, the threshold is *no* reasonable prospects or success, not little reasonable prospects of success, and indeed it is not the case, although the claimant asserts it in this case, that the claimant need show that this case that the claim does have reasonable prospects of success.

52. I take the view therefore that evidence requires to be heard before this matter can be determined. Given this backdrop, the respondent's application for strike out is refused.

Next steps

53. This case will now require to be listed for a final hearing. No in person hearings can currently be listed given the Presidential Guidance on the Covid-19 Pandemic. Consideration therefore requires to be given to whether this claim can be progressed by way of telephone or video hearing.

54. It seems to me that this is a case which is suitable for a remote hearing by way of video conferencing, because both parties are represented, the issue for determination is a discrete one, and there will be a limited number of witnesses and productions.

55. I therefore propose that this case should be listed for a two day remote hearing by CVP. I am proposing two days because hearings by way of video conference require much more concentration than in person hearings and more breaks require to be built in, so tend to take longer.

56. Parties should advise, **within seven days of the issue of this decision**, if they have any objections to this case being listed for a remote hearing by way of video conference. Parties should consult the Presidential Practice Direction, Remote Hearings Practical Guidance and Frequently Asked Questions about the Impact of COVID-19 on tribunal practice which are all available online at https://www.judiciary.uk/publications/directions-for-employment-tribunals-scotland/ before responding. Parties should note that consideration should also be given to whether all parties and witnesses have access to appropriate technology, but should be aware that a trial will be carried out before the hearing in any event.

57. In the event that there are no objections, this case will be listed for a two day CVP remote hearing before any judge sitting alone, who will issue appropriate case management orders, and a notice of hearing will be issued to parties in the usual way.

Employment Judge: Muriel Robison
Date of Judgment: 09 July 2020
Entered in register: 16 July 2020
and copied to parties