



EMPLOYMENT TRIBUNALS

Claimant: James Leece

Respondent: Lidl Great Britain Ltd

Heard at: Bristol (remotely) **On:** 14 October 2021

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: Alice Beech of Counsel, instructed by Gregsons, Solicitors

JUDGMENT having been sent to the parties on 27 October 2021 and written reasons having been requested on 01 November 2021 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The preliminary hearing was ordered on 26 July 2021, by EJ Rayner. It was to define the issues and to consider the Respondent's application to strike out the claim.
2. The Claimant had much time off sick after the Respondent required him not to work because of an occupational health report which stated that he was not able to work. He was paid sick pay in accordance with his contract. He was hourly paid. He started work on 17 August 2015, as a warehouse operative.
3. He was unfit for work from 11 September 2020. A letter from an occupational health provider dated 11 September 2020 (page 53 of the bundle of documents) stated that there were two issues. First, joint pains in upper and lower limbs and spine, and secondly an issue with heart rhythm. It concluded that he was able only to undertake lighter duties (page 56). He should not lift more than 10 kg. His heart rhythm issue led to sudden dizziness and he should not be permitted to work up ladders. He ought to have companions around in case he fainted. He was under the care of a cardiologist and a rheumatologist, but no diagnosis had yet been made for either of these

problems. On receipt of this report the Respondent placed the Claimant on sick leave, on the basis that it was unable to meet the requirements of the occupational health report.

4. The Claimant raised a grievance about this, on 05 November 2020 (page 60), saying that it was a medical suspension.
5. The outcome letter of 11 December 2020 (page 70-72) dismissed the grievance saying that it was not a medical suspension. His appeal was dismissed on 18 January 2021 (80-81).
6. The Claimant asserts in his claim that this was a medical suspension and so he should be paid full pay while off work for this reason, not SSP. This, he calculates, amounts to a deduction from his wages, contrary to S13 of the Employment Rights Act 1996, of £4,641.
7. The Claimant's contract of employment, signed on 16 August 2015 sets out the terms of sick pay. The Claimant does not say that the pay he got was not in accordance with the sick pay to which he was entitled: his claim is that those provisions do not apply because he was sent home, and so was medically suspended and should have full pay.
8. The Respondent says that he went home voluntarily, but I take the Claimant's claim at its highest, which is that on receipt of the occupational health report he was sent home as not medically fit for his work.
9. S64 of the Employment Rights Act 1996 provides a right for remuneration on suspension on medical grounds. It states:

"64 Right to remuneration on suspension on medical grounds.

(1) An employee who is suspended from work by his employer on medical grounds is entitled to be paid by his employer remuneration while he is so suspended for a period not exceeding twenty-six weeks.

(2) For the purposes of this Part an employee is suspended from work on medical grounds if he is suspended from work in consequence of—

- (a) a requirement imposed by or under a provision of an enactment or of an instrument made under an enactment, or
- (b) a recommendation in a provision of a code of practice issued or approved under section 16 of the Health and Safety at Work etc. Act 1974,

and the provision is for the time being specified in subsection (3).

(3) The provisions referred to in subsection (2) are—

- Regulation 16 of the Control of Lead at Work Regulations 1980,
- Regulation 25 of the Ionising Radiations Regulation 2017 [[SI 2017/1075](#)], and
- Regulation 11 of the Control of Substances Hazardous to Health Regulations 1988.

(4) The Secretary of State may by order add provisions to or remove provisions from the list of provisions specified in subsection (3).”

(5) For the purposes of this Part an employee shall be regarded as suspended from work on medical grounds only if and for so long as he—

(a) continues to be employed by his employer, but

(b) is not provided with work or does not perform the work he normally performed before the suspension.”

10. S 65 is also relevant:

“65 Exclusions from right to remuneration.

(1) An employee is not entitled to remuneration under section 64 unless he has been continuously employed for a period of not less than one month ending with the day before that on which the suspension begins.

(2)

(3) An employee is not entitled to remuneration under section 64 in respect of any period during which he is incapable of work by reason of disease or bodily or mental disablement.

(4) An employee is not entitled to remuneration under section 64 in respect of any period if—

(a) his employer has offered to provide him with suitable alternative work during the period (whether or not it is work which the employee is under his contract, or was under the contract in force before the suspension, employed to perform) and the employee has unreasonably refused to perform that work, or

(b) he does not comply with reasonable requirements imposed by his employer with a view to ensuring that his services are available.

11. Mr Leece points to S64(1) as the basis for his claim. However, that subsection refers to “medical suspension”, which is then defined in S64(2). Mr Leece does not fall within either S64(2)(a) or (b), and so does not qualify as medically suspended for the purposes of S64(1).

12. Even if he was within S64(1) he would not succeed in his claim. This is because Mr Leece falls squarely within subsection 65(3). He has been incapable of work by reason of disease or bodily disablement, and so even if he was medically suspended he would not be entitled to remuneration under S64(1).

13. Accordingly, there has been no deduction from Mr Leece’s wages.

14. I said that it might have been possible to bring a claim that another role should have been found for Mr Leece within his workplace, but that has never been his claim. Mr Leece was clear in the hearing that this was all about his claim for being paid full pay while medically suspended. There was no

application to amend, and as this was all over a year ago it would be doubtful that it would be allowed now.

15. For the avoidance of doubt, the position is that if not able to work for health reasons you are entitled to sick pay in accordance with statute or your contract of employment. Mr Leece was paid that.
16. You are entitled to full pay if medically suspended, but only if you fall within S64 of the Employment Rights Act 1996 and are not excluded from that right by S65.
17. Mr Leece does not fall within S64, and if he did he would be excluded by S65.
18. Therefore, Mr Leece is not entitled to full pay while away from work after 11 September 2020.

Employment Judge Housego

Date: 3 December 2021

Reasons sent to parties: 17 December 2021

FOR THE TRIBUNAL OFFICE