



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE TRUSCOTT QC

BETWEEN:

Mr K Akinwale **Claimant**

AND

NSL Limited **Respondent**

ON: 22 April 2022

Appearances:

For the Claimant: in person

For the Respondent: Ms L Neal solicitor

JUDGMENT

The judgment of the Tribunal is that the claim that there has been an unlawful deduction of wages in relation to sick pay is not established and is dismissed.

REASONS

PRELIMINARY

1. The Claimant has bought a claim for non payment of sick pay.
2. The Claimant gave evidence on his own behalf although he had not provided a written witness statement. The Respondent was represented by Ms L Neal, solicitor who led the evidence of Mr P Boxall, senior account manager.

3. There was one file of documents to which reference will be made where necessary.

FINDINGS OF FACT

1. The Claimant is a mobile civil enforcer who reported that he had been involved in a road traffic accident during his working day, on 3 November 2020 having swerved to avoid a fox. No other vehicle or individual was involved in this accident. As a result of this accident, the Claimant was then off work sick between 4 November 2020 and 4 January 2021.

2. The Claimant's contract of employment, signed by him on 1 June 2017 states [75] that details of arrangements for payment during absence due to certified sickness or injury are contained within the Handbook of Employment. The Handbook of Employment at Part 1 (Absence) [57] details an individual's entitlement to company sick pay and this entitlement is linked to an individual's length of service. Company sick pay is normally only payable after the first three days of absence and for those who have been working for the company for between 2 and 5 years (as the Claimant had at all relevant times), it confirms an entitlement to a total of 6 weeks (30 working days) full pay in a rolling 12 month period. The policy states "Any absences that qualified for Company sick pay in the twelve months before your current absence are deducted from your entitlement. Where your sick pay entitlement has been exhausted, a period of twelve months commencing from the last day of sick pay is required before you re-qualify for any additional payment". Company sick pay is paid less the amount of any Statutory Sick Pay entitlement.

3. The Claimant had exhausted his 30-day entitlement on 23rd November 2020 [86], after he had the following absences in a 12-month period;

- a) 16 days Company Sick Pay (18th March 2020 to 8th April 2020), specific dates paid are 18th, 19th, 20th, 23rd, 24th, 25th, 26th, 27th, 30th, 31st March 2020, and 1st, 2nd, 3rd, 6th, 7th, 8th April 2020;
- b) 14 days Company Sick Pay (4th November 2020 to 23rd November 2020), specific dates paid are 4th, 5th, 6th, 9th, 10th, 11th, 12th, 13th, 16th, 17th, 18th, 19th, 20th, 23rd November 2020.

4. The Claimant received full pay for each of these days of sickness absence. These payments can be identified on his payslips for the relevant months [112-115].

SUBMISSIONS

5. The Tribunal heard oral submissions from both parties.

LAW

Deductions

6. The relevant section of the Employment Rights Act is 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 the 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.

...

7. The Court of Appeal in **New Century Cleaning Co Ltd v. Church** [2000] IRLR 27 CA had to specifically consider whether the worker had to show an actual legal entitlement to the relevant payment in order to fall within the definition of wages for the purposes of the Act. By a majority they held that there did have to be such a legal entitlement. Further, demonstrating a legal entitlement accords with the notion that the sum is 'properly payable' in terms of section 13(3). It is submitted that the observation contained in Harvey at Division B1 3F paragraph 266 must be correct:

"It is respectfully submitted that the majority of the Court of Appeal are right on this question. If parliament had intended to create a new legal right to enforce the payment of sums which were not otherwise legally due it would have been expected to do so in very clear terms and it is difficult to see precisely how s 27(1) of the Employment Rights Act can satisfy this demanding requirement."

DISCUSSION and DECISION

8. Neither the Claimant's contract nor the Handbook allow for any different treatment for sick pay relating to an accident at work as set out in paragraph 2 hereof. The Claimant received his sick pay entitlement in accordance with his contract.

9. In relation to the payslips in paragraph 4, the Claimant received the contractual payment of sick pay for the absences, the sick pay is calculated in line with the cut off dates for absences which occur between 16th of the previous month and 15th of the month in which the wages are to be paid. For this reason, payment for the absences from 18 March 2020 were made in the April 2020 payslip, and whilst payment for 4-13 November 2020 was paid in the November 2020 pay, payments for the absences during 16-23 November fell into the December 2020 pay.

10. The Claimant pursued an internal grievance and appeal both of which were unsuccessful. He sought to compare himself to other employees who had received sick pay in similar circumstances. Mr Boxall did not find this to be the

case. Even if he had, comparison would have to have been necessary on a like for like basis.

11. The Claimant in essence wanted the Respondent to exercise a discretion in his favour. The Respondent had never exercised its discretion in the manner sought by the Claimant. Whether or not the failure to exercise discretion was unfair was not a matter for this Tribunal. The Respondent adhered to and applied the terms of the Claimant's contract of employment. The claim is dismissed.

Employment Judge Truscott QC

Dated: 22 April 2022