EMPLOYMENT TRIBUNALS

Claimant: Mr M Deasy

Respondent: The Governors of Loreto College Manchester (a Roman Catholic Designated Sixth Form College, in the Diocese of Salford, under the trusteeship of the Institute of the Blessed Virgin Mary)

Heard at: Liverpool **On:** 24 October 2022

Before: Employment Judge Horne

Neither party attended the hearing; each party made written submissions.

RESERVED JUDGMENT

The respondent did not make any unlawful deduction from the claimant's wages. The claim is therefore dismissed.

REASONS

The claim

1. By a claim form presented on 9 April 2021, the claimant raised a single complaint of unlawful deduction from wages, contrary to section 13 of the Employment Rights Act 1996.

Issues

2. The parties agreed what issues the tribunal would need to determine. An agreed list of issues was referred to in the case management order of Employment Judge Shotter which was sent to the parties on 1 September 2021. Paragraphs (17) and (18) of that order stated that the agreed list was an "Annex" to that order. In fact, no list was annexed to the order at the time of sending it, but the parties e-mailed an agreed list to the tribunal on 14 September 2021.
3. Here are the issues as they appeared in the parties' list:

"Unlawful deduction of wages

1. The Claimant claims that the Respondent has made a series of unlawful deductions from his wages by failing to pay him additional sick pay.

2. The Claimant claims that the Respondent failed to pay additional sick pay in accordance with paragraph 86 (Absences Arising from Accidents at Work) of the 'Staff in Sixth Form Colleges, Teaching Staff, Conditions of Service Handbook' known as the 'Red Book'. The matters relied upon in this regard are set out in the particulars attached to the Claimant's claim form and comprise the Claimant's assertion that:

2.1 his absence arose from an 'accident' at work; and

2.2 he was therefore entitled to an additional six months' full pay under paragraph 86 of the Red Book.

3. The employment tribunals will need to decide:

3.1 Whether the Claimant had a contractual right to additional contractual sick pay, under the contract of employment or the Red Book, as a Vice Principal; and

3.2 If there were such a right, can the definition of 'accident' (as required by the Red Book) include absence, certified by the Claimant's GP, as 'work related stress'.

Causation

4. If the Claimant has a contractual right to additional contractual sick pay under the Red Book, whether the Claimant's absence, certified by the Claimant's GP's as 'work related stress', is sufficient evidence to satisfy the requirement that his absence was caused by the Respondent.

5. If not, has the Claimant provided any evidence 'attested by an approved medical practitioner' that his 'absence' was 'due to [an] accident … to have arisen out of and in the course of [his] employment' (as required by paragraph 86 the Red Book).

6. If so, is additional sick pay under paragraph 86 of the Red Book payable.

Loss

7. The Respondent paid the Claimant six months' full pay and six months' half pay. In addition, the Respondent exercised its discretion and paid the Claimant a further 21 days of full pay.

8. What further sick pay is the Claimant entitled to, if at all?

9. If the Claimant is entitled to an additional six months full pay, is the amount unlawfully withheld reduced to five months, on account of already being paid an additional month full pay?"

Evidence

4. I read documents in a joint bundle consisting of 150 electronic pages. I also read the witness statement of Mr Michael Jaffrain, the College's then Principal. His evidence was not tested by questioning. By e-mail dated 26 May 2022, the claimant accepted what Mr Jaffrain's witness statement had to say.

Submissions

5. I read the written submissions of Mr Feeny, counsel for the respondent, dated 20 September 2022. I read submissions e-mailed by the claimant to the tribunal on 27 January 2021 together with the arguments made on his behalf in the claim form and summarised in the EJ Shotter's case management order. I also read the claimant's schedule of loss, the respondent's counter-schedule, the claimant's submissions in reply, and the respondent's counter-submissions in reply to those.
6. I also took account of the arguments put forward extensively on the parties' behalf in the correspondence set out in the agreed bundle.

Facts

7. The respondents are the governors of a sixth form college. I shall call it "the College" for short. The claimant was the College's Vice-Principal. He began employment with the respondents on 18 June 2018. At the time of bringing his claim, he was still the respondents' employee, although his employment has since terminated.
8. The claimant signed a written contract of employment on 23 May 2018. So did a representative of the respondents. Paragraphs 11 and 15.1 of the contract expressly incorporated "those recommendations from the National Joint Council and Committee for Teaching Staff that have been adopted by the Board of Governors". By clause 15.2, the recommendations adopted by the Board included recommendations on terms for "Sickness Pay and Leave". Those recommended terms were included in a document commonly known as "the Red Book". Everyone agrees that paragraphs 71, 72, 86 and 87 of the Red Book were suitable for incorporation and, as a matter of law, were incorporated into the claimant's contract. At the time of the events with which this claim is concerned, the current version of the Red Book was the May 2018 version.
9. Paragraph 71 of the Red Book set out the basic entitlement to paid sick leave. From what I have deduced from the agreed bundle, paragraph 71 provided for a period of entitlement to sick leave on full pay, followed by a further period during which the teacher would be entitled to half pay. The length of those periods was apparently determined by a formula of which one variable was the teacher's length of service.
10. Paragraph 72 of the Red Book gave the employer discretion to extend the period of paid sick leave under paragraph 71.
11. Paragraphs 86 and 87 of the Red Book read, relevantly, as follows. (The emphasis is mine.)

> "In the case of **absence due to accident attested** by an **approved medical practitioner to have arisen out of and in the course of the teacher's employment,** including attendance for instruction at physical training or other classes organised or approved by the college or participation in any extra curricular or voluntary activity connected with the college, full pay shall in all cases be allowed, such pay being sick pay for the purposes of paragraphs 73 to 82 above, subject to the production of self-certificates and/or doctors' statements from the **day of the accident** up to the date of recovery, but not exceeding six calendar months, after which the case will be reviewed before a decision on any extension of the period of sick pay is made. Where the college decides to extend the period of sick pay, the teacher shall be paid half pay for a

> further period based on the entitlements to half pay set out in paragraph 71 above.
>
> 87. Absence resulting from such accidents shall not be reckoned against the teacher's entitlement to sick leave…"

12. The Red Book is for staff in sixth form colleges. School teachers' collectively-agreed terms and conditions are set out in a separate document, whose familiar name is the "Burgundy Book".

13. Section 4 of the Burgundy Book concerns school teachers' sick leave and pay. By paragraph 2.1, a school teacher is entitled to sick pay based on a formula apparently similar to that contained in clause 71 of the Red Book. The paragraph began, "Provided the appropriate conditions are met, a teacher who is absent from duty **because of illness** (which includes injury or other disability) shall be entitled to receive…"

14. I have made an assumption that clause 71 of the Red Book provides for a similar condition of entitlement. Under my heading, "Conclusions", below, I explain why I made this assumption, rather than reading the provision for myself.

15. Paragraph 9.1 of Burgundy Book Section 4 contains a provision similar to paragraph 86 of the Red Book. The rubric reads:

> "In the case of absence due to accident, injury or assault attested by an approved medical practitioner to have arisen out of and in the course of the teacher's employment including attendance for instruction at physical training or other classes organised or approved by the employer or participation in any extra curricular or voluntary activity connected with the school, full pay shall in all cases be allowed, such pay being treated as sick pay for the purposes of paragraphs 3 to 7.5 above, subject to the production of self certificates and/or doctors' statements from the day of the accident, injury or assault up to the date of recovery, but not exceeding six calendar months."

16. The definitions section of the Burgundy Book defines "approved medical practitioner" as meaning "any registered medical officer nominated or approved by the employer". I only know this from reading the EAT's judgment in *Cooke* (see below). I was not referred to any corresponding definitions section in the Red Book. I therefore do not know whether or not "approved medical practitioner" had the same definition in the Red Book as it does in the Burgundy Book.

17. It is common for teachers' collective agreements to record the parties' common aspirations to keep teachers' workloads at manageable levels. I have not been referred to any particular provisions of the Red Book about workloads. I do not know what was specifically agreed.

18. The claimant had an appraisal meeting on 8 November 2019. In anticipation of that meeting he prepared an "Addendum" document to "express concerns over events that have compromised my role as a senior leader". In short summary, the claimant asserted that he was overworked. This was, he said, due to a combination of his being timetabled with a heavier teaching load than other senior managers, his having to cover for an absent colleague, and his having to take effective responsibility for an underperforming department, as well as his management responsibilities as Vice-Principal.

19. On 10 January 2020 the claimant began a period of sickness absence from which he never returned.

20. The claimant consulted his general practitioner on 16 January 2020. The GP completed a MED3 fit note stating that the claimant was unfit to work for 28 days due to "exhaustion", adding that the claimant had "sciatica, muscle pains and symptoms of Burn Out". Fit notes on 14 February, 10 March 2020 and 8 April 2020 added, "work related stress".

21. On 3 April 2020, the claimant raised a written grievance against the Principal (not Mr Jaffrain). It was a long document, but its essential point was that the claimant had been undermined by senior colleagues and had been subjected to an "inequitable and unsustainable teaching workload" causing him to have to work very long hours. "At its height," the grievance alleged, "I was working seven days a week, up to 14 hours per day".

22. Mr Jaffrain took over as Principal on 20 April 2020.

23. There followed a correspondence between the claimant and Mr Jaffrain. Since this is a published judgment, I ought to forewarn the reader that my depiction of the correspondence might make it look rather cold-hearted. It was not. The claimant and Mr Jaffrain showed each other appropriate professional respect and concern. I have kept my focus on what they wrote so far as it is relevant to this claim.

24. Mr Jaffrain wrote to the claimant on 12 May 2020. His letter informed the claimant that his pay would be reduced to half pay with effect from 1 June 2020.

25. The claimant replied on 18 May 2020, asserting that he was entitled to six months' pay under paragraph 86 of the Red Book. His position was that paragraph 86 pay should be additional to any pay given to him under paragraph 71. Mr Jaffrain's reply on 22 May 2020 was an attempt to hold the ring. He made no concession about any entitlement under paragraph 86, but agreed to make a discretionary extension to the claimant's full sick pay under paragraph 72 whilst he investigated. The extension period ended on 30 June 2020. From 1 July 2020, the claimant's pay was reduced to half pay.

26. The respondent referred the claimant to occupational health. On 4 June 2020, the claimant spoke on the telephone to Dr Charlie Vivian, consultant occupational physician. There is no dispute that Dr Vivian was an approved medical practitioner within the meaning of paragraph 86 of the Red Book.

27. The same day, Dr Vivian wrote a report which he addressed to the respondent. So far as is relevant, the report began:

> "He has been signed off sick with work-related stress, anxiety and depression. He confirmed that there are no pressures on him outside work…

28. Under the heading, "Medical Issues", the report stated:

> He said that his difficulties centre on work."

29. The report then summarised the workload issues that the claimant had been raising, which I have already set out, and continued:

> "He said that, because of these various responsibilities, he regularly worked 14-hour days, seven days per week. This persisted for about 9 months. He became exhausted, and developed a number of physical

> symptoms suggestive of stress, such as poor sleep, a skin disorder, and muscle tension down one leg. He also developed a bowel disorder, which began to disrupt his ability to attend or remain in meetings.
>
> By December 2019, he was exhausted, and felt completely engulfed by work. He was unable to relax over the Christmas holidays, and remained anxious and unable to relax. He started the new term, but was struggling to complete tasks, and struggled to concentrate.
>
> He went to see his GP, who said she thought he was burned out. Initially he hoped that his symptoms would settle, allowing him an early return to work, but they worsened, and he has not been able to return to work.
>
> …Despite [physiotherapy and counselling] he continues to have most of the symptoms of depression and all the symptoms of anxiety, although this is mainly focused on work, rather than being generalised…
>
> He has no past history of any psychological problems…

30. Under the heading, "Opinion and Recommendations", Dr Vivian expressed this opinion:

> "[The claimant] has been off sick since January. He has been diagnosed with work-related stress, anxiety and depression. There were no causes of stress on him outside work, and in my assessment of him today, he continues to display symptoms compatible with his diagnosis.
>
> Stress is best understood as being caused by a mismatch between the tasks expected of a person and their individual capability. A person becomes stressed, either because they are unsuited for the role, or because the workload is unrealistic for the time available. It is clear that [the claimant] thinks the latter is the cause. I recognize that I do not have your version of events. My advice is that you explore the evidence, and decide whether or not you agree with his perception…"

31. Dr Vivian then answered a series of specific questions that had been put to him by Human Resources. One of these questions was, "Are there any underlying problems causing or contributing to the absence?" In answer to that question, Dr Vivian wrote, "He has anxiety, depression and stress, all of which are work-related."

32. The claimant attended a grievance meeting. His grievance was not upheld. He appealed against that outcome, but his appeal was unsuccessful.

33. On 29 April 2021, the claimant spoke to Dr Vivian again, this time on video. Dr Vivian then prepared a further report. It did not express any opinion about the cause of the claimant's medical condition, other than to refer back to his previous report.

Relevant law

34. Section 13(1) of the Employment Rights Act 1996 begins with these words:

> "(1) An employer shall not make a deduction from wages of a worker employed by him…"

35. The remainder of the subsection (1), supplemented by subsection (2), set out exceptions to that prohibition. In short summary, provision is made for cases

where the deduction is required or authorised or has the worker's consent. Nobody suggests that any of these exceptions apply.

36. Subsection (3) provides, relevantly:

> "(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…the amount of the deficiency shall be treated… as a deduction made by the employer from the worker's wages on that occasion."

37. In deciding what amount of wages was "properly payable" on an occasion, the tribunal has jurisdiction to resolve disputes about the interpretation of a contract of employment: *Agarwal v. Cardiff University & others* [2018] EWCA Civ 2084.

38. When interpreting a written contract, the tribunal is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The starting point is the language of the agreement itself. Commercial common sense and the surrounding circumstances may be relevant, but the clearer the natural meaning of the contractual words, the more difficult it is to justify departing from that meaning. Authority for these propositions can be found in *Arnold v. Britton* [2015] UKSC 36 at paras 15-23.

39. The principles in *Arnold* concern the construction of written contracts in general. *Altes v. University of Essex* EA-2020-001057 concerned a contract of employment. In that context, at paragraph 5, HHJ Tayler set out the principles of interpretation as follows. I have removed the underlining.

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable [person]…
>
> …
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable [person] is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable [person] to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the

> wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749.
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191 , 201:"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

40. An employment tribunal (Regional Employment Judge Tickle presiding) has decided that the word, "injury" in paragraph 9.1 of the Burgundy Book is wide enough to encompass psychological and psychiatric injury caused by stress at work. That decision was not appealed, but was referred to in *Roberts v. Governing Body of Whitecross School* UKEAT 0070/12. That case involved the same parties as those who had appeared before REJ Tickle, but the point of law at hand was different.

41. *Cooke v. Highdown School & Sixth Form Centre* UKEAT 0005/16 also concerned para 9.1 of the Burgundy Book.

42. One of the points in issue in *Cooke* was whether or not a school teacher's general practitioner was an "approved medical practitioner" within the Burgundy Book definition. Eady J was prepared to "allow" (at para 31) that "(1) a GP's expression of view might be sufficient in these circumstances, and (2) in the absence of express nomination by the [employer], approval of the GP, as the requisite medical practitioner, might be implied in certain circumstances."

43. Another legal point decided by Eady J (also in para 31 of *Cooke)* was about what the approved medical practitioner had to "attest" for the purposes of Burgundy Book para 9.1. The thing that required attestation was:

> "…whether the **accident, injury or assault** had arisen out of, and in the course of, the teacher's employment. That is not necessarily the same thing as attesting to whether the **absence from work** is due to the accident, injury or assault. Whilst the distinction might be a fine one to draw, particularly in the case of work related stress, the question still arises as to whether that stress arose out of and in the course of the teacher's employment."

(I have emphasised the words in bold.)

Conclusions

44. I have applied the law to the facts in order to determine the issues. In doing so, I have recast the wording of the issues slightly. This is because, on a literal reading of the list of issues, it did not appear to me that each paragraph needed a decision from me. I mean no disrespect to the parties in saying this. They have obviously cooperated well to identify where they agree and disagree. I hope that my analysis

has properly engaged with what is truly in dispute between the parties so far as it is necessary to determine whether the complaint is well founded.

Meaning of "absence due to accident"

45. Issues 1 to 3.2 appear to be an amalgam of disputes about the meaning of the phrase "absence due to accident" and the claimant's arguments as to why those disputes should be determined in the claimant's favour. It seems to me that issues 1 to 3.2 boil down to one question:

> In paragraph 86, does "absence due to accident" include absence due to illness caused by stress at work?

46. The starting point is the ordinary meaning of the words. How would they have been understood by a reasonable reader in possession of all the relevant facts in March 2018?

47. My attempt to interpret paragraph 86 has been hampered by the fact that the parties only showed me a small portion of the Red Book. They did not provide paragraphs 71 to 85. This would have been a helpful aid to construction. It is clear from the wording of paragraph 86 that it was intended to be part of a comprehensive sick pay scheme. See, for example, the express cross-reference to paragraphs 73 to 82. The Joint Council would, I am sure, have wanted paragraph 86 to be interpreted so as to make sense within the scheme as a whole.

48. A tempting solution would be to use an internet search to read the provisions for myself. That might lead to unfairness, because the parties would not have the chance to comment on any provisions that I took into account. It might also lead me into error. For all I know, the currently-available Red Book may incorporate amendments introduced after the period relevant to this claim. I also considered inviting further submissions on the Red Book and Burgundy Book, but I did not think that that would help to achieve the overriding objective. It would cause further delay and expense.

49. Instead, what I have done is to piece together what I know of paragraph 71 based on the material in the agreed bundle. This will be apparent from the way I have worded my findings of fact.

50. In my view, the reasonable reader would not have understood "accident" to include illness caused by stress at work. Here are my reasons:

    50.1. The ordinary meaning of "accident", in isolation, means no more than something that happens which has an unintended consequence. "Dictionaries and grammars" do not help. Context is everything.

    50.2. The Joint Council's use of the word "accident" appears to me to have been quite deliberate. This was a carefully-drafted document. The parties can be taken not to have wanted to introduce unnecessary words or meaningless concepts. Had the parties intended that a staff member should be entitled to para 86 sick pay for absence due to workplace stress illness, it is hard to understand why they would have chosen to use the word "accident" at all. They could simply have made it a condition of entitlement that the absence was due to "illness" attested to have arisen out of and in the course of the teacher's employment. The concept of "illness" would be easy to understand, because it would carry across from paragraph 71.

50.3. The parties evidently intended that an "accident" should be something that could be identified as having happened on a particular day. Otherwise, the contractual machinery would break down. Entitlement to full sick pay, and the condition of providing self-certificates and/or doctors' statements, ran "from the day of the accident up to the date of recovery", subject to the six-month cap.

50.4. It is very hard to identify the "day of the accident" where a staff member has become ill due to stress at work. The onset of stress-related illness tends to be gradual and cumulative. A teacher does not necessarily become ill on the first day of sickness absence. In fact, it will rarely be that precise day. Employment tribunals encounter teachers whose sick leave began after a period of attempting to soldier on through stress-related illness. It is not difficult to imagine the opposite scenario either: overworked teachers may take pre-emptive sick leave as a means of initiating change, or because it is the only way they can think of to get the rest they need before becoming ill. In any case, if the Joint Council had wanted the six months to run from the first day of absence, they could have said so, instead of agreeing that the clock should tick from the day of the accident.

50.5. It might be said, on the claimant's behalf, that this difficulty did not appear to have troubled the employment tribunal in *Roberts.* REJ Tickle appears to have interpreted paragraph 9.1 in the Burgundy Book in a way that allowed entitlement to compensation to run from the date of the injury, with all its attendant problems in establishing the date on which the teacher became ill due to stress. I do not know whether or not this particular point was raised or taken into account in *Roberts.* In any case, *Roberts* is not binding on me. To the extent that my reasoning on the "day of the accident" point conflicts with that of the tribunal in *Roberts,* I would respectfully depart from that decision.

50.6. The Red Book must be read through the spectacles of someone who knew the relevant provisions of the Burgundy Book. By the time the parties agreed the Red Book in March 2018, paragraph 9.1 of the Burgundy Book had been existence for many years and had been the subject of at least one EAT decision. I cannot imagine that any of the negotiators in the Joint Council would have been unaware of what paragraph 9.1 said. Paragraph 9.1 and paragraph 86 are, for the most part, so similarly-worded that it would be an astonishing coincidence if they had been drafted wholly independently of each other.

50.7. Knowing what was in the Burgundy Book, any reasonable reader of paragraph 86 would conclude that the parties had chosen to alter the wording by omitting the words, "injury or assault". The obvious conclusion to be drawn from that is that they intended paragraph 86 to be narrower in its scope than paragraph 9.1.

51. My conclusion, therefore, is that absence due to illness caused by stress at work is not "absence due to accident" within the meaning of paragraph 86. That being the case, there was no occasion on which wages were properly payable under that paragraph. Since it is not suggested that wages were properly payable under any other term of the contract, it must follow that there was no deduction from the claimant's wages.

52. I accordingly dismiss the claim.

Attestation

53. In case I am wrong on this first point, I have also set out my conclusions in relation to some of the remaining issues.

54. At the risk of stating the obvious, my analysis starts from the premise (just rejected by me) that absence due to illness caused by stress at work is capable of being "absence due to accident" within the meaning of paragraph 86.

55. I start with issue 4. It appears under the heading, "Causation". The parties have invited me to determine whether or not the claimant's "absence was caused by the respondent". I have not taken the parties up on that invitation. That is because Issue 4 misses the point. It is not a condition of eligibility under paragraph 86 that the absence was caused by the employer. To frame the condition in that way is to make three errors. First, it misstates the thing that needs to have arisen out of the teacher's employment. It is not the absence that needs to be caused; it is the accident. Second, Issue 4 suggests that the causal link must be proved in court, which is not what paragraph 86 says. The Joint Council agreed that the causal link merely had to be "attested". Third, it wrongly suggests that entitlement depends on *who* caused the absence, when the identity of the person responsible is not in any way determinative. A workplace accident might be entirely the teacher's fault, but it does not stop the teacher becoming entitled to paid sick leave under paragraph 86.

56. What paragraph 86 requires is that the absence was "due to accident attested by an approved medical practitioner to have arisen out of and in the course of the teacher's employment". This, in my view, means that three conditions must be satisfied:

    56.1. Someone has attested that the accident arose out of the teacher's employment;

    56.2. Someone has attested that the accident arose in the course of the teacher's employment; and

    56.3. The person doing the attesting was an "approved medical practitioner".

57. These questions are combined in Issue 5, but I prefer to deal with them separately.

Approved medical practitioner

58. I deal with the last question first. Which medical practitioners are "approved"?

59. In the absence of any evidence to the contrary, I have formed the view that the negotiating parties are likely to have intended the phrase, "approved medical practitioner" in the Red Book to carry the same meaning as the same phrase in the Burgundy Book.

60. Eady J's remarks in *Cooke* are instructive here. Approval of a GP fit note may be implied, but not where the employer has expressly approved a different medical practitioner. I respectfully agree. An employer might in certain cases decline to incur the cost of an occupational health referral if they take what the employee's GP says at face value. One can readily imagine an employer taking that pragmatic approach, say, where it receives a fit note for 14 days citing a routine medical procedure from which a swift and full recovery is expected. But where the employer makes a referral to occupational health, it is the occupational health medical practitioner who is approved by the employer to the exclusion of any implied approval of the GP.

61. In this case, the respondent expressly approved Dr Vivian. They did nothing to suggest that the claimant's GP would be approved for the purpose of paragraph 86. I therefore conclude that Dr Vivian was an approved medical practitioner, but the claimant's GP was not.

Did Dr Vivian "attest" that the accident arose out of the claimant's employment?

62. I agree with the respondent's interpretation of the word "attest". The parties to the Red Book must have intended the word "attest" to mean something more than merely relating the claimant's subjective perception. In my view, the natural meaning of the word, "attest" connotes making a statement that the author believes to be true, as opposed to reporting a statement made by someone else.

63. In my view, Dr Vivian was making a statement of his belief that the claimant's illness was caused by stress which had arisen out of the claimant's employment. He was not just passing on the claimant's subjective opinion. The following passages of the report were statements of Dr Vivian's own opinion:

> "[The claimant] has been off sick since January. He has been diagnosed with work-related stress, anxiety and depression. There were no causes of stress on him outside work, and in my assessment of him today, he continues to display symptoms compatible with his diagnosis."
>
> and
>
> "He has anxiety, depression and stress, all of which are work-related."

64. Where Dr Vivian was careful to distance his views from those of the claimant was on the question of *how* the claimant's stress had arisen out of his employment. When relating the history given to him by the claimant of the number of hours he was working, Dr Vivian made clear that he was relating the claimant's history, as opposed to an opinion of his own. He did not express his own view about what it was about the workplace that caused the claimant to become so stressed that he became ill. But that is not what Dr Vivian had to attest. All that paragraph 86 required was an attestation as to *whether,* not *how,* the claimant's stress had arisen out of the claimant's employment.

Did Dr Vivian "attest" that the accident arose in the course of the claimant's employment?

65. I also conclude that Dr Vivian attested that the claimant's illness due to stress at work had arisen in the course of the claimant's employment. Rightly or wrongly, Dr Vivian expressed his view that there were two possible causes of workplace stress. They were presented as binary alternatives ("either…or"). One possible cause was unrealistic workload. The other possible cause was the claimant being unsuited to his role. Dr Vivian would not be drawn as to which of those two possibilities it was, but he evidently thought that it was one of them. Both possible causes (a teacher trying unsuccessfully to cope with an excessive workload, or a teacher doing a job to which they are unsuited) would necessarily arise in the course of a teacher's employment.

Issues 4 and 5 - conclusion

66. I would therefore find that the condition of attestation was satisfied. Had it not been for my conclusion on what the parties intended "accident" to mean, wages would have been properly payable under paragraph 86. This would mean that a

deduction would have been made from the claimant's wages on every occasion when para 86 wages were not paid.

When were the deductions made and in what amount?

67. Had I determined Issues 1 to 3.2 in the claimant's favour, I would have been required to determine on which occasions deductions had been made from the claimant's wages and in what amount. Only then would I know how much money to order the respondent to pay.

68. In order to determine those questions I would have needed to resolve Issues 8 and 9. The key point of principle is whether the respondent was entitled to set discretionary sick pay under paragraph 72 off against wages that would otherwise be properly payable under paragraph 86.

69. I decided not to determine this point. I would need a better understanding of how paragraphs 71, 72 and 86 related to each other in the context of Red Book sick pay scheme as a whole. Had I not dismissed the claim, I would have asked the parties to provide me with the entire March 2018 Red Book and asked them to make further representations.

Disposal

70. For the reasons I have given the claim is dismissed.

Employment Judge Horne
16 November 2022

SENT TO THE PARTIES ON
18 November 2022

FOR THE TRIBUNAL OFFICE