



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4108153/2022

Hearing held by CVP on 28 September 2023

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Employment Judge McFatridge

Mr Tim Skinner

**Claimant
Represented by:
Mr Waplington,
NASUWT**

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Aberdeenshire Council

**Respondent
Represented by:
Mr Taylor,
Solicitor
Instructed by:
Ms Bremner, HR**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the respondent unlawfully withheld wages from the claimant in the sum of Two Thousand, Four Hundred and Ten Pounds and One Pence (£2410.01). The respondent shall pay to the claimant the sum of Two Thousand, Four Hundred and Ten Pounds and One Pence (£2410.01) in respect thereof.

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REASONS

- 35 1. The claimant is a teacher at Turriff Academy where he works as an Additional Support for Learning Teacher. He commenced employment there in April 2016. The claimant was previously also employed as a job-sharing Principal Teacher for Additional Support for Learning but ceased to carry out this role in August 2020. As an Additional Support for Learning
- E.T. Z4 (WR)

Teacher the claimant reports to the Principal Teacher for ASL who was his line manager. A new Principal Teacher took over the role in February 2021. Initially things took off to a very good start and the claimant developed a good relationship with his PT. There were a lot of new initiatives which initially the claimant found to be stimulating and interesting. From around April 2021 onwards however the claimant began to feel that the changes were being implemented too quickly. He approached his principal teacher and sought to discuss matters with her but his concerns were dismissed in a manner which made him feel that he was being put in his place. He was simply told to get on with things and do his job. Matters continued with the claimant being asked to change his timetable at the last moment. The claimant was concerned about these changes as they sometimes involved him appearing to break promises to children such as saying he would see them on a particular day the following week and then find that his timetable was changed so this did not happen. The claimant felt that matters had gone from a fairly settled timetable to all of a sudden there being a large number of last minute changes. Documents were being changed at the last minute. The claimant was being asked to organise events which required parental notices going out without having time to do this. He felt that matters moved from an environment where he knew what the job was to a situation where he was having to be entirely reactive. The claimant discussed the matter with his principal teacher's own line manager but was again told simply to get on with things. The claimant met with this person in around May 2021. The meeting was also attended by the claimant's principal teacher. Far from the meeting addressing the claimant's concerns the claimant felt that the principal teacher used the meeting to express concerns about him. He felt that allegations were raised at this meeting that had never been brought to his attention before.

2. Following the meeting each party agreed to certain compromises and matters improved up to the school holidays. Unfortunately when the claimant returned from the school holidays the claimant found that one of his colleagues was off with stress. This placed a lot of additional responsibility on the claimant and also caused considerable confusion and disruption. The claimant felt that more and more pressure was put on him

and that he did not have enough time to prepare to do his job properly. On or about 28 September the claimant was sitting in the library and had a type of breakdown. He began to feel so unwell that he attended the school nurse who advised him to go home. The claimant self-certified for the first five days of his absence. He then consulted his GP. He submitted a statement of fitness for work signed by the Macduff Medical Practice dated 5 October 2021 covering the period 5 October 2021 to 11 October 2021. The statement said the unfitness for work was due to stress at work.

3. The claimant then submitted a further statement of fitness for work signed by the Macduff Medical Practice dated 13 October 2021 covering the period 12 October 2021 to 22 October 2021. The statement said the unfitness for work was due to stress at work.

4. The claimant submitted a statement of fitness for work signed by the Macduff Medical Practice dated 1 November 2021 covering the period 19 October 2021 to 5 November 2021. The statement said the unfitness for work was due to stress at work.

5. The claimant then submitted a statement of fitness for work signed by the Macduff Medical Practice dated 5 November 2021 covering the period of 28 days from 5 November 2021. The statement said the unfitness for work was because the claimant was under investigations for chest pain.

6. The claimant submitted a statement of fitness for work signed by the Macduff Medical Practice dated 16 December 2021 covering the period 3 December 2021 to 5 January 2022. This statement said the unfitness for work was because the claimant was under investigations for chest pain.

7. The claimant submitted a statement of fitness for work signed by the Macduff Medical Practice dated 14 January 2022 covering the period 1 January 2022 to 23 January 2022. This statement said the unfitness for work was due to stress at work.

8. Initially on 28 September when the claimant was sitting in the library feeling overwhelmed his chest was racing and he did not feel right. When he went to his GP practice they wanted him to be checked over to see if there were any issues relating to his heart. The claimant at that time felt

that his heart was missing the occasional beat. His GP was satisfied that the problem was the stress the claimant was under however subsequently when the claimant asked for a fit note he was asked by his GP what should go on that. At that point the claimant asked if it could be changed to put
5 undergoing investigations for chest pain. They put this on two of the notes. The others said stress at work. The claimant was still suffering from stress at work at this time and having ongoing discussions with the Depute Rector and various meetings looking at ways to allow him to return to work. During this period the claimant was not having chest pains but just felt
10 unwell and struggled with the thought of returning to what had become for him a very uncomfortable environment. During the period of his last fit note from 1 January up to 23 January whilst the fit note stated unfitness for work was due to stress at work the claimant was aware that he also had been given a cardiology appointment. He was however attending
15 meetings with the respondent with a view to returning to work and in fact following such a meeting it was arranged that he would be returning to work on 23 January following various arrangements which had been made with regard to arranging a phased return. As at 5 January when the claimant's fit note changed from stress at work to chest pains the claimant
20 was still not in a position to return to work due to stress and the meetings which were ongoing to decide what he would be doing when he returned. He was not actually having chest pains at that point, he just felt unwell. The claimant's understanding of the position was that in the period up to 23 January he was having one continuous absence which was for stress
25 due to his work.

9. The claimant met with the Deputy Rector and his union representative and the return to work was agreed. The claimant then had his appointment with a cardiologist a few days later. The cardiologist advised him that he was showing signs of an atrial problem and he should not return to work
30 until the matter had been fully investigated. The claimant remained absent but following 23 January his absence was due to his heart condition. He did not return to work for the phased return which had been planned to start the week following 23 January.

10. The claimant attended an occupational health appointment arranged by the respondent on 21 January 2022. The report from this was lodged (pages 30-31). This document states under Consultation

5 “During consultation today we have discussed the referral in full as well as the supportive measure to return to work and medical intervention that has taken place. Mr Skinner reports symptoms of stress which appear to be driven by work related factors which over time have left him feeling unwell. I understand Mr Skinner had a return to work interview 20 January 2022 and his employer are fully aware of his stressors.

10 Mr Skinner reports improvement in his symptoms and he will continue to be supported by the GP and talking therapy. Mr Skinner is currently under the care of a Cardiologist and he will require further investigations and medical management.”

- 15 11. The report goes on to reply to various questions posed. It is probably as well to quote these in full.

20 **“Is the employee fit to undertake the job for which they were employed?** From the information Mr Skinner has provided me with today on the telephone, I am of the opinion he is fit for a phased return to work.

25 **Are job restrictions or modifications to normal work duties recommended and what specifically are these?** I advise Mr Skinner carries out a phased return to work to allow him to build up work stamina and confidence. I advise Mr Skinner works 25% of his hours in week one, 50% in week two, 75% in week three and 100% in week four. Any phased return plan should be viewed as flexible and aided by frequent monitoring between Mr Skinner and his Line Manager.

30 **Is the medical problem likely to be caused by or made worse by work activity?** Mr Skinner perceives he has suffered with work related stress. Mr Skinner reports a happy personal life.

Is the employee fit to attend absence meetings, welfare meetings? Yes.

What further support can we consider for the employee?

Regular meetings with his Line Manager is advisable.

5 **Is Mr Skinner's absence wholly work related or are there other factors that are affecting his levels of stress and anxiety?** Mr Skinner reports his absence is wholly work related and he has a happy personal life."

10 The letter was signed by Mary Moss, Occupational Health Nurse. She indicated that she did not propose to formally arrange a further review.

12. The claimant's terms and conditions of employment are governed by the SNCT. So far as sickness absence is concerned this provides in the usual way for such absence to be paid at the rate of full pay for the first six months and half pay thereafter. In addition to ordinary sick pay however
15 there is a further separate allowance described in condition 6.20 and 6.21. It is as well to set out section 6.20 and the subsequent two paragraphs in full. They state

20 "6.20 Where an employee is absent due to sickness or disablement as a result of work related injury or illness, the employee shall be entitled to a separate allowance. It will be calculated on the same basis as the sickness allowance provided for in paragraph 6.6 and 6.7 above. This allowance and the sickness allowance are entirely separate.

25 6.21 Normally an injury caused by an accident at work will only qualify for payment if the accident book (form BI 510) has been completed. Where there is good reason for the entry not to have been made (by the employee or other party) the council should not refuse the allowance.

30 All other cases of injury or illness that are work related must be confirmed by both the employee's medical practitioner and the medical officer appointed by the council. For this allowance to be

applied, the medical officer appointed by the council must confirm that the injury or illness is work related.”

5 On 24 January 2022 the claimant’s then union representative wrote to the respondent seeking that the claimant’s absence be recorded as work related illness under section 6.20. and that he was entitled to the “separate allowance” rather than sick pay. The letter was lodged (page 38).

13. Arlene Cheyne, an HR Adviser with the respondent responded to this letter on 8 February 2022 (page 37). She stated

10 “I can confirm that Tim’s absence will not be reclassified as a work related illness. During Tim’s period of absence he is also shared that there are ongoing medical concerns. Aberdeenshire’s position in Tim’s case would also align with the Council’s practice when dealing with similar previous requests.”

15 In fact there had been no “ongoing medical concerns” up until 23 January albeit at that point the claimant did have a cardiology appointment which as matters turned out identified areas of concern. This was confirmed in a letter from the claimant’s medical practitioner dated 4 January 2023 which was lodged (page 46). This states

20 “I can confirm that Mr Skinner describes on-going stress at work noted from 5th October 2021 up to and including 23rd January 2022, whilst concomitantly being investigated for a mitral valve problem.”

14. Following the claimant’s cardiology appointment the claimant required to remain off work sick for a substantial period. The claimant accepted that his absence from 23 January 2022 onwards was ordinary sick leave and did not fall within the terms of section 6.20 or 6.21.

15. During this period of extended sick leave the claimant was placed on half pay. In taking the decision to place the claimant on half pay the respondent took into account the absence between 5 October and 23 January. If the respondent had granted the claimant special leave under section 6.20 for the period from 5 October to 23 January then the claimant would have received sickness pay at his full rate of pay for an additional 15 days. If the claimant had been granted special leave for this

period he would have received payment in full for this period rather than half pay and therefore lost 15 half days' pay and lost 15 half days' pension contributions.

16. In November 2022 once these losses became apparent the claimant submitted a grievance to the respondent. During the course of that grievance the respondent wrote to the occupational health providers who had examined the claimant in January 2022 seeking clarification. A copy of this email dated 21 December 2022 was lodged (pages 48-50). A copy of the response from the occupational health provider was also lodged (pages 47-48). It is probably as well to set this out in full.

“Question – Was Mr Skinner suffering from a work related illness i.e. work related stress and if so, what evidence is this decision based upon?

Answer – The term perceived work stress is used in such situations where an individual reports that they perceive that work factors are resulting in stress.

Question – *‘Mr Skinner reports a happy personal life’* – what evidence is there to support this position? I understand that there may have been stressors in Mr Skinner’s home life around this time.

Answer – Where an OH report says Mr X ‘reports’ Y this would be based on history obtained from the employee.

Question – In light of Mr Skinner’s diagnosed heart condition, is it correct to say that at the time of investigation of chest pains in January 2022, this was not due, upon reflection, to a work related illness?

Answer – In subsequent OH referrals in 2022 the question has been asked about whether the cardiac problem is caused by work and this has been responded to within the corresponding OH report.

Question – Mr Skinner had sight of the report dated 21/01/22 prior to it being sent to the Council. Can you advise if the report was amended as a result and, if so, what was changed i.e. anything remove or added and why?

Answer – When an employee seeks sight of a report prior to release we are unable to advise you what, if any, changes have subsequently been made. I can advise that the Doctor is only required to change factual inaccuracies.

5 Question – Can you seek further information and evidence from Macduff Medical Practice for the basis on which it was determined that Mr Skinner was suffering from work related stress?

Answer – A report is not likely to add value and I would not recommend this. Please see answer to first question – when an individual is determined to have ‘work-related stress’, this is based on the history from the individual.”

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Observations on the evidence

17. The claimant gave evidence in a patently straightforward and honest manner. I had no hesitation in treating his evidence as credible and reliable.

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Issues

18. The issue between the parties was whether in terms of the claimant’s contract of employment which incorporated NCT terms the claimant’s absence during the period from 28 September 2021 to 23 January 2022 should be treated as ordinary sickness absence or as “separate allowance” in terms of 6.20 and 6.21 of the SNCT handbook. If it was to be treated as “separate allowance” then the respondent would be due to pay the claimant 15 half days’ pay and benefits given that he had subsequently been paid half pay for a period of sick leave whereas he would have been paid at full pay for this period had the respondent not decided to treat his absence between 28 September and 23 January as being ordinary sick leave.

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Discussion and decision

19. Both parties made submissions. It was common ground between both parties that the question for the Tribunal was whether the claimant’s absence fell within the terms of paragraph 6.20, 6.21 and the unnumbered paragraph after that. The respondent did not contend that paragraph 6.21

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was relevant since they did not gainsay the claimant's argument to the effect that there was good reason for not recording this absence in an accident book.

20. The respondent's position essentially was that the claimant's absence did not qualify for "separate allowance" on the basis that the terms of the unnumbered paragraph after paragraph 6.21 were not met. It was their position that the claimant's illness had not been confirmed as work related by both the employee's medical practitioner and the medical officer appointed by the council. It was their position that the medical officer appointed by the council in this case was their occupational health practitioner. The respondent's position was that nowhere in either the original report or the clarification provided in January 2023 did the medical practitioner provide a definite opinion that the claimant was suffering from work related stress. The respondent's representative contrasted the answer given to the question 'is the employee fit to undertake the job for which they were employed' where the occupational health nurse states

"I am of the opinion he is fit for a phased return to work"

with the answer given to the subsequent question about whether the medical problems likely to be caused or made worse by work activity where she simply states

"Mr Skinner perceives he has suffered with work related stress. Mr Skinner reports a happy personal life."

21. The claimant's representative in his submissions took me through the test set out in paragraph 6.20 and subsequent. In his view the matter was on all fours with the decision in the Employment Tribunal first instance case of **L McIntyre v South Lanarkshire Council**, case number 4100359/2017 decided on 8 January 2019. A copy of this case was provided to the Tribunal.

22. With regard to remedy the parties indicated that if the Tribunal confirmed in principal that payment was due then they would be prepared to work with each other with a view to having this calculated correctly. The matter is slightly complicated by the fact that there will be pension entitlement in

5 addition to salary. There was initially a dispute between the parties as to whether the pay for the additional days should be calculated on the basis of 1/365ths of salary as contended for by the respondent or 1/235th of salary as contended for by the claimant. Subsequent to the Tribunal the claimant's representative helpfully wrote to the Tribunal confirming that having been referred to the appropriate part of the SNCT rules he now accepted that the appropriate percentage was 1/365th.

Decision

10 23. This is a claim under section 13 of the Employment Rights Act 1996. It is the claimant's contention that he has suffered an unlawful deduction from his pay.

15 24. Whilst the ET decision which I was referred to was not legally binding on me I considered that the reasoning contained within this judgment was entirely correct. The question I had to determine was whether or not the claimant was entitled to be paid for the relevant period of absence as ordinary sick pay or whether he was entitled to the "separate allowance" referred to in paragraph 6.20, 6.21 and the unnumbered paragraph thereafter on the basis that his absence was work related as defined therein.

20 25. I accepted the claimant's evidence that the factual situation was that he had initially gone off work with stress. He described the background which led up to this involving various work stressors following the appointment of a new head of his department. I was entirely satisfied that during the period from 28 September to 23 January the claimant was off as a result of this stress. I was also in no doubt based on his evidence that the stress was work related. His evidence was entirely consistent with this. In addition it is clear that the respondent was treating it as a case of work related stress. They were holding meetings with the claimant and his representative with a view to sorting out the stressors at work so as to enable him to return. Matters changed after 23 January where as a result of a cardiology appointment to which he had been referred by his GP the claimant was advised he had an atrial problem which then caused him to

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be off work for a considerable period of time and which appears to have resulted in him requiring to have surgery later in the year.

26. On the basis of the evidence what appears to have happened is that his medical advisers prudently decided that when he presented with symptoms of stress it would be appropriate to carry out further background checks to see if there were underlying health problems. It was as a result of this that his cardiac problem was discovered but it was clear to me that the reason for the claimant's absence up to 23 January was work related stress. After that the reason for his absence was his cardiac problem.

27. In terms of the contractual position it is not enough simply for the Tribunal to conclude that the claimant was in fact off with a work related illness. The claimant's contractual terms specifically state that

"All other cases of injury or illness that are work related must be confirmed that both the employee's medical practitioner and the medical officer appointed by the council. For this allowance to be applied the medical officer appointed by the council must confirm that the injury or illness is work related."

In this case I was entirely satisfied that the claimant's own medical practitioner had confirmed that the injury or illness was work related. This is clear from the terms used in the original fit notes (I accepted the claimant's explanation for the fact that some fit notes said something different) and even more clearly in the letter from the claimant's GP lodged at page 46. I also considered that the medical officer appointed by the council had confirmed that the illness was work related. I did not consider that the respondent's representative's criticism that the word opinion had not been used was in any way critical. As pointed out by the claimant's representative the letter was signed by the occupational health nurse and as a matter of ordinary construction it must be assumed that she agrees with what is said in the letter.

28. What the occupational health nurse says in the letter is that the claimant is suffering from symptoms of stress. She states that the claimant perceives this to be work related. In a subsequent correspondence she clarifies what is meant by perceived in this situation and also confirms that

the information about having no stressors in his personal life came from the claimant. The occupational health nurse does not suggest any other reasons for the stress and in my view all of these matters taken together are sufficient to make a finding that using the ordinary meaning of the words the medical officer appointed by the council has confirmed that the illness is work related.

29. In my view therefore it is clear that the claimant was entitled to the “separate allowance” for the period of his absence between 28 September and 23 January.

30. As a result of this it would appear that at a subsequent date the claimant did suffer an unlawful deduction of wages in that he was paid sick pay at the rate of half pay rather than full pay to which he was entitled. I did not hear any detailed evidence from either of the parties regarding the precise dates on which this payment was made however both parties seemed to be agreed that the claimant had suffered a loss equivalent to 15 half days’ pay. The respondent provided a Schedule of Loss which indicates that this figure amounted to £2410.01. My understanding was that the claimant’s representative initially disputed this figure but subsequently agreed that the method of calculation was correct. It is therefore my finding that the claimant suffered an unlawful deduction of £2410.01. This is the sum which I will therefore order the respondent to pay to the claimant. During the course of the hearing both parties foreshadowed that the sum may require some “tweaking” in light of the fact that pension contributions may require to be taken account of and I should say that if the parties wish to make application for the monetary award to be altered then they are free to apply for a reconsideration in the usual way.

Employment Judge: McFatridge
Date of Judgement: 12 October 2023
Date sent to Parties: 13 October 2023