



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Sturm

Respondent: Disability Initiative Services Limited

Before: Employment Judge T Brown

DECISION ON RECONSIDERATION APPLICATION

The Respondent's application for reconsideration, dated 19 June 2023, is refused under rule 72(1) of the Employment Tribunals Rules of Procedure, on the ground that it gives rise to no reasonable prospect of the original decision being varied or revoked, for the following reasons:

- (1) I decided in my original decision, for reasons which I gave orally and in respect of which a request for written reasons has been made, that the Respondent's designation of time, during which the Claimant was required to remain away from work because her son had developed a cough, as sick pay was in fact was time when the Claimant was not sick, and was indicating that she was ready, willing and able to work, and in respect of which the Claimant should receive her normal pay.
- (2) The Respondent led no evidence at the hearing to indicate that the Claimant could not have carried out her normal duties remotely during this time, but in any event, the Claimant was indicating that she was ready, willing and able to work, and it was the Respondent which indicated that the Claimant could not attend work. The Respondent could have, but did not, refer me to any Covid regulations which it said were relevant to this issue. It is seeking to advance an argument on an application for reconsideration which it could reasonably have anticipated at the time of the final hearing, but did not deploy. While this is not determinative of its application, the fact that the Respondent is seeking a second opportunity to argue the case is notable.
- (3) The sum total of the Respondent's written application is that:

The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations SI 2020/287, effective 13 March 2020, provide that individuals who self-isolate to prevent infection or contamination with coronavirus in accordance with guidance published by Public Health England are to be treated as incapable of work (and potentially able to claim statutory sick pay).

The Claimant was not, therefore, able to work during this period of self-isolation and the Respondent did not request her to do so.

- (4) The amendment to regulation 2 of the Statutory Sick Pay (General) Regulations 1982/894 referred to by the Respondent *deemed*:

(1) A person who is not incapable of work [...] which he can reasonably be expected to do under a particular contract of service [...] to be incapable of work of such a kind by reason of some specific disease or bodily or mental disablement for any day on which [...]:

he is—

(i) isolating himself from other people in such a manner as to prevent infection or contamination with coronavirus [...] ⁶, in accordance with guidance published by Public Health England, [...] and effective on [16th] March 2020; and

(ii) by reason of that isolation is unable to work.

- (5) The basis of the Respondent's application is misconceived in the following respects:

(i) Regulation 2 is a deeming provision. It does not decide that as a matter *fact* a person cannot work; only that for certain legal purposes (limited to eligibility for statutory sick pay) a person who is capable of work is deemed to be incapable of work.

(ii) I found as a fact that the Claimant was able to work notwithstanding her remaining at home. Therefore, regulation 2 as amended did not have effect in relation to her, because could only apply where by reason of isolation a person is unable to work (and I found that the Claimant was able to work).

(iii) In any event, regulation 2 is concerned with the position as regards statutory sick pay, and not the contractual position, which was my necessary focus. As a matter of fact, the Claimant was (I found) indicating that she was ready, willing and able to attend work, and the Respondent required the Claimant to stay away from work. In those circumstances, the Respondent could not avoid paying the Claimant for the period when it kept her away from work. If a person declined to come to work because they were self-isolating, (in other words, if they said that they were not ready, willing and able to come to work), or a person could not come to work, including because of a *legal* impediment to them doing so, it would be the employee not the

employer who was responsible for the absence of work, but here the Claimant was not prevented from working by law and was ready and willing to do so, and therefore the employer cannot avoid payment for time when it kept the Claimant away from work, however understandable its reasons for doing so.

- (6) Therefore, the Respondent's failure to advance this argument at the final hearing is not decisive—had the argument been advanced then, it would have failed—though it remains notable that this was an argument that could have been advanced at the final hearing and no good reason has been identified for failing to do so.
- (7) Therefore, there is reasonable prospect of the original decision being varied or set aside and I dismiss the Respondent's application for reconsideration without a hearing.

Employment Judge T Brown

26 October 2023

Sent to the parties on:

31 October 2023....

For the Tribunal: