EMPLOYMENT TRIBUNALS

London South Employment Tribunal
9th August 2023 (video)

Claimant: Caroline Whyman

Respondent: Accent Catering Services Limited

Full merits hearing

Before: Judge M Aspinall (sitting alone as an Employment Judge)

Appearances: Mrs C Whyman in person
Mrs C Fitzgerald for the Respondent

JUDGMENT WITH REASONS

Judgment

1. The Claimant's claim that she was entitled to company sick pay succeeded on its merits. The Respondent failed to reasonably exercise discretion when denying her contractual sick pay, resulting in an unlawful deduction under Section 13 ERA 1996.

2. However, the claim was brought 26 days outside the applicable time limit set out in Section 23(2) ERA 1996. The Claimant did not demonstrate that it was not reasonably practicable to bring the claim in time nor that it was brought as soon as reasonably practicable thereafter. Applying the principles in *Selkent*, I found that there were no proper grounds to extend time. While the claim would succeed on its merits, it was dismissed due to being lodged out of time.

Application for written reasons

3. Having delivered my decision orally at the hearing, I distilled that decision into a summary judgment following the hearing. This was sent to the parties on 11 August 2023.

4. The Respondent emailed the Tribunal on 10 August 2023, the day after the hearing on 9 August 2023, to request written reasons for my judgment. It is of no import that the parties did not receive the summarised judgment until a day after this application was made.

5. At the hearing, I had informed the parties that they could apply for written reasons within 14 days of the judgment being sent. This is in accordance with Rule 62(3) of The Employment Tribunals Rules of Procedure 2013 (as amended), which states that a party may apply in writing for written reasons within 14 days of the date on which a judgment is sent to the parties.

6. Rule 62(4) provides that the reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short. Therefore, in providing written reasons for the judgment in this case, I will ensure the reasons are proportionate and focus on the pertinent issues, in accordance with Rule 62(4). The Respondent requires the written reasons to fully understand the rationale behind my judgment.

Introduction

7. The Claimant, Mrs Caroline Whyman, brings a claim against her former employer, the Respondent Accent Catering Services Limited, for unlawful deduction from wages under the Employment Rights

Act 1996 ("ERA").

8. The claim arises from a dispute regarding payment of company sick pay during the Claimant's final week of employment, when she contends she contracted COVID-19.

The Parties

9. The Claimant commenced employment with the Respondent on 5 September 2011 as a Senior Operations Manager.

10. The Respondent is a catering services company operating throughout the UK. The Claimant was based at the Respondent's head office.

11. The Claimant resigned from her employment, with her last day being 2 September 2022. Prior to resigning, the Claimant had over 10 years of continuous service.

The Claim

12. The Claimant alleges that during her final week of employment, from 30 August 2022 to 2 September 2022, she contracted COVID-19.

13. On 29 August 2022, the Claimant notified the Respondent that she had tested positive for COVID-19 and would be absent for the remainder of the week. She provided proof of her positive test result. As a salaried employee working in the head office, the Claimant expected to be paid company sick pay during her sickness absence.

14. However, in her September 2022 salary payment, the Claimant notes she was only paid statutory sick pay for 30 August to 2 September 2022 and did not receive any payment of company sick pay.

15. The Claimant argues she was contractually entitled under her terms of employment to be paid company sick pay from the first day of sickness absence.

16. On 3 October 2022, the Claimant emailed the Respondent querying the lack of company sick pay in her final salary. On the same day, the Respondent replied stating that company sick pay was discretionary, and the Claimant had been paid statutory sick pay in accordance with her entitlement.

17. The Claimant requested a copy of her signed contract of employment to confirm the contractual sick pay entitlement. The Respondent informed they were unable to locate the Claimant's contract. They provided a copy of a contract for an employee who commenced in 2011 around the same time as the Claimant, stating this would contain the same terms. That contract contained a clause stating company sick pay was discretionary.

18. On 21 November 2022, the Claimant sent a further email to the Respondent demanding payment of her outstanding company sick pay by 25 November 2022. The Respondent maintained their position that there was no outstanding entitlement.

19. The Claimant now brings a claim to the Tribunal seeking payment of 4 days' company sick pay which she contends was unlawfully deducted from her wages.

The Response

20. The Respondent maintains that company sick pay was discretionary under the Claimant's contract of employment.

21. As they no longer held a copy of the Claimant's contract, the Respondent states they provided a copy of the standard terms in place in 2011 when she commenced employment, which would have been the same terms as the Claimant's contract. This 2011 contract, for another employee, states that company sick pay is discretionary.

22. The Respondent contends the finance director decided not to award discretionary company sick pay to the Claimant during her sickness absence in notice period. They say that this was in line with their policy for newer employees, whereby company sick pay is not paid during notice periods.

23. The Respondent submits they reasonably exercised their discretion not to pay company sick pay

in this instance and denies there is any outstanding entitlement owed to the Claimant.

Issues for the Tribunal

24. Whether the Claimant was contractually entitled to company sick pay or if it was discretionary.
    a) If discretionary, whether the Respondent failed to reasonably exercise discretion in denying the Claimant company sick pay.
25. Whether there was an unlawful deduction from wages under Section 13 of the Employment Rights Act 1996.
26. Whether the claim was submitted within the 3-month time limit stipulated by Section 23(2) of the Employment Rights Act 1996.
    a) If out of time, whether it was not reasonably practicable for the claim to have been presented within the time limit, applying applicable legal principles.
27. Whether the Tribunal had jurisdiction to hear the late claim or if it should be dismissed due to being out of time.

The Law

28. The Claimant brings her claim under Part II of the Employment Rights Act 1996, which deals with protection of wages.

29. Section 13 ERA provides that an employer shall not make a deduction from wages payable to a worker employed by him unless:

    a) the deduction is required or authorised by statute 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.

30. Therefore, an employer is prohibited from making deductions unless there is a statutory or contractual basis for the deduction.

31. Under Section 23(2) ERA, a claim for unlawful deduction from wages must be brought within 3 months of the date of the last deduction or payment.

32. The ACAS early conciliation process can extend the time limit for bringing a claim by up to one month, if the process is initiated before the original primary time limit expires.

33. Where the claim is brought outside the time limit, the Tribunal does not have jurisdiction to hear the claim unless it was not reasonably practicable for the claim to be brought in time (Section 111 ERA).

34. The leading authority on extending time limits is *Selkent Bus Co Ltd v Moore [1996] ICR 836*, *EAT*. In that case, the Employment Appeal Tribunal held there was no general discretion to extend time limits. The test is whether it was reasonably practicable for the claim to have been presented in time.

35. The EAT in *Selkent* emphasised that ignorance of the law, mistakes, and lack of legal advice will generally not be sufficient to extend time. The 3-month time limit serves as a clarifying date to parties by preventing claims being brought long after the event.

Findings on the merits

36. Having carefully considered the evidence and submissions presented at this hearing, I make the following findings on the balance of probabilities:

    a) The Claimant was employed by the Respondent as a Senior Operations Manager from 5 September 2011 until her resignation which was effective from 2 September 2022.
    b) The Claimant contracted COVID-19 and was absent from 30 August 2022 to 2 September 2022, her final week of employment. She notified the Respondent and provided proof of her positive test.
    c) As a salaried employee based in head office, the Claimant expected to receive company sick pay but was only paid statutory sick pay.

d) The Claimant argues she was contractually entitled to company sick pay from the first day of absence under her terms of employment.
e) The Respondent says company sick pay was discretionary under the Claimant's contract. They provided a 2011 contract for a comparable employee containing a discretionary sick pay clause. I am not asked to consider the sufficiency of the keeping of employment records by the Respondent, so I do not do so.
f) The Respondent's finance director decided not to award discretionary company sick pay to the Claimant during her notice period. This was said to be in line with policy for newer recruits.
g) The last deduction of company sick pay was on 30 September 2022 when the Claimant received her final salary payment.

37. I found that the extract from the 2011 contract indicates company sick pay was discretionary, as per the clause stated. I was prepared, on the balance of probabilities, to accept this document as being equivalent to the terms upon which the Claimant was engaged in 2011.

38. However, I was not satisfied the Respondent properly exercised its discretion when deciding to withhold company sick pay from the Claimant during her sickness absence.

39. The Claimant had over 10 years of service. It was, I find, unreasonable to apply the policy for short service employees to her, without properly considering her individual circumstances, long service and the provisions of her contract of employment which, the Respondent told me, had not been varied to incorporate such terms as those which applied to newer employees; such as the provision that discretionary sick pay was not payable to newer employees (than the Claimant) during their notice period.

40. The Respondent could provide no evidence that such a change had been communicated to, let alone agreed with, the Claimant at any time prior to her resignation or notice period.

41. The finance director did not give evidence and I saw no documents indicating the specific thought process or reasoning behind the decision to deny sick pay. I find that the Respondent failed to demonstrate that it properly turned its mind to the issue and appropriately exercised discretion. The outcome was not reasonably reached in this instance.

42. I find the Claimant has established sufficient facts to prove her claim. She was contractually entitled to discretionary sick pay and the Respondent unlawfully exercised its discretion to deny her this sick pay during her period of absence.

43. This amounts to an unlawful deduction under Section 13 ERA.

Time Limit

44. However, the claim must fail as it was lodged outside the time limit.

45. The last deduction occurred on 30 September 2022 when the Claimant received her final salary payment. Under Section 23(2) ERA, the primary time limit for bringing a claim therefore expired on 29 December 2022.

46. The Claimant did not commence ACAS early conciliation until 11 January 2023. As this was after the time limit had expired, it did not operate to extend the limitation period. The claim was submitted to the Tribunal on 24 January 2023. This was 26 days after the expiry of the primary time limit on 29 December 2022.

47. As per *Selkent*, there is no general discretion to extend time limits. The burden is on the Claimant to demonstrate it was not reasonably practicable to bring the claim within the time limit.

48. The Claimant stated she was awaiting information from the Respondent about her contract and sick pay in November and December 2022. Due to the Christmas period, the Claimant did not chase this up until early January 2023. She believed there was flexibility around the time limit. In my judgment, the Christmas period may have caused some minor delay, but does not provide a sufficient explanation or justification for the Claimant bringing the claim 26 days late.

49. While she was awaiting information from the Respondent, it was properly open to the Claimant to commence ACAS conciliation and bring the claim before the time limit expired. The requested information from the Respondent did not prevent her from doing so.

50. The Claimant conceded she was unaware of the strict rules around time limits. However, ignorance or lack of understanding of the law does not satisfy the reasonably practicable test or provide a basis to extend time, as confirmed in *Selkent*.

51. In the circumstances, I am not satisfied that it was not reasonably practicable for the Claimant to submit the claim within the 3-month time limit. As the claim was brought outside the time limit and the conditions for extension were not met, the Tribunal does not have jurisdiction to hear the claim. The purpose of the time limit is to provide certainty for parties and to prevent claims being brought long after the event, as emphasised in *Selkent*.

52. While I may have sympathy for the Claimant's position, I cannot stretch the law to the point that I could find I have discretion to extend time given the facts before me. That would go against binding precedent. Doing so would undermine the important public policy represented by the time limit, which Parliament has imposed.

53. I acknowledge this may appear to produce a harsh result for the Claimant, but the Tribunal must apply the law as it stands. The consequences of missing a time limit can be severe, but time limits are an established feature of employment law, and it is incumbent on claimants to familiarise themselves with the time limits for bringing claims; and to abide by them in all but the most exceptional circumstances.

54. Therefore, although I have found the claim succeeds on its merits, regrettably I must dismiss the claim. Whilst I cannot order payment of the sums claimed today, I trust the Respondent will reflect on this outcome and review its policies and practices accordingly.

55. The parties are thanked for their courteous conduct during the hearing.

56. For the foregoing reasons, the claim is dismissed.

Judge M Aspinall
Sunday, 13th August 2023