



EMPLOYMENT TRIBUNALS

Claimant

Mr Artur Suzinowicz

v

Respondent

Hilton Foods Limited

Heard at: Bury St Edmunds (by CVP)

On: 3 November 2023

Before: Employment Judge Z Islam

Appearances

For the Claimant: In person

For the Respondent: Mr M Bloom, Retired Solicitor

Interpreter: Ms Joseph,

RESERVED JUDGMENT

The Judgment of the Tribunal is that discretionary company sick pay is not properly payable to the Claimant and as such this claim fails.

REASONS

Background

1. The Claimant presented a claim to the Tribunal on 21 February 2023 [page 2] (following ACAS Early Conciliation between 9 January 2023 and 20 February 2023) and a claim was brought for contractual sick pay for an 8-week period commencing 18 December 2022. The Claimant was paid £794.80 Statutory Sick Pay (SSP). The additional company sick pay claimed is for £2747.20.
2. The Respondent has defended the claim on the basis that the Claimant was only entitled to SSP and payment of additional company sick pay was purely discretionary.

The Issues

3. The issue to be determined, as agreed in a Preliminary Hearing which took place on 8 September 2023, was what was properly payable to the Claimant during his sickness absence, including whether the enhanced company sick pay arrangements had acquired some enforceable legal

status through custom and practice or otherwise notwithstanding they are stated to be discretionary.

The Hearing

4. At the Hearing on 3 November 2023, the Claimant represented himself and the Respondent was represented by Mr Bloom. The Claimant was assisted by an interpreter, Ms Joseph.
5. There was an agreed Hearing Bundle of 92 pages (page references below are to this bundle), a Witness Statement from the Claimant and a Witness Statement from Mr Retesh Dosa for the Respondent. I heard evidence from the Claimant who was cross-examined by Mr Bloom. I also heard evidence from Mr Dosa who was cross-examined by the Claimant. I also asked questions of the Claimant and Mr Dosa. I heard submissions from both parties and was provided with the authority of Bateman & Ors v Asda Rations Ag UKEAT/0221/09/ZT, by Mr Bloom.

Findings of Fact

6. Having heard the evidence, I make the following findings of fact, and any that appear in the 'Discussion and Decision' section on the balance of probabilities.
7. The Claimant was employed by the Respondent as a 'General Operative.' He had a contract of employment signed and dated 10 April 2014 [pages 31-34]. Paragraph 7 of the contract states,

"In the event that you are absent from work due to illness or accident, payment will be made at the discretion of the Company and in accordance with the Company's Sick Pay Scheme. The details of this scheme are outlined in the Employee Handbook (see attached Appendix 1)"
8. The Employee Handbook 2014 [pages 72 – 81] includes the following provisions:
 - 8.1. The purpose of this Handbook is to inform and help you and it is expected that you will familiarise yourself with its contents [paragraph 1.1];
 - 8.2. It should be read in conjunction with the Statement of Main Terms and Conditions of Employment issued to you as part of your 'Terms of Employment' [paragraph 1.2];
 - 8.3. The Company sick pay year runs from 1st April to 31st March of the following year [paragraph 8.1];
 - 8.4. The Company operates a discretionary Sick Pay Scheme as detailed below:
 - 8.4.1. Up to 12 months continuous service: SSP only;
 - 8.4.2. 12 months to 2 years continuous service: 2 weeks at full pay;

- 8.4.3. 2 years to 5 years continuous service: 4 weeks at full pay;
 - 8.4.4. After 5 years continuous service: 4 weeks at full pay;
 - 8.4.5. The payments set out above indicate the maximum Company sick pay per sick pay year. The Company reserves the right to withdraw this scheme at its discretion [paragraph 8.4];
 - 8.5. The provisions of this Handbook may be altered by the Company as occasion requires or as legislation demands. Such legislative changes as are mandatory on the Company will be deemed to take effect as at the effective date of the legislation. However, the terms of any other proposed alteration or addition will be discussed as appropriate, for example with the Hilton Improvement Forum, and posted on the Notice Board [paragraph 59].
9. **The Statement of Main Terms and Conditions of Employment [pages 15-29] signed and dated by the Claimant on 2 September 2014 includes the following provision:**
 - 9.1. In addition to the Statutory Sick Pay Scheme, for which the qualifying days will be your normal working days, the Company operates a discretionary Sick Pay Scheme for employees [paragraph 6.1];
 - 9.2. Further details on the Company sick pay and procedures can be found in the Employee Handbook [paragraph 6.2].
10. **A Company Attendance Policy effective from 1 December 2019 [pages 35-40] made changes to the Company's Sick Pay Scheme. It changed the sick pay year and removed the years of continuous service criteria. It stated:**
 - 10.1. The Company sick pay year runs on a rolling basis, starting from the date of your first absence of work. **The Company operates a purely discretionary Sick Pay Scheme.** [paragraph 8.0].
11. **The updated Company Attendance Policy in effect from 1 September 2021 [pages 49-57] confirmed the arrangements outlined in the 2019 policy, namely that that the Company has a discretionary Company Sick Pay Scheme.**
12. **The Claimant was aware that the Company operated a discretionary sick pay scheme. However, he had not seen the 2019 and 2021 Company Attendance policies and as such, believed that the arrangements outlined in the Employee Handbook 2014, with respect to years of service and amount to be paid, were still applicable.**
13. **The Company had an app which employees used on their mobile phone which told them what shifts had been allocated to them. The app also contained the Employee Handbook. When asked whether proposed alterations to the 2014 Handbook were discussed with employees as per paragraph 59.1 of the Handbook, Mr Dosa's evidence was that this would have been discussed at the 'Your Voice' employee forum. Minutes from**

forum meetings were also posted on the app. The updated attendance policies would have been matters discussed at the forum. The new attendance policies were published on the app. Mr Dosa said that he could not comment on the specifics of how the app worked, but as far as he was aware, when a new document was uploaded, users would receive a notification. The Claimant confirmed that he has access to the app but that he did not use the app to look for HR documents. The Handbook and updated policies were also available to employees through the company's HR office.

14. The Claimant emailed Mr Dosa on 3 January 2023 explaining that he had not been paid the full company sick pay for the 8-week period beginning 19 December 2022 [page 83]. Mr Dosa replied to this email explaining that any additional company sick pay was entirely discretionary and said,

"looking at your records, this latest absence is the 4th absence in a 12 month period and the reason why only a payment of SSP has been made" [page 82].

15. In that email, Mr Dosa outlined the factors relevant to when the discretion would be exercised:

- 15.1. Length of service 1 year or more (SSP would be paid for those employees under 1yr LOS);
- 15.2. If the maximum amount of CSP already been paid out in the last 12 months;
- 15.3. If the employee had 4 or more occasions of absence in the last 12 months;
- 15.4. If the absence reporting procedure is being followed;
- 15.5. Has a UK med cert been submitted;
- 15.6. Is the individual co-operating with attending welfare meetings and / or Occupational Health appointments? If not, then no CSP;
- 15.7. Was the absence prior or after a holiday;
- 15.8. Payment made for 1st absence due to COVID. Subsequent absences of COVID would be subject to normal CSP rules;
- 15.9. CSP is not paid for the first 3 waiting days in a period of sickness for weekly paid employees.

16. Mr Dosa's evidence was that during his time working for the Respondent, these factors relevant to the discretionary sick pay had not been communicated to employees. In terms of how the discretion would be exercised, on a weekly basis, the Payroll Department would provide a list of employees and the duration of the absences. Mr Dosa's role was to

independently review the absences, assess them against the criteria and identify any discrepancies to ensure that a fair and consistent approach was applied to all employees. If any issues arose, there would be a discussion with colleagues to make a final decision. Mr Dosa said that the discretion was not exercised in relation to the Claimant's absence for the 8-week period from 18 December 2022 as no exceptional circumstances applied.

17. Mr Dosa's evidence was that during the nearly three years of his employment by the Respondent, the discretionary company sick pay had only been paid in a handful of cases. These cases were because of extremely serious medical conditions, for example, in one case, where an employee had been diagnosed with terminal cancer. He explained that the discretion would be exercised exceptionally, at particularly difficult times for employees.
18. The Respondent provided a schedule of absences relating to the Claimant between March 2021 and March 2023 [pages 70-71]. The schedule records several occasions of absence, and it was not disputed that the Claimant had lengthy periods of time off work. The Claimant had only received full company sick pay for a two-week period in 2021 where he had an emergency admission to hospital. This accords with Mr Dosa's evidence that the discretionary company sick pay would apply in serious medical situations.
19. For the rest of the relevant periods, the Claimant had received SSP. The Claimant in evidence said that he knew he was only receiving SSP for these periods. When asked whether he had previously challenged this with the Respondent, the only example he provided was in respect of the current complaint being determined.
20. The entry of 11 December 2022 on the schedule records was,

'called absence line – kidney problem'

The Claimant asked Mr Dosa in cross-examination why the schedule did not record that he had called the Respondent on 11 December 2022, informing them of his absence of going to hospital. Mr Dosa said that there was no record of him being admitted to hospital. I have seen no evidence that there was a hospital admission on 11 December 2022 and as such rely on what is recorded in the schedule.

Relevant Legal Framework

Contractual right to vary

21. Mr Bloom referred to the authority of Bateman and ors v Asda Stores Limited 2010 IRLR 370, EAT in his submissions. In that case,

'...An employer was entitled to introduce a new pay regime without the consent of its employees in accordance with a provision in its staff handbook.'

The provision, which was incorporated into the employees' contracts, reserved to the employer the right to vary terms in that handbook unilaterally to reflect the changing needs of the business. The EAT upheld an employment tribunal's decision that the term was unambiguous and that the changes introduced were consistent with it. It held that the wording in the handbook was clear and conferred two separate rights: one related to the handbook, and the other concerning the introduction of new policies. No consent was required since A Limited's right to review clearly entitled it to change the handbook content unilaterally. That power was not limited to non-contractual policies, since the handbook included contractual matters such as pay and hours of work.

Implied terms – custom and practice

22. Terms may be implied into employment contracts if they are regularly (but not necessarily universally) adopted in a particular trade or industry, in a particular locality or by a particular employer.
23. The requirement for the implication of terms under this head is that the custom in question must be reasonable, notorious and certain. The custom must be fair and not arbitrary or capricious. It must be generally established and well known, and it must be clear cut. It should be borne in mind that neither custom and practice nor any of the other legal bases for implying terms into a contract permits the courts to displace specific express terms that deal fully with the same subject matter as that on which a party is seeking to imply a term.
24. Examples of terms that have been held to be implied by custom and practice include:
 - 24.1. An employee was entitled to contractual sick pay during periods covered by medical certificates as this had been the employer's consistent practice over a substantial period of time (Akthar v Brd Retail Limited, t/a Burton Kia ET Case No.1901747/11); and
 - 24.2. An employee should be paid full contractual sick pay rather than merely statutory sick pay while on sick leave as he had been paid full pay for sickness absence, without exception, during a period of nine years and the practice of paying full pay was known and understood by all employees of the respondent firm, (Rubin v Andrew Angel Solicitors ET Case No.3202614/13).

Submissions

25. Mr Bloom submitted that the discretionary company sick pay is not properly payable as the Claimant has no contractual entitlement to it. He argued that the express terms in the contract of employment, terms of employment, 2014 Handbook and attendance policies make it clear that additional company sick pay has been discretionary going back to 2014. The arrangements in the 2014 Handbook referring to 8 weeks' pay after 5 years of continuous service was removed in the Attendance Policy dated December 2019, highlighting that the company operated a discretionary sick pay policy. This position was reiterated in the updated Attendance Policy in 2021. Mr Bloom submitted that these variations were permitted by clause 59 of the 2014 Handbook. Additionally, he relied on the authority of Bateman & Ors v Asda Rations Ag UKEAT/0221/09/ZT and said that employers reserve the right to vary contractual terms if the term is clear and the power is not exercised in an unreasonable way. Mr Bloom said that the Handbook and subsequent changes made to policy were available from several sources within the company such as through the HR office and the app.
26. He further submitted that there was no implied term that the Claimant was entitled to the company sick pay. If the Claimant was right in being entitled to the additional sick pay for the 8-week period in December 2022, Mr Bloom posed the question why he had accepted only receiving SSP for past periods of absence for example between January 2022 to May 2022.
27. The Claimant submitted that he believed he did satisfy the criteria outlined in Mr Dosa's email. He said that he only had two periods of sickness in the relevant timeframe. He further submitted that the requirements outlined in the 2014 Handbook had been met and that he did not understand why he has not received the additional company sick pay. He said that he was not aware of any alterations to his contract. He accepted that changes were permitted to be made by the employer but that employees should be informed about those changes and amendments.

Discussions and Conclusions

Variation

28. I conclude that there had been a permissible variation to the arrangements of the 2014 Handbook, namely, changing the sick pay year and removing the reference to years of service via the 2019 and 2021 Attendance Policies. I am satisfied that para 59 of the 2014 Handbook allowed for such a variation to happen and accept the evidence of Mr Dosa as to how updates about the policy would have been communicated and discussed, namely through the employee forum and the company app. I conclude therefore, that although the Claimant himself says he was not aware of the updated policy it had been 'discussed as appropriate' as required by paragraph 59 of the 2014 Handbook. It was not, therefore, a unilateral

variation. I also note that the Claimant in evidence, accepted that the 2014 Handbook allowed the company to make amendments.

29. I have a degree of sympathy towards the Claimant who said in his evidence that he was not aware of the changes as he was not involved in the employee forum and he did not use the company app for that purpose. However, in any event, the variation to the company sick pay arrangements, is not material to the issue to be determined. The fundamental nature of the provision, that the company had a discretionary sick pay scheme, remained unchanged.

Implied term?

30. The documentary evidence presents a clear picture that the company sick pay scheme was always discretionary, dating back to the 2014 Handbook. Even if, as the Claimant believed, the arrangements in the 2014 Handbook were still in force, it did not automatically entitle him to additional company sick pay. The company sick pay scheme was entirely discretionary, even then, and the Respondent would have been entitled to exercise their discretion as to whether an employee would receive the additional sick pay, irrespective of the years of service.
31. It is clear from Mr Dosa's evidence that the discretion to pay additional company sick pay is exercised sparingly, where an employee is faced with a particularly difficult issue, for example a serious medical condition or an emergency hospital admission. Only a handful of people had received it during the course of Mr Dosa's employment with the Respondent.
32. Although the Claimant asserted that he was admitted to hospital for the relevant absence in December 2022, it was not recorded in the schedule. I had no other evidence showing that there had been a hospital admission. Even if there had been a hospital admission, it is clear from Mr Dosa's evidence that the factors to consider when exercising the discretion, were guidelines, they were not determinative.
33. Similarly, the Claimant asserted that there had only been two periods of absence in the relevant period. The schedule of absences in 2022 shows four occasions of absence prior to 11 December 2022. In any event, as I have already outlined, even if an element of the criteria had been met, it did not necessarily mean that a decision would be made to pay the additional sick pay. Mr Dosa's evidence was that the decision would be made in a holistic way, taking into account various factors to reach a fair and consistent decision.
34. The schedule outlining the Claimant's absences supports the fact that the discretion to pay the additional company sick pay was exercised as an exception rather than a rule, given the Claimant had only received additional company sick pay for a single period in 2022. Whereas, for other periods of absence, he had only received SSP. Notably, the Claimant did not challenge the fact he had previously only received

payments for SSP for previous periods of absence, for example the lengthy period of absence between January and May 2022.

35. The Authorities contained in the 'Relevant Legal Framework' section above, where employees were found to be entitled to contractual sick pay through custom and practice, do not apply in the present case. Unlike in those cases, there was no established practice over a substantial period of time. Nor is there any evidence that the practice of receiving full company sick pay was understood by all employees. The evidence from Mr Dosa, is that only a handful of employees have received discretionary sick pay. As such, when looking at the past conduct between the Claimant and Respondent, it is clear that no custom or practice to pay additional company sick pay had been established in respect of the Claimant.
36. The Claimant has no contractual entitlement to additional company sick pay. The company sick pay is not properly payable and as such this claim fails.

Employment Judge Z Islam

Date: 8 January 2024

Sent to the parties on: 17 January 2024

For the Tribunal Office.