EMPLOYMENT TRIBUNALS

Claimant: Mr P Griffiths

Respondent: First Trenitalia West Coast Rail Limited

Heard at: Manchester Employment Tribunal (by CVP)

On: 25 May 2024

Before: Employment Judge Dunlop

Representation

Claimant: In person
Respondent: Mr C Meiring (counsel)

JUDGMENT

1. The claimant was entitled to be paid company sick pay in respect of his employment between 3 July 2023 and 23 November 2023 (inclusive). By not paying him company sick pay in this period, the respondent made unauthorised deductions from his wages.

2. The amount of compensation due to the claimant will be determined at a remedy hearing, if not agreed between the parties.

REASONS

Introduction

1. This is a claim of unauthorised deductions from wages. The claimant, Mr Griffiths, claims that he was entitled to be paid company sick pay (commensurate with his full salary) for the periods set out below. The parties agree that the claimant was absent and this his sick pay was stopped. They disagree about whether he was entitled to receive it.

The Hearing

2. This was a one-day hearing conducted by CVP. Unfortunately, there were some significant difficulties with connection and sound during the hearing. I raised with both parties whether they felt that they could adequately put forward their case in the face of these difficulties. Both agreed that they would prefer to continue the case than seek an adjournment. Although the hearing was more difficult for all involved than would have been the case without the connection difficulties, I was satisfied that both parties were still able to have a fair hearing.

3. I was provided with an agreed bundle of documents of 263 pages. I read those pages to which my attention was drawn by the parties. I explained that this was the case, and that the parties must not assume I had read anything which they had not expressly referred to.

4. I also read witness statements prepared by Mr Griffiths, and by Ms Vikki Roberts (Strategic HR Business Partner) on behalf of the respondent. I read the documents referred to in those statements. Both Mr Griffiths and Ms Roberts gave evidence, and were cross-examined.

5. I heard submissions from Mr Meiring, on behalf of the respondent. I then heard submissions from Mr Griffiths. Mr Meiring made a brief reply.

6. There was insufficient time at the end of the day for me to reach a decision and give a reasoned Judgment. I therefore reserved the decision and informed the parties I would produce a written Judgment.

7. Producing this Judgment has taken longer than I would have wished, and I apologise to the parties in respect of that delay.

The Issues

8. An unauthorised deduction claim will succeed where the wages claimed were “properly payable” to the employee, and have been deducted without proper cause. It was acknowledged by the parties in the hearing that the real issue in this case was whether the sick pay was “properly payable”. If it was, then there was no justification for it not being paid.

Findings of Fact

Background

9. Mr Griffiths has worked as a train driver since 2008. He resigned from First Group (Transpennine Express) in 2017 to take up work with West Coast Trains Ltd, a part of the Virgin rail group. In or around 2019, the West Coast rail franchise transferred from the Virgin Group to the respondent, meaning that Mr Griffiths was once again working for a business within the First Group. Mr Griffiths has an extremely low opinion of the First Group generally, and the respondent in particular.

10. Mr Griffiths’ contract of employment with West Coast Trains appears in the bundle. The parties agree that it remains the contract which determines his

terms of employment, with the respondent assuming the rights and responsibilities of West Coast Trains.

11. In respect of sick pay, the contract says this at clause 11:

"Your terms and conditions relating to incapacity for work due to sickness or injury, and sick pay, are set out in the Virgin Trains handbook. Virgin Trains sick pay is not payable to new entrants until six months' employment has been completed."

12. I was not provided with a copy of the Virgin Trains handbook. I was provided with a copy of the respondent's handbook, setting out the procedure for sickness reporting and entitlement to sick pay. Mr Griffiths did not suggest that a different procedure applied to him due to his previous employment with Virgin. Both parties proceeded on the basis that the handbook in the bundle governed the employee's entitlement to sick pay. I have also proceeded on that basis.

13. The handbook includes the following provisions about sickness absence and pay. It is important to set them out in full:

7.2.1 Contact and communication

It is important that we know about any absence which may occur due to illness as soon as possible. It is vital that your manager (or, if appropriate, the Resource Centre) is informed in good time of your sickness absence.

Keep your manager fully informed of your situation on a weekly basis (or timeframe as agreed with your manager), so that they can fully support you and plan ahead.

For more information, see 3.2.3. [I interpose that paragraph 3.2.3 refers to notification of unexpected absence on the day it occurs. It is not relevant to the determination in this case.]

7.2.2 Seven days or less

If you are ill for up to seven calendar days, complete a return to work document on your return to work, as per local arrangements. Payment of statutory sick pay (SSP) may depend on this document being completed.

There may be occasions when your absence must be certified by your GP.

7.2.3 More than seven days

To qualify for sick pay, a Fit Note is required if the period of sickness is longer than seven days and a new certificate should be obtained and sent to your manager if the previous one expires and your sickness absence continues.

If you are not fit for work, the circumstances or length of sickness may require you to undergo a medical examination to confirm how we can support your recovery or provide further information on your absence/ illness to assess your fitness to work. If you are absent for four weeks or more, we may also require you to attend a medical examination before returning to work in order to confirm you're fit for all your duties.

7.2.4 Statutory Sick Pay

Regardless of eligibility for Company Sick Pay, you will receive SSP as you are entitled to, at the current rate. A qualifying day for the purpose of SSP is a day when you would ordinarily work.

7.2.5 Company sick pay

If in a period of absence, you have exhausted your Company Sick Pay entitlement, you cannot re-qualify for further sick pay during that absence. You should note that Company sick pay is normally not payable where you have refused to undergo a medical assessment or examination, or in the event that you are absent while facing disciplinary proceedings.

Providing false information to obtain sick pay is a disciplinary offence; it is dishonest and depending on circumstances may be fraudulent.

Length of service	Company sick pay entitlement
0-6 months completed service	Zero pay
6 months – 1 years' service	6 weeks at full pay followed by 6 weeks at ½ pay
1-5 years' service	16 weeks at full pay followed by 16 weeks at ½ pay
Over 5 years service	52 eeks full pay

14. By an email sent in September 2022, the respondent proposed to change this process set out in the handbook. The material change was that Fit Notes were now to be emailed to a central payroll email address, rather than to the line manager. The email stated:
Doing this will ensure the Fit Note gets to the right person on time, and crucially ensures that you'll continue to be paid. ***If you do not follow the process, there is a risk it could impact your eligibility for sick pay, a situation we all want to avoid.***

15. Ms Roberts' evidence was that the very high levels of sickness absence during the pandemic had resulted in the respondent relaxing its requirement for Fit Notes. This email represented a retrenchment of the position that Fit Notes would be required, implemented in a way which would be more centralised and effective.

16. Mr Griffiths alleges that on 30 January 2019, the respondent unlawfully stopped some of his wages. (I record that assertion, without making any findings about it.) From there, relations between the parties deteriorated. There was a grievance and, in May 2022, correspondence from a solicitor instructed by Mr Griffiths. Mr Griffiths alleges that as a result of raising these complaints he was targeted, and the respondent's managers took every opportunity to attempt to cause problems for him.

17. In May 2023, Mr Griffith was notified that there was going to be a disciplinary investigation into a conduct matter. He saw that as an act of persecution. Again, I make no findings as to whether or not the conduct investigation was appropriate or justified.

Sickness absence

18. This was the backdrop against which Mr Griffiths commenced a sickness absence on 5 June 2023. That absence would, in due course, become the long-term absence with which this claim is concerned.

19. Mr Griffiths attended Preston station on 5 June 2023, when he was rostered to work. He was deployed to a non-operational role at this point. He used his company mobile to phone the central resources team and report that he was unwell and unable to work. The reason he gave was a bad back. He then went home, leaving his company mobile at work, as was his usual practice. (I assume he has a locker or some similar place to leave it securely, this was not directly covered in evidence).

20. At 18.31 on 9 June 2024 the claimant's daughter, who also works for the respondent, emailed Colin Barratt, a manager at Preston, with a Fit Note sent on behalf of Mr Griffiths. She explained that she was sending it on his behalf as he did not have access to his work email. Mr Barrett responded on the same evening saying that he would "*get it over to payroll*" and passing on his regards. There was no suggestion that anything more needed to be done at that stage by Mr Griffiths or his daughter. The sickness certificate stated that Mr Griffiths would be unfit to work until 5 July 2023, and gave the reason as work-related stress.

21. It was the respondent's case that this was not a valid way to submit a sickness certificate, and it should have been submitted direct to a central department, as per the email referred to above. In view of Mr Barrett's response, I find that this was an acceptable way to submit a sickness certificate in practice, and that Mr Giffiths (and his daughter) were entitled to rely on the assurance that Mr Barrett would submit the certificate to payroll, and that they were not required to do anything more.

Requests for contact

22. Aaron Cody, of the respondent's HR Attendance Support Team, wrote to Mr Grifiths by letter dated 12 June 2023. The letter was sent by post and post-marked 15 June 2024. The letter stated:

    I have attempted to contact you via your work mobile a few times since this date, however calls are not connecting to the number in question. I have alternatively tried to call your personal mobile on the following dates: Tuesday 6th June at 11:06, Friday 9th June at 11:53 and on Monday 12th June at 15:51. I have left voicemails on each occasion but regrettably have not heard back from you.

    Mr Cody and Mr Griffiths had not had any previous dealings with each other. Mr Griffiths asserts that the letter was a lie, and that the respondent had not made attempts to contact him. There is no credible reason put forward as to why Mr Cody would deliberately lie in this letter. I find that Mr Cody had attempted to call Mr Griffiths work phone, and that that was unsuccessful as the phone was at work. I find that Mr Cody also attempted to contact Mr Griffiths using another number, which he believed to be Mr Griffiths 'personal' number.

23. Mr Griffiths denies that he received any such calls. The respondent has not provided call records to show the number used, nor does Mr Cody's letter state the number he was calling. At a later point, the respondent called the claimant's wife, seemingly understanding that the number it had for her was the claimant's 'personal' number. Mrs Griffith's phone records appear in the bundle, and do not seem to marry up with Mr Cody's information. In all the circumstances, I accept Mr Griffiths evidence that he did not, for whatever reason, receive the calls (or voicemails) referred to in the letter. It is accepted, however, that he did receive the letter itself.

24. The letter went on to give a mobile number for Mr Cody, and to request that Mr Griffiths make contact "as a matter of urgency" by Wednesday 14th June "*so that we can understand the reason for your absence and what support you may need to enable a timely return to work*". There was no evidence about the mechanism for a letter produced by Mr Cody being printed and put in the post. It hopefully does not need to be said that it is poor practice for an HR department to produce letters containing a deadline for an employee's response, which are posted to the employee after that deadline has already passed.

25. The letter makes no reference to the sickness certificate which had been submitted by Mr Griffiths' daughter. I can understand why Mr Griffiths, who already felt persecuted by the respondent, considered this letter to be a further example of such persecution and reacted badly to it. Notwithstanding this, the sensible response to the letter would have been to call the number, and make contact with Mr Cody. Mr Griffiths did not do that.

26. A further letter 15 June 2023 was sent to Mr Griffiths from "The Payroll Team". This letter noted that Mr Griffiths had not supplied a fit note to cover his sickness (which, in fact, he had, as I have found above). It asks for Mr Griffiths to provide the documentation by email. Mr Griffiths received this letter on 19 June. He chose not to respond to it. In his words:
Having put up with exactly this kind of behaviour from Avanti for a few years at this point, I was certainly in no frame of mind to respond to such ridiculous letters. I had tried to reason with them for a long time and got nowhere. I protected myself by not responding to such nonsense, thus reducing further distress. Their claims of trying to understand the reason why I was off work and wanting to help are bogus, cynical and disingenuous. They knew full well why I was off work, and didn't care.

27. I also note here that Mr Griffiths has produced a document which appears within the bundle of documents headed "Driver Welfare Calls". It appears to be a policy document on that subject, setting out five numbered points. The fourth point is:
Depending on the Type of sickness (ie mental/stress issues), or If a Driver is off sick for longer than 4 weeks, a welfare call maybe made be made to the driver by leaving contact details on the Drivers Company Mobile phone, unless the driver has Authorised other means of contact, (please note any interaction by the driver is purely voluntary and confidential on a case by case basis).

28. Mr Griffiths relies on this document to say that it the company was "not allowed" to contact him in the way that Mr Cody had purported to do (notwithstanding his argument that Mr Cody had lied about trying to contact him anyway). Ms Roberts' evidence, which I accept, about this "policy" is

that it was a proposed policy document produced by the union but not adopted by the company.

29. The respondent can rightly be criticised for what, in my judgement, is best described as administrative error/incompetence, in terms of the deadlines in its letters, the failure to acknowledge the Fit Note, and so on. However, I find that it was clear to Mr Griffiths by 19 June at the latest that the Fit Note had not made it to the right place. He also knew from the letters the respondent was trying to call him. Around this time, if not earlier, his wife began to receive calls which both suspected were from the respondent. The respondent's file notes indicate that Mr Barrett was also trying to make contact, including via Mr Griffiths' daughter. I do not find it credible that all of the evidence of those attempts are essentially part of a detailed fabrication, as Mr Griffiths at times appeared to suggest. Instead, I find Mr Griffiths deliberately chose not to engage with the respondent, due to the extremely negative views he held about the business.

30. On 29 June 2023 Mr Cody sent another letter. The letter set out the history of attempted contact from the respondent's perspective. It did not mention the Fit Note. It gave a number and advised Mr Griffiths to contact Mr Cody by 3 July. Finally, the letter stated that Mr Griffiths' company sickpay would be stopped if contact was not made by the deadline. As things transpired, that is exactly what happened. From 3 July, Mr Grififths continued to be paid statutory sick pay, but not company sick pay.

31. Although Mr Griffiths did not contact Mr Cody, he sent a further Fit Note to the respondent by recorded delivery, which was signed for on 8 July. This Fit Note certified him as unfit to work for four weeks from 5 July. I am unsure where the sicknote was sent to.

32. On 18 July the respondent's payroll department wrote to Mr Griffiths. It is apparent from this letter that they had now received the first Fit Note (certifying absence up to 4 July) although that had never been acknowledged to Mr Griffiths. The letter states that no further Fit Note has been received. The letter states (contrary to Ms Roberts explanation of the policy) that Fit Notes are to be submitted both to payroll and to the line manager. It is likely true from the perspective of the payroll department that no certificate had been received, albeit that Mr Griffiths had sent one in by post, as noted above.

33. Following weeks of deliberate non-contact from Mr Griffiths, he then wrote to the respondent's human resources department on 31 July 2023. This is a long and vituperative letter which accuses the respondent generally of being "corrupt", "rancid" and "dystopian" amongst other adjectives.

Occupational Health referrals

34. In a short letter dated 17 August 2023 from Mr Barratt (produced on the advice of Ms Roberts) Mr Griffiths was informed that the respondent was going to refer him for an Occupational Health appointment, and that details of the appointment would be provided in due course.

35. Unfortunately, Medigold, the respondent's occupational health providers, managed to generate duplicate appointment invitations. These were sent to Mr Griffiths in early September, for an appointment on 28 September, although there was confusion as to whether this was to be face-to-face on in Leeds. Mr Griffiths raises various concerns about this appointment in addition to the confused communication – including the difficulty of travelling to Leeds and the failure of the respondent to provide a rail warrant. These were not raised with the respondent at the time. Mr Griffiths simply ignored the letters. In reality, I find these issues were no more than distractions. Mr Griffiths had no intention of attending an occupational health appointment as he felt occupational health had nothing to offer him. If he had been prepared to attend, then a simple phone call could have sorted out the difficulties.

36. On 7 September Mr Griffiths provided a further Fit Note, by email, direct to the payroll department. So far as I understand, there were no issues with the provision of Fit Notes thereafter. All of Mr Griffiths' absence was medically certified.

37. Mr Barratt wrote to Mr Griffiths on 26 October 2023 informing him that a further occupational health appointment had been arranged for 2 November by video call. However, no paperwork in relation to such an appointment appeared from Medigold.

38. By a further letter of 8 November 2023, Mr Barratt informed Mr Griffiths that there would now be an appointment on 13 November 2023. There is no mention in this letter of the previous letter, or the proposed appointment on 2 November. It is a feature of this case that the respondent does itself no favours in its communication, by never acknowledging where something has gone wrong, or where things have been put right (for example the lack of any express acknowledgement that the first two Fit Notes had reached payroll, as described above).

39. This time, Medigold also wrote to Mr Griffiths on the same date with details of the videolink appointment. The letter included the mobile number via which the videocall would take place. Mr Griffiths evidence, which was not challenged, was that this was his work mobile number (and therefore he would be unable to receive the call). He did not, however, take any steps to notify Medigold, either directly or through his employer, and to provide an alternative number.

40. On 17 November Mr Barratt wrote to Mr Griffiths, noting that he had not attended the appointment on the 13th, and asking him to make contact "so we can agree next steps in supporting you to return to work".

41. Mr Griffiths wrote to the respondent, addressing his letter to P Holland in the the HR department. The letter was received on 23 November. The letter, which is again scathing and intemperate, is largely concerned with the disputes between Mr Griffiths and the company which pre-dated his sickness absence, and remained unresolved. In a post-script, Mr Griffiths adds, "I think that you should cease and desist with bungling attempts to arrange a company medical for me (because you 'cannot contact me and have no idea why I am off work')" before going on to refer to a medical

arranged at Salford prior to the events in this case from which Mr Griffiths was turned away because the medical providers were not expecting him.

42. Mr Grifiths has said to the Tribunal that the meaning of this comment was that the respondent should cease making "bungled" medical appointments, and instead make proper arrangements. I reject this assertion and find that the meaning of the comment was that, so far as Mr Griffiths was concerned, the respondent should stop making appointments at all. That is also how the respondent interpreted his meaning.

43. Medigold sent a further letter for a telephone assessment. The letter was sent on 12 December and the proposed appointment was 20 December. Again, the number on the appointment letter was the unavailable work mobile number, but this is perhaps not surprising as Mr Griffiths had not pointed out to anyone (whether at Medigold or the respondent) the problem with using that number.

44. On 13 December Mr Barratt sent a letter confirming the above appointment. Referring to Mr Griffiths letter of the 23 November, he stated "*it appears from this communication you do not intend to attend any future appointments that are arranged for you.*" Giving details of the proposed 20 December appointment, Mr Barratt informed Mr Griffiths that he was making a reasonable management request that Mr Griffiths attend, and asks him to get in touch to confirm his attendance. Mr Griffiths did not contact Mr Barratt to contradict the assertion that he had no intention of attending, nor to highlight the phone number issue, nor to confirm his attendance. Medigold subsequently informed the respondent he did not attend.

45. No further appointments were arranged, and the respondent continued to withhold Mr Griffiths' company sick pay. Mr Griffiths had, by this stage, already completed the ACAS Early Conciliation process, and had submitted his claim to the Tribunal on 6 November 2023.

46. Mr Griffiths remained off on certified sickness absence until the date of this hearing.

Relevant Legal Principles

47. Section 13 Employment Rights Act 1996 provides as follows (my emphasis added):

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision 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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(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 (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4)-(8) omitted.

48. As noted above, the issue in this case is whether the company sick pay claimed by Mr Griffiths amounted to "wages properly payable" at the time it was stopped. For wages to be properly payable, there must be some legal entitlement to them (**New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA**). This will usually, although not always, be a contractual entitlement. The Tribunal may have to interpret the contract of employment and/or imply terms, in order to determine what is properly payable, and it is within the Tribunal's jurisdiction to do so (**Agarwal v Cardiff University 2019 ICR, 433, CA**).

Submissions

49. Both parties made oral submissions which were relatively brief and focused on the facts in the case. Mr Meiring also addressed the provisions of the handbook, and their effect, in some detail. No authorities were cited.

Discussion and conclusions

50. I am satisfied that the terms of the handbook, as they relate to sickpay, were incorporated into the contract. They are apt for incorporation, and neither party contended otherwise. Indeed, as Mr Meiring pointed out in his submission, Mr Griffiths' claim rests on the terms in the handbook being incorporated, as that is what gives rise to the entitlement to company sickpay on which the claim must be based.

51. The starting point is that Mr Griffiths was entitled to company sick pay in appropriate circumstances. He had sufficient length of service as per the table in the handbook at 7.2.5. Again, neither side disputes this.

52. Paragraph 7.2.3 provides that, to qualify for sick pay, a Fit Note is required if the period of sickness is more than seven days. Despite the confusion over provision of Fit Notes in this case (which was not helped by the actions of either party) it is not now in dispute that Mr Griffiths' absence was covered by a valid Fit Note throughout (or at least after the initial self-certification period). This means, absent anything which operates to take away Mr Griffiths' entitlement, he was entitled to receive company sick pay throughout this absence.

53. Paragraph 7.2.5 provides two express scenarios where "sick pay is not normally payable". Those are, firstly, "where you have refused to undergo a medical assessment or examination". I will return to this below. The second scenario is where an employee is absent whilst facing disciplinary proceedings. Although there was evidence that Mr Griffiths was, or was about to be, under investigation at the start date of his absence, the respondent has never suggested there were extant disciplinary proceedings, nor anything of that nature, which affected his entitlement to sick pay. That scenario is therefore irrelevant here.

54. Paragraph 7.2.1 imposes an obligation on a sick employee to keep their manager fully informed of their situation on a weekly basis, or timeframe agreed with the manager. Mr Meiring says that an employee's entitlement to receive company sick pay is also contingent on complying with this obligation. Otherwise, he submits, 7.2.1 imposes on the employee a condition without a consequence. He says that it is necessary to imply such a provision to give efficacy to the arrangement. The respondent cannot be obliged to pay completely uncooperative employees.

55. I disagree with Mr Meiring's submission for several reasons:
    55.1 This is a unionised workplace and the sick pay provisions represent a generous and valuable benefit negotiated by the employees. I consider I am entitled to assumed that the handbook (which is identified by the contract as the source of the entitlement) represents that entitlement fully and accurately, and I should be very careful about implying additional restrictions (or, indeed, any additional entitlement) which is not expressly set out in the handbook.
    55.2 Sick pay is only available when employees are sick, as evidenced by a Fit Note. There may be periods of sickness where employees cannot reasonably comply with a requirement to communicate or cooperate. Further, a requirement to communicate is somewhat subjective and not particularly certain. The employer may be very unhappy with an employee who phoned his manager once per week at midnight, in order to avoid ever having to have a conversation, but it would this amount to compliance with 7.2.1 – the scope for argument is obvious. This tells against that particular provision being apt for incorporation as a contractual obligation.
    55.3 There are many other expectations which an employer may have of its workforce, and which may be set out in policies, including in this handbook. It is not generally the case that the failure to comply with such an expectation will result in a loss of entitlement to pay. (There is no suggestion, for example, that a failure to "work diligently" or "avoid waste" as mandated by paragraph 3.1 of the same handbook would cause an employee to lose their entitlement to wages). If that is to be the case, it would be clearly stated.
    55.4 The fact that a failure by an employee to comply with a particular obligation does not impact on their entitlement to sick pay/wages does not mean that there is no effective recourse for the employer. Such failures may give rise to conduct or capability proceedings as appropriate.
    55.5 In this case, the employer has chosen to make clear statements about the potential for entitlement to sick pay to be lost in the two specific

instances above. That militates against the existence of other, unexpressed and ambiguous circumstances, where the entitlement to sick pay can also be lost.

55.6 For those reasons, if the entitlement to sick pay was to be contingent on the fulfillment of an on-going duty to communicate I consider the handbook would have to clearly state that. It does not, and I find that the entitlement to sick pay is unaffected by whether or not the employee has communicated about his absence with his employer as required by 7.2.1 (provided always that he has supplied Fit Notes).

56. It follows from that analysis that the respondent was not entitled to stop Mr Griffiths' pay on 3 July 2023.

57. That is not the end of the matter, as the respondent also asserts, as a fall-back argument, that Mr Griffiths' alleged failures to attend occupational health appointments provided separate grounds for stopping his sick pay.

58. Returning to the wording of paragraph 7.2.5, Mr Griffiths asserted during the hearing that the words "medical assessment and examination" in that paragraph referred to a form of statutory medical which train drivers are required to undergo on a periodic basis in the interests of public safety. I reject that assertion. I consider that the words are broad enough to clearly encompass a standard occupational health assessment, and, further, that such an assessment is much more likely to be in the contemplation of the drafters of this part of the handbook than the statutory medical referred to by Mr Griffiths.

59. So, the question becomes, did Mr Griffiths refuse to undergo an occupational health assessment and, if so, when?

60. As I have said above, I am quite convinced that Mr Griffiths had absolutely no intention of undergoing any occupational health assessment at any point. Notwithstanding that, I do not think that he can be said to have "refused" absent any positive statement of refusal, in circumstances where the purported appointments made were appointments that were not realistically feasible, because of poor administration.

61. I find that Mr Griffiths' statement in his letter received by the respondent on 23 November 2023 that it should stop arranging appointments can properly be viewed as an express refusal to attend in the specific circumstances of this case (which include, importantly, Mr Griffiths' continued failure to attempt to inform anyone that he could not participate in video appointments via his work mobile, and to provide an alternative means of contact). Although not strictly relevant on my findings, that refusal was confirmed when he failed to respond to Mr Barratt's letter of 13 December 2023, asking him to confirm his attendance.

62. On that basis, I find that the respondent was entitled to withhold company sick pay, in accordance with the handbook, in respect of Mr Griffiths' service from that date onwards. The sick pay was not "properly payable" so far as it related to 24 November and subsequent dates.

63. In those circumstances, Mr Griffiths' claim for unauthorised deductions from wages succeeds, but only in respect of the period 3 July 2023 to 23 November 2023.

64. With the agreement of the parties, I did not hear evidence on the amount of those deductions. I trust that the parties will be able to agree the appropriate compensation figure between themselves. If the cannot, the matter will be determined at a remedy hearing, and the Tribunal will write to the parties separately about this.

Employment Judge Dunlop

Date: 21 June 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 2 July 2024

FOR EMPLOYMENT TRIBUNALS