



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr A Simonds

BMW Hams Hall Motoren GmbH

HELD AT Birmingham
(by video)

ON

29 July 2024

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: In Person

For the respondent: Mr E MacDonald (Counsel)

JUDGMENT

1. The correct name of the Respondent is BMW Hams Hall Motoren GmbH.
2. The claimant's claim for sick pay fails and is dismissed.

REASONS

Background

1. Following a period of Early Conciliation commencing on 19 October 2023 and ending on 30 November 2023, the Claimant issued a claim for

other payments which was received by the Employment Tribunal on 28 December 2023.

2. The respondent produces engines for a range of cars.

Evidence and documents

3. I was presented with a bundle of some 90 pages. At the commencement of the hearing I sought confirmation from the parties as to whether the bundle was agreed. This was confirmed to me.
4. I also heard evidence from the Claimant and from Maxine Hawkins, the Respondent's Head of Human Resource Management.

Issues

5. I began the hearing by clarifying the claimant's claims. Although the Claimant has referred to holiday pay in his witness statement, he confirmed that his holiday pay had been paid and was no longer an issue.
6. I set out below the list of issues which the Tribunal needed to consider and which were agreed with the parties.
7. The issues are:

Unlawful deduction of wages

- 7.1 was sick pay for the period 26 July 2023 to 23 November 2023 properly payable to the Claimant?
- 7.2 If so, how much is the Claimant owed?

Facts

8. I make the following findings of fact :
 - 8.1 The Respondent is a manufacturer of car engines.
 - 8.2 The Claimant was employed by the Respondent as a Machinist from 17 September 1990 until his resignation with effect from 18 January 2024.
 - 8.3 The Claimant was absent from work due to sickness from 29 September 2022 until 23 November 2023. The Claimant received full company sick pay for the period up to and including 25 July 2023.
 - 8.4 The Respondent has a very generous sick pay scheme details of which are set out in its Associate Handbook. This provides that the Respondent will pay basic salary during sick leave to eligible employees for 52 weeks in total. This is calculated on a rolling basis. In long term absence cases where the 52 week sick pay

- entitlement has been exhausted, the Respondent has discretion to extend the period of paid sick leave and any extension is also subject to review by the Respondent's appointed medical practitioner.
- 8.5 The Claimant received sick pay until 25 July 2023. He accepted in cross examination that he had no entitlement to sick pay beyond that.
- 8.6 The Claimant requested an extension to his sick pay. This was considered by the Respondent. The evidence of Ms Hawkins, which was not challenged by the Claimant, was that the extension of sick pay was reserved for serious cases such as where someone was terminally ill or had a life threatening illness. The Tribunal heard that although the Respondent considered the Claimant's request, it was turned down as the Claimant's illness did not fall within these categories. On the contrary the Claimant was certified as fit to return to work from 24 November 2023. Further, two other employees had their requests for extended sick pay to be turned down for the same reasons. The Claimant was informed of the Respondent's reasons for refusal during a grievance hearing in October 2023.
- 8.7 The Respondent also supported the Claimant in an application for a claim under its income protection scheme but this application was rejected by Aviva, the insurers.
- 8.8 It was clear from the evidence before the Tribunal that the Claimant did not wish to return to work and had indicated as such from April 2023 onwards, seeking instead an exit package.

Applicable law

9. Section 13 of the Employment Rights Act 1996 provides:

“(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)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

Submissions

10. In his submissions Mr MacDonald asserted that discretionary sick pay was not properly payable to the Claimant. He referred me to the authority of **New Century Cleaning -v- Church [2000] IRLR 27** as authority for the fact that there must be a legal entitlement in order to bring a claim under s13 of ERA. He accepted that for a discretion to be properly exercised it must be done reasonably (**Bannerman Company Limited -v- MacKenzie UK EAT 275/95**). Mr MacDonald asserted that the Respondent had exercised its discretion and had done so reasonably. The evidence showed that such discretion was only exercised in cases where an employee had a life threatening or terminal illness and the Claimant did not fall within this category. Furthermore, discretion was unlikely to be exercised where an employee had indicated that they did not wish to return to work.

11. The Claimant made no submissions other than to say that he did not return to work at the time due to his mental health.

Conclusions

12. In reaching my conclusions I have considered all the evidence I have heard. I have also considered the bundle in its entirety as well as the oral submissions made by or on behalf of the parties.
13. I am satisfied on the evidence before me that there have been no unlawful deductions from the Claimant's wages and he is not entitled to any sick pay for the period 26 July 2023 to 23 November 2023. The Claimant had no entitlement (which he accepted) to discretionary sick pay. I am satisfied that the Respondent considered the Claimant's request for discretionary sick pay in good faith and turned down the Claimant's application as his illness did not fall in the categories for terminal or life threatening illnesses. Others were turned down for the same reasons and I am satisfied that it was reasonable for the Respondent to refuse the Claimant's request for these reasons.
14. As such, sick pay for the period 26 July 2023 to 23 November 2023 is not properly payable and the Claimant's claim fails and is dismissed.

Signed by _____ on 29 July 2024
Employment Judge Choudry

Judgment sent to Parties on

31 July 2024

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>