



EMPLOYMENT TRIBUNALS

Claimant: Mr Kadees Mohammed

Respondent: Department for the Environment, Food and Rural Affairs

Heard at: London Central Tribunal (via CVP)

On: 20 and 21 February 2024

Before: EJ Boyle

Representation

Claimant: Mr Darshan Patel (Counsel)

Respondent: Ms Laura Robinson (Counsel)

JUDGMENT having been sent to the parties on 1 March 2024 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant registered his complaint with ACAS on 3 February 2023 and received his Early Conciliation Certificate on 17 February 2023. He presented a claim with London South Employment Tribunal on 16 February 2023 alleging unlawful deductions from wages due to non-payment of occupational sick pay from 9 November 2023. He claimed his losses at that time were on-going.
2. The respondent filed an ET3 denying the claim on 20 April 2023.
3. A case management hearing took place on 17 May 2023 before EJ Buchanan where a list of issues were agreed. Both parties counsel confirmed that this remained the issues to be determined in this case.

4. Did the respondent make unauthorised deductions from the claimant's wages in relation to occupational sick pay from 9 November 2022 to 8 September 2023 and if so how much was deducted?
5. The claimant sought to amend his claim on 14 August 2023 to claim on-going loss until 8 September 2023. Leave was granted by the Tribunal and the claimant served amended particulars on 13 October 2023.

.Procedure Documents and Evidence

6. I heard evidence from the claimant, his sister, Ms Maryam Zahri, and Mr Tom Culmer and Mr Aadam Lloyd for the respondent. I was supplied with an agreed bundle of papers including the Claimant's contract, letters and emails. I was referred to this bundle during the course of the hearing.
7. The claimant remains at the Tamarind Centre, a male medium secure facility where he continues to being treated for mental health issues. In accordance with the Equal Treatment Bench Book, we agreed to have regular breaks. It was also agreed that the claimant would not be questioned about the criminal charges made against him.
8. At the end of the case, I had the benefit of written submissions from both Counsel together with an authorities bundle. Both Counsel took me through their submissions and were able to expand on their arguments orally.
9. Put very succinctly the claimant argued that the occupational sick pay policy was activated here because he was unwell (and sectioned) and that despite his detention, this was a reason for his absence. As such he was entitled to occupational sick pay for the entire period of eligibility. The respondent argued that the reason for the claimant's absence was his detention as a prisoner having been charged with criminal offences. As this was the reason for his absence, he was not entitled to occupational sick pay for the absence.

Fact Findings

10. After a careful consideration of all the evidence before the Tribunal, I make the following findings of fact.
11. The claimant is employed as a senior business analyst by the respondent (a Government department) and has been employed by the respondent since 1st April 2022. The claimant's full continuous employment with the civil service began on 23 November 2015.
12. The claimant had a contract of employment with the respondent dated 1 April 2022. The Summary of Principal Terms and Conditions of Service states at the outset that, "*The following paragraphs summarise or refer to your main terms of your employment. Additional details can be found at Annex 1*

13. *Defra retains the right to review and change HR Policies, following the appropriate consultation... Full details of your conditions of employment and the Policies that apply to you are contained on the HR Intranet”.*
14. Annex 1 section 3 under the heading Sick Absence Pay states “*You will receive occupational sick pay, increasing by length of service, as set out in the table below... [Any absence due to sickness must be fully covered using a self and/or doctor’s certificate and the Department will keep a record of this information, in order to pay contractual pay and/or SSP, and to monitor your attendance... ”*
15. The DEFRA Sick Pay Policy states “*Employees appointed into the Civil Service on or after 28 April 2014 will receive occupational sick pay increasing by length of service as set out in the table below, up to a maximum of 10 months sick pay in a four year rolling period... ”*
16. It was not in dispute that due to the claimant’s total length of service with the Civil Service, that if so entitled the claimant could receive up to 5 months full pay and 5 months half pay for a period or periods of sickness absence.
17. The claimant took a period of paternity leave from 27th September 2022 followed by a period of annual leave and was due to return to work on 9th November 2022
18. On 18 October 2022 the claimant was arrested following the death of his baby, and injuries to his wife and mother. He was arrested and charged with murder, wounding with intent and assault by beating and remanded in custody
19. By order of the Criminal Court dated 20 October 2022, he was transferred from HMP Birmingham to the Tamarind Centre – a medium secure hospital facility for treatment. This transfer was made under s48 (2) (a) Mental Health Act (“MHA”)1983. This was because it was considered (following medical evidence)

“that he was suffering from mental disorder within the meaning of the said Act and that the mental disorder was of a nature or degree which makes it appropriate for the patient to be detained in a hospital for medical treatment, and is satisfied that appropriate medical treatment is available to the patient, and that the said person is in urgent need of such treatment.”
20. I find that claimant was detained from 18 October 2022 and following his removal to the Tamarind Centre on 20 October 2022 he would not have been free to leave the Tamarind Centre in the event his health improved without a further court hearing to determine bail.

21. I do not need to find when the claimant's illness started. However by 20 October 2022 he was clearly so unwell he was sectioned under the MHA 1983. This continued past 9 November 2022 when he did not return to work.
22. On 21 October 2022, Mr Tom Culmer (the claimant's counter-signing manager at the time) received a call from a family friend to explain what had happened.
23. On 25 October Mr Culmer spoke to Someya Isa (the claimant's criminal legal representative). She informed Mr Culmer that the claimant was seriously unwell, and that he had been charged with murder.
24. On 28 October 2022, Helen Sharatt of the respondent's HR Dept spoke with the police who confirmed that the claimant had been arrested and charged and that he had been remanded into custody and would remain there unless he applied for bail.
25. On 1st November 2022 Ms Isa wrote to Mr Culmer to confirm in writing that she was the claimant's legal representative. She also said that the claimant was no longer in prison and had been sectioned and moved to the Tamarind centre in Birmingham.
26. On 9th November 2022 the claimant did not return to work.
27. On 9th November 2022 Mr Culmer received from the claimant's sister Miss Zahir a letter from Doctor Dinesh Maganty confirming that the claimant was detained under the Mental Health Act 1983, that he was under Doctor Maganty's care at the Tamarind centre in Birmingham where he would be remaining there for the coming months.
28. On 22nd November 2022 Mr Culmer wrote to the claimant care of Ms Isa to inform him that his pay would be stopped with effect from 9th November 2022 as he had not returned to work following his period of leave as planned and as a result of his ongoing detention.
29. Further letters were received by the respondent on 24 November 2022 from Dr Maganty and 10 January 2023 which reiterated that the claimant was 'off sick' and continuing to suffer from 'severe mental illness'. I find that these letters amount to a doctor's certificate under the respondent's sick pay provision.
30. The claimant via his family and Trade Union appealed against the respondent's decision not to pay him occupational sick pay during this period. On 10th January 2002 Mr Dunn (the Claimant's Trade Union representative) wrote to the respondent to formally request that the claimant's pay be reinstated and backdated to 9th November 2022. In his e-mail he stated that he believed the claimant should be treated in accordance with the respondent's sickness absence procedure as he was

away from work undergoing treatment for a mental health condition. He enclosed a further letter from Dr Maganty dated 10 January 2023 confirming that the claimant had a severe mental illness.

31. On 20th January 2023 Mr Culmer wrote to Mr Dunn stating that whilst it was confirmed that the claimant was unwell that was not the reason for the claimant's absence from work which was in fact because he was detained pending trial on criminal charges. He set out his view that if the claimant was no longer detained in a hospital facility he would nonetheless be detained in prison awaiting his trial.
32. Mr Dunn, on the claimant's behalf, wrote to Miss Sherritt asking to appeal against Mr Culmer's decision. Mr Adam Lloyd (head of pay and reward) was appointed to undertake an internal review of Mr Culmer's decision.
33. On 20th February 2023 Mr Dunn submitted a written statement to Mr Lloyd once again setting out his position that the claimant should be treated like any other employee on sick leave. Mr. Dunn submitted that the claimant's legal issues were not the reason that he was not available for work and that if the claimant's circumstances changed he could be taken into custody but equally he could be available for work.
34. On 29th March 2023 Mr Lloyd wrote to Mr Dunn to confirm the outcome of this review which was that having reviewed the information from Mr Dunn and spoken to Mr Culmer about the reason for decision he found Mr Cullmer's original decision to be reasonable and so found no reason to overturn it. Mr Lloyd stated that if the claimant was formally granted bail and released from custody or the respondent was notified by a relevant authority that there was no other legal reason restricting him from returning to work then the situation would be immediately reviewed.
35. A letter from Dr Ahmed (Consultant Forensic Psychiatrist) on 24 April 2023 confirmed that the claimant continued to be detained due to his mental health under the MHA 1983.
36. The reason for the claimant's absence was both his detention in a medium secure hospital and his ill-health as evidenced by medical reports received from his treating clinician and his on-going detention under the Mental Health Act 1983.

I have applied the following LAW to these facts

Unauthorised Deductions from Wages

37. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the

making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

38. The term 'wages' is defined in section 27(1) as including "any sums payable to the worker in connection with his employment, including—(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise, (b) statutory sick pay..." etc. It was not disputed here contractual sick pay would fall within the meaning of 'wages'.

39. I was referred to the following authorities which primarily deal with the cases on whether an employee is 'ready willing and able to' to work.

- a. *Petrie v McFisheries* [1940] 1 KB 258
- b. *Miles v Wakefield Metropolitan District Council* [1987] (SC)
- c. *Burns v Santander* [2011] EAT
- d. *Kent CC v Knowles* EAT [2011]
- e. *Gregg v North West Anglia NHS Foundation Trust* [2019] CA

CONCLUSIONS

40. Having regard to all relevant circumstances, I conclude as follows:

41. There were very few factual disputes in the case to resolve. This is also a fairly unique case and not one that many employers encounter.

42. Of the authorities referred to by Counsel, in my judgment the *Gregg* case provides the most help here. It summarised authorities to determine some 'uncontroversial principles' [at paragraph 52] and questions "*this concept of avoidable or voluntary absence from work in relation to criminal charges as it is uncomfortably close to an assumption of guilt*". [at paragraph 53].

43. I also agree with the *Gregg* case that says the starting point must be the contract itself. "*I consider that the starting point for any analysis of [whether the employer is entitled to withhold pay] must be the contract itself... Was a decision to deduct pay for the period [in question] in accordance with the express or implied terms of the contract? If the contract did not permit deduction then... the related question is whether the decision to deduct pay for the period... was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the "ready, willing and able" analysis... falls to be considered.*" [paragraph 54].

44. This was also confirmed in the *Miles* case where Lord Templeman stated: *'Different considerations apply to a failure to work by sickness or other circumstances which may be governed by express or implied terms or by custom'*. [paragraph 24].
45. I accept the claimant's submission of how the Tribunal should go about making its decision here. This is that:
- a. First, consider whether the contractual terms permit the deductions made; and if not (given that there is no pleaded argument as to custom and practice) ;
 - b. Secondly, consider if the 'ready, willing and able to work' doctrine supports the deduction.
46. Therefore starting with the contract – was there an express term that permitted the respondent to deduct wages in the circumstances that the claimant found himself in? No implied terms were argued by the respondent nor were any arguments raised regarding custom and practice.
47. The contractual terms are set out in Annex 1 as was the sick pay policy (set out above). There must be sickness and there must be absence. Apart from this, the only other condition is that there must be either a self-certificate or doctor's certificate fully covering the absence.
48. The sickness policy does not deal with this particular situation where there are two reasons for the absence. This is perhaps not surprising – as it is an unusual situation. It does not say that the sole reason must be absence. In the vast majority of reasons that will of course be the case. I could not find any terms that deal with anything even similar in the respondent's sick absence pay policy.
49. I was not asked to imply any terms here but do not believe it would be necessary to imply a term that sickness must be the only reason for the absence. In my judgment, the contractual position is clear – if the employee is sick and absent and that sickness is certified by a doctor (or self-certified for shorter periods), the employee is entitled to occupational sick pay for the requisite period of absence.
50. Based on the medical evidence alone, even if the claimant had not been detained during this time, he would still have been severely unwell throughout the entire period and therefore entitled to occupational sick pay.

51. It is not disputed that the claimant was unwell during this period in question. Further this was supported by several reports from his treating clinicians during the period in question.
52. I agree with claimant's submission that there is no reason contractually that supports a notion that the detention as a prisoner in a secure unit must be elevated to being the main or only reason for the absence.
53. I have found that the occupational sick pay scheme was contractual and therefore as the claimant satisfied the conditions of the scheme he is entitled to up to up 5 months full pay and 5 months half pay depending on his length of absence. The claimant was ill for the entire period of 9 November 2022 to 8 September 2023.
54. Therefore the respondent was not permitted to deduct wages (i.e. occupational sick pay) during the period claimed by the respondent.
55. I find as a matter of contract that the claimant was entitled to receive occupational sick pay during the period 9 November 2022 to 8 September 2023. Therefore the respondent's failure to make this payment amounted to an unauthorised deduction from wages.
56. On this basis, I do not believe I need to then go on to consider the second limb here as to whether the 'ready willing and able' doctrine supports the deduction made. However for completeness, I have also considered this.
57. I again accept the claimant's submissions here.
58. This doctrine does not entitle the respondent to deduct sick pay from the claimant because: a. The doctrine has no application when someone is sick (*Miles*) and/or b. the claimant's sickness is an 'unavoidable impediment'; and I found this to be the most compelling reason and supported by the case authorities.
59. Further, the claimant's detention is also an 'unavoidable impediment', and it would be wrong in principle to seek to pre-judge his guilt, particularly where there has been no formal verdict and a further criminal trial takes place later this year (paras 52-53 and 69, *Gregg*).
60. This was the end of my judgment on liability. We then went on to consider remedies.

61. By agreement, the parties agreed that the sums outstanding to be paid to the claimant are £31,642.67 which is the gross amount and subject to deductions for income tax and national insurance contributions.

62. I therefore ordered that this amount now be paid to the claimant.

Employment Judge Boyle

Date 8 August 2024

REASONS SENT TO THE PARTIES ON

15 August 2024

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FOR THE TRIBUNAL OFFICE