



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102586/2024

Held at Aberdeen on 17 April 2024

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Employment Judge N M Hosie

Miss A Mackenzie

**Claimant
Represented by,
Mr S Colligan,**

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Highland Health Board

**Respondent
Represented by,
Mr R Davies,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Judgment of the Tribunal is that the claim is dismissed.

REASONS

- 35 1. Arlene Mackenzie claimed that the respondent, Highland Health Board ("the Board"), was in breach of contract in respect of its failure to pay sick pay; or, in the alternative, that the Board had made an unlawful deduction of wages. Her claim was denied in its entirety by the Board. It was agreed that the sum in dispute was £1,095.50.

E.T. Z4 (WR)

The evidence

2. I first heard evidence from Miss Mackenzie who spoke to a written statement which is referred to for its terms.

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3. I then heard evidence on behalf of the Board from:-

- Gaye Boyd, Deputy Director of People
- Laura Ford, Head of Treatment Planning/Radiotherapy
- Eilidh Pauli (formerly Barnett), People Services Advisor.

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4. The parties also each submitted a bundle of documents ("C" and "R").

The facts

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5. Having heard the evidence and considered the documentary productions, I was able to make the following findings in fact. By and large, they were either agreed or not disputed. Miss Mackenzie started her employment with the Board on 21 May 2007 as a Radiography Assistant in Radiotherapy, She was promoted subsequently and in September 2017 was appointed to the position of Senior Dosimetrist.

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6. In 2012, she was diagnosed with multiple sclerosis. For many years her symptoms were stable and her work remained largely unaffected. However, during lockdown, due to the Covid pandemic, her symptoms became more problematic and worsened in severity in the second half of 2022.

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7. Details of her sickness absences were produced (C2).

8. In August 2022, Miss Mackenzie stepped down from her role as Senior Dosimetrist to a Dosimetrist post and reduced her working hours from 37.5 to 30 hours per week.
- 5 9. Miss Mackenzie was signed off work on 27 October 2022. As it transpired, she did not return to work until she was dismissed on 23 October 2023.

Sick pay

- 10 10. In February 2023, Miss Mackenzie had a discussion with her line manager, Laura Ford, about the possibility of taking early retirement (C3).
11. Miss Mackenzie moved to half pay on 6 March 2023.
- 15 12. On 1 June 2023, Miss Mackenzie met with Laura Ford and informed her that she could not foresee a return to work. She agreed to progress through the Attendance Policy which was produced (R28-47), along with a "Flowchart" (R48-53). She also informed Miss Ford that she was concerned that her pay would stop in September. Fortnightly meetings with Miss Ford then commenced, as requested by Miss Mackenzie.
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Stage 2 meetings

13. On 17 July, Miss Mackenzie met with Miss Ford for a "Stage 2 meeting" (R.40). She expressed her concern about her pay stopping while she remained unfit for work. Ms Ford issued an outcome letter on 24 July (C.8-9).
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14. On 31 August, Miss Mackenzie met again with Miss Ford for another Stage 2 meeting. On 1 September, Ms Ford issued an outcome letter headed, "Stage 2 Final Review - Outcome" (C10).
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15. Miss Mackenzie's pay stopped on 3 September but she used annual leave to ensure that she still had an income. Her annual leave ran out on 29 September, at which time her income stopped.

5 16. At that time, she had no indication as to when the "attendance process" would be completed.

17. By e-mail on 18 October, Miss Mackenzie's representative, Steven Colligan, was advised by e-mail that Miss Mackenzie's sick pay would not be restarted (C13):-

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"As per Agenda for change 4.10: Reinstatement of sick pay should continue until the final review meeting has taken place. Reinstatement of sick pay is not retrospective for any period of zero pay in the proceedings 12 months of continuous absence.

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You state that disagreement is whether a "Final review" meeting has taken place. To clarify the final review for the pay status has taken place during meetings (Long Terms Sick meeting and Formal Stage 2) and there has been no delay by the employer.

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What has not taken place is Formal Stage 3 hearing (which is different to final review of sick pay status).

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I hope this clarifies the situation."

18. Both Miss Mackenzie and Mr Colligan were of the opinion that she had met the criteria for her pay to be restarted under the Agenda for Change Terms & Conditions (C55).

Stage 3 meeting

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19. On 23 October, Miss Mackenzie attended a Stage 3 meeting at which her contract was terminated (R103-104). She was given three months' pay in lieu of notice. On 26 October, Lorraine Cowie issued an outcome letter (C11-12).

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Claimant's submissions

20. It was submitted by and on behalf of Miss Mackenzie that she was not treated, *"in accordance with NHS Scotland's Principles and Values"* (C136-140), as
5 her, *"individual circumstances were never taken into account. If People Services had attended meetings they could have ensured that we didn't have to repeat meetings to cover the same things."*
21. It was also submitted that Occupational Health, *"should have worked more
10 closely with the neurology team"* (C86-92).
22. Although the attendance process continued, it was not completed before Miss Mackenzie's sick pay ran out (C81-85).
- 15 23. It was further submitted that, *"the attendance process was repetitive and took much longer than it needed to"* (C93, 112, 116, 127 and 135).
24. At the Stage 3 meeting, Miss Mackenzie asked why her sick pay had not been
20 restarted. She was told that this was, *"being dealt with outside of this meeting."* However, the outcome letter from her Stage 3 hearing stated that the matter was closed (CI 1).
25. On 12 November, Miss Mackenzie submitted an application for an extension
25 to sick pay (C22) but this was not approved (C50/51).
26. Miss Mackenzie appealed (C52). Her appeal was unsuccessful (C53).
27. Her application for retirement was accepted and she is now in receipt of a
30 pension.
28. Miss Mackenzie advised that she remains, *"upset and frustrated"* by her
"experience of the attendance process".

29. She claims that she is entitled to payment of sick pay for the period from 29 September 2023 when it stopped to 23 October 2023 when her employment ended.

Respondent's submissions

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30. The respondent's solicitor referred to the following provisions in the Agenda for change documents which he submitted were applicable (R25):-

"Conditions for contractual sick pay.....

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14.9 Sick pay for those who have exhausted sick pay entitlement should be re-instated at half pay, after 12 months of continuous sickness absence, in the following circumstances:

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» Staff with more than 5 years' reckonable service: sick pay will be re-instated if sick pay entitlement is exhausted before a final review meeting for long-term absence has taken place:

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• Staff with less than 5 years' reckonable service: sick pay will be re-instated if sick pay entitlement is exhausted and a final review does not take place within 12 months of the start of their sickness absence."

31. He submitted that the claimant was not entitled to have her sick pay re-instated as she did not have, "12 months of continuous sickness absence".

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32. He also disputed the claimant's contention that there should be a purposive interpretation of this provision given the express wording of the Clause.

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33. The respondent's solicitor also submitted, with reference to Clause 14.10, that Miss Mackenzie was not entitled to "back pay":-

5 *"14.10 Reinstatement of sick pay should continue until the final review meeting has taken place. Reinstatement of sick pay is not retrospective for any period of zero pay in the preceding 12 months of continuous absence."*

34. He submitted that, on these grounds alone, the claim must fail.

Was sick pay exhausted before the final review meeting?

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35. The respondent's solicitor submitted that this issue turned on the definition of the "final review meeting". He invited me to find, on the basis of the evidence of Gaye Boyd, that the "Annex 26 Managing sickness absence" in the NHS Terms & Conditions of Service Handbook, which was submitted by the claimant was, *"not up-to-date"* (C141-144).

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36. As there is no express definition of a final review meeting in the Agenda for Change Handbook, the respondent's solicitor submitted that Clause 14/11 in the Agenda for Change Handbook, which was updated on 5 June 2023, should be applied (R25):-

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"14.11 These arrangements will be in accordance with local sickness absence procedures, established in accordance with Annex 26 (R27) will only apply where the failure to undertake the final review meeting is due to delay by the employer. This provision will not apply where a review is delayed due to reasons other than those caused by the employer."

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37. He submitted that the "local absence procedures" were those which applied to Scotland. The final review only applied to Stages 1 and 2, and, as there was no Stage 1 in the present case he submitted that it must apply to the Stage 2 meeting on 31 August 2023. He submitted that this meant there could be no extension.

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38. He also disputed the claimant's contention that the Stage 3 meeting was the final review meeting. *"More specific language"* would have been used if that was the case; if so, that would give employers the incentive to consider termination earlier and that could not have been the intention. However, he
5 accepted this was a *"speculative point"* and re-stated his principal submission that as Miss Mackenzie did not have continuous "12 months' of continuous sickness absence", she was not entitled to reinstatement of her sick pay.
39. Further, the respondent's solicitor submitted, with reference to Clause 14.11,
10 that there had to be delay on the part of the employer for the extension to be granted. He submitted that there was no material delay in holding the meeting on 31 August. He submitted that, on the evidence, the claimant's managers wanted to *"take a compassionate approach"*.
- 15 40. Miss Mackenzie *"went straight in at Stage 2"* which accelerated the process. The decision to move to Stage 3 was taken around the end of August. The Managers *"were pushing to move to Stage 3"* but HR required medical evidence and, *"that took some time"*.
- 20 41. The respondent's solicitor submitted that were the Tribunal to decide that the final review meeting was the Stage 3 meeting on 23 October 2023, it was not put to the respondent's witnesses that that meeting could have been done more quickly.
- 25 42. Finally, the respondent's solicitor accepted that Clause 14.12 afforded the respondent a discretion to extend the period of sick pay but that Clause was not relied upon by the claimant.

Discussion and Decision

43. I am bound to say that I did not find this at all easy. The myriad of documents which were referred to, issues as to their effective dates and how they interacted, was confusing and difficult to follow.

44. However, I am persuaded that, by and large, the submissions by the respondent's solicitor were well-founded.

45. I am satisfied that the following provisions relating to, "Conditions for contractual sick pay" in the Agenda for Change document ("the Agenda"), which the respondent's solicitor relied upon (R.25), were applicable:-

"14.9 Sick Pay for those who have exhausted sick pay entitlements should be re-instated at half pay after 12 months of continuous sickness absence (my emphasis) in the following circumstances:

- *Staff with more than 5 years' reckonable service: sick pay will be re-instated if sick pay entitlement is exhausted before a final review meeting for long-term absences taking place;*
- * *Staff with less than 5 years' reckonable service: sick pay will be re-instated if sick pay entitlement is exhausted and a final review does not take place within 12 months of the start of their sickness absence;*

14.10 Reinstatement of sick pay should continue until the final review meeting has taken place. Reinstatement of sick pay is not retrospective for any period of zero pay in the preceding 12 months of continuous absence.

14.11 These arrangements will be in accordance with local sickness absence procedures, established in accordance with Annex 26 and will only apply where the failure to undertake the final review meeting is due to delay by the employer. This provision will not apply where a review is delayed due to reasons other than those caused by the employer."

46. I accepted the evidence of Gaye Boyd that this document (R.25), "Last updated on 5 June 2023", was the latest version of the Agenda; that Annex 26, "Last updated on 22 November 2021", was also the latest version (R. 27); and that the Annex 26 document submitted by the claimant was not up to date (C. 141-144).

47. The hyperlink “here” in the second paragraph of Annex 26 refers to “Workforce Policies” which include the Attendance Policy (R.28-47) (“the “Policy”),
- 5 48. “Local Sickness Absence Procedures” means procedures agreed between the respondent’s management and the trade unions. The Policy (R28-47) is the “Local Sickness Absence Procedure”.
- 10 49. The Policy has three stages (P.38-42). The term “final review” only appears in relation to Stages 1 and 2. In the present case, Miss Mackenzie chose to proceed immediately to Stage 2 (P.39-40). The final review is a review of that stage of the process, rather than a final review of the entire process.

“Final review meeting”

- 15 50. The final review meeting in the present case, was the Stage 2 meeting Miss Mackenzie had with Miss Ford on 31 August 2023, The outcome letter says as much (C. 10)
- 20 51. With reference to paragraph 14.9 of the Agenda, Miss Mackenzie had over 5 years’ reckonable service. However, an employee has to have “*12 months of continuous sickness absence*” before sick pay entitlements should be reinstated. Miss Mackenzie started a period of continuous sickness absence on- 27 October 2022. Her dismissal hearing was on 23 October 2023. She was given notice which meant that by 26 October 2023 she was receiving notice pay at her full rate; she -was no longer receiving sick pay. She did not have, 25 “*12 months of continuous sickness absence*” which meant that her sick pay could not be “reinstated”.
- 30 52. Her claim, therefore, is not well-founded and it is dismissed.

53. Finally, with reference to para.14.11 of the Agenda, I was not persuaded, on the evidence, that there was any delay by the respondent. I accepted the submission by the respondent's solicitor that this meant "unreasonable delay". The respondent followed the Policy and it was reasonable in all the circumstances, especially when such a significant decision as the possible dismissal of a long-serving and valued employee was being considered, to seek advice first from Occupational Health. .

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**Employment Judge: N M Hosie
Date of Judgment: 22 May 2024
Entered in register: 22 May 2024
and copied to parties**

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