



EMPLOYMENT TRIBUNALS

Claimant: M Popham

Respondent: Halcyon Tankers Limited

Heard at: Manchester (By Video)

On: 12 December 2024

Before: Employment Judge Buzzard

REPRESENTATION:

Claimant: In Person

Respondent: Ms S Ismail (Counsel)

JUDGMENT having been sent to the parties on 17 December 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Issues

1.1. The only claims that remained to be determined at this hearing were claims that unlawful deductions were made from the claimant's pay. There were two instances in relation to which it is alleged such deductions were made, as follows:

1.1.1. The claimant was not paid for a shift from 5:30pm on 20 June 2023 until early on 21 June 2023; and

1.1.2. The claimant was not paid for two shifts starting around 5:30pm on 17 and 18 July 2023 respectively.

1.2. There is no dispute that the claimant did not work any of these shifts. There is no dispute that the claimant was not paid for any of these shifts.

1.3. The reasons why the claimant did not work these shifts are different. There is little dispute between the parties about these reasons.

1.4. The 20 June 2023 shift

1.4.1. The claimant worked a shift which commenced on 19 June 2023. This shift overran and did not end until around 7:30am on 20 June 2023.

1.4.2. The shift the claimant did not work, and argues he should have been paid for, commenced at 5:30pm on 20 June 2023.

1.4.3. The claimant states that because of the late finish to the shift that started on 19 June 2023 his sleep patterns were disturbed. The result was that he could not sleep adequately in the gap of approximately 10-hours between shifts and was too tired to work the shift due to start around 5:30pm on 20 June 2023.

1.4.4. There is no dispute that the gap between the shifts, noting the other shifts worked that week, was compliant with minimum daily rest break rules that apply to HGV drivers.

1.4.5. The claimant has not suggested that he was medically unfit for work and did not either produce a certificate to that effect or self-certify to that effect.

1.4.6. Having not worked the shift which was due to start around 5:30 on 20 June 2023, the claimant was not paid for that shift. The issue is therefore whether the claimant was entitled to be paid for the shift he did not work.

1.4.7. The claimant argues he is so entitled. The claimant bases this on an assertion that it was the respondent's fault he was tired, because the overrun of his previous shift had disturbed his sleep patterns. The claimant could point to no part of his contract or the respondent's employee handbook that suggested that there was such an entitlement.

1.5. The 17 July 2023 and 18 July 2023 shifts

1.5.1. The claimant had been scheduled to undergo a medical procedure at around 8am on 18 July 2023. The claimant did not work the shift due to run from around 5:30pm on 17 July 2023 until the early morning of 18

July 2023. This was because he believed he needed to be well rested before the medical procedure.

- 1.5.2. The medical procedure was cancelled and did not take place on the scheduled date. The cancellation occurred after the claimant had travelled to hospital on the morning of 18 July 2023, expecting to undergo the procedure.
- 1.5.3. The claimant returned home that day and informed the respondent that the procedure had been cancelled. The claimant phoned the respondent with this information at around 11am on 18 July 2023.
- 1.5.4. The claimant's shift which would normally run from around 5:30pm on the 18 July 23 until early on 19 July 23 had previously been cancelled on the basis the claimant would be recovering from the medical procedure and unable to work. That cancellation was not reversed.
- 1.5.5. The claimant states that he could have worked a shift from around 5:30pm on 18 July 2023 given his medical procedure had been cancelled. There is disagreement regarding whether reinstating that shift for the claimant was discussed with him when he called the respondent on 18 July 2023.
- 1.5.6. The claimant argues that he was entitled to be paid for time off for a medical appointment. The respondent argues that the claimant is not so entitled, unless he is certified unfit for work and entitled to sick pay. Given the procedure did not occur, the respondent does not accept that the claimant was unfit for work at any time. The claimant has not produced a sickness certificate or sought to certify himself as medically unfit for work for either of these two shifts.
- 1.5.7. The issue is therefore to determine whether the claimant had an entitlement, express or implied, to be paid for work not done because of a medical appointment.

2. The Law

- 2.1. The right not to suffer an unlawful deduction from wages is set out in the Employment Rights Act 1996. The relevant parts of this are found in s13 which states:

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.

(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.

2.2. Accordingly, the failure to pay the claimant for shifts that were not worked will only amount to a deduction from pay if wages for those shifts were “*properly payable*” to the claimant. It is for the claimant to prove that he was entitled to be paid for shifts not worked, not for the respondent to prove that he was not.

2.3. Wages will be properly payable if the claimant had a right to be paid, either a contractual right or a statutory right. The only potential statutory right would be a right to statutory sick pay.

2.4. Even if the claimant had been certified as unfit for work, he would not, however, have been entitled to statutory sick pay on these occasions because such pay is not due for the first three days of any sickness absence. These are known as ‘*waiting days*’. Although there had been a suspension of waiting days during the Covid-19 pandemic, that suspension was removed in March 2022, meaning that they were applicable in 2023 when the claimant claims relate to. Accordingly, there could be no right to statutory sick pay, regardless of the reason for absence, for either of the relevant instances of unworked shifts.

2.5. The claimant asserts the right to be paid was contractual. A contractual right can be either express or implied. The claimant in this case argues that it was implied by previous conduct, namely an established practice of paying drivers for shifts not worked when they have taken time off to attend a medical appointment.

2.6. To imply a contract term by previous conduct, as the claimant suggests the Employment Tribunal should, is a step often referred to as implication by ‘*custom and practice*’. To imply a contract term on this basis, the term has to meet three basic requirements.

2.6.1. The term must be reasonable;

2.6.2. The term must be notorious; and

2.6.3. The term must be certain.

2.7. In summary these requirements mean that the custom of paying for medical appointments must be fair, must be generally established and well known and must be what is often referred to as clear-cut.

2.8. The claimant argues it is generally established and well known, because it is a practice that has been followed for many years. This includes the period before a Transfer of Undertakings (Protection of Employment) Regulations 2006 transfer to this current respondent.

2.9. A claimant, seeking to establish such a contract term exists, has to produce evidence that this is the case. Such evidence needs to extend beyond a mere example of a past payment, to a pattern of regular payments.

3. The Evidence and submissions

3.1. The Employment Tribunal heard from the claimant who gave evidence on his own behalf. The claimant relied on a statement relating to an alleged disability which was produced for an earlier hearing. As this did not cover the facts relevant to this hearing the claimant was permitted to give evidence without a relevant statement.

3.2. For the respondent the Employment Tribunal heard from Helen Blick, a contract manager with the respondent. Mrs Blick had produced a written statement of her relevant evidence.

3.3. The Employment Tribunal were also provided with a bundle of documentary evidence.

3.4. In addition to the evidence, the Employment Tribunal heard oral submissions from both parties.

4. Findings and Conclusions

4.1. Given the two distinct reasons for the claimant not working shifts, the findings in relation to the two distinct reasons are discussed in this judgment separately.

4.2. Findings in relation to the 20 June 2023 shift

4.2.1. There is no material dispute about the events surrounding this shift. The only reason that the claimant did not work it was because he was tired, he states because of a disturbed sleep pattern. The claimant blames the respondent for this disturbed sleep pattern and thus argues he was entitled to be paid.

- 4.2.2. Even if the claimant had been unfit for work he would not have been entitled to statutory sick pay because the single shift missed would have fallen within the applicable three waiting days for statutory sick pay.
- 4.2.3. There is no evidence that the claimant self-certified as unfit for work and would thus be entitled to any contractual sick pay.
- 4.2.4. There was no copy of the claimant's contract produced. There was, within the bundle of evidence a standard contract of the type that the respondent states applied to the claimant. The claimant did not dispute this was the case.
- 4.2.5. The standard contract has an Appendix C, which states at paragraph, 3.iii, that "*The first 1 days of any absence will not be paid...*". Accordingly, the respondent argued this was evidence that there was no right to contractual sick pay for the first day of any sickness absence.
- 4.2.6. The claimant was not able to point to any evidence that this contractual provision did not apply. Accordingly, it is found on the balance of probability that there is an express contract term forming part of the claimant's contract of employment that states that, even if the claimant was unfit for work on this date, he would not have been entitled to be paid.
- 4.2.7. The claimant was not able to point to any evidence that suggested that there was a contractual entitlement, express or implied, to be paid for work not done because of disturbed sleep. The claimant conceded in evidence that there was no practice of the respondent paying drivers in such circumstances.
- 4.2.8. Accordingly, it is found that the wages the claimant claims for the shift not worked by the claimant and which should normally have commenced around 5:30pm on 20 June 2023 were not '*properly payable*' to the claimant. For this reason, the claimant's claim that the failure to pay him these wages was an unlawful deduction from his wages cannot succeed and is dismissed.

4.3. Findings in relation to the 17 July 2023 and 18 July 2023 shifts

- 4.3.1. There is again very little relevant dispute about the events on these dates. The only dispute in evidence related to whether there had been any discussion about the claimant working the shift on 18 July 2023 when he phoned the respondent to inform them that his medical procedure had been cancelled.
- 4.3.2. The claimant's evidence in relation to this was initially that he could not recall the conversation and was not able to give any indication if it was

discussed or not. When it was put to the claimant that the respondent's witness states the shift was offered back to him, the claimant's recollection returned, and he denied this had occurred.

- 4.3.3. The respondent's evidence was that the claimant was offered the shift on 18 July 2023 but declined it. This was in Mrs Blick's statement disclosed in advance of the hearing.
- 4.3.4. On balance, the claimant's later recollection of a conversation he had moments before stated he had no recollection of is found to be less reliable than the evidence of Mrs Blick. Her evidence on this point has been consistent throughout.
- 4.3.5. That he would not have agreed to work the shift due to commence around 5:30pm on 18 July 2023 is consistent with the claimant's position on 20 June 2023. On 20 June 2023 the interruption to his sleep pattern caused by his shift not ending until after 7:30am meant he was too tired to work later than day. It appears likely that not being able to commence sleep until after 11am would have had a even more significant effect. This casts some doubt on the claimant's assertions that he would have worked the shift if it had been reinstated.
- 4.3.6. For these reasons it is found, on the balance of probabilities, that the claimant was offered the chance to work the shift due to commence around 5:30pm on 18 July 2023 and declined to take up that offer.
- 4.3.7. The claimant argued that there was an established practice of paying drivers for shifts that were not worked which had become an implied contractual right. The claimant argued that this practice had arisen prior to a TUPE transfer to the current owner of the respondent business.
- 4.3.8. The Employment Tribunal were taken to the respondent's employee handbook and to the standard contract referred to above.
- 4.3.9. The handbook which applied to the claimant's employment prior to the TUPE transfer states:

"Medical Appointments

Where reasonably possible, employees should arrange for doctor, dentist or hospital appointments outside of normal working hours. If this is not possible, employees should give their line manager as much notice as possible and to try and arrange these at the beginning or end of the working day to avoid disruption to the business.

Time off may be permitted where an appointment card is produced. Subject to individual circumstances and local procedures, any time taken can be worked back later in the day / week, taken as unpaid leave or treated as sick leave."

- 4.3.10. Accordingly, this does not appear to support the claimant's assertion that he was entitled to be paid for work not done because he was attending a medical appointment.
- 4.3.11. The relevant contract makes no specific reference to medical appointments. In relation to sick pay, at Appendix C, 3.iii, it is stated that *"The first 1 days of any absence will not be paid..."*.
- 4.3.12. There is no suggestion that the claimant was unfit for work at the time of the shift due to commence on 18 July 2023. Had the planned medical procedure taken place as planned, it appears likely the claimant would have been unfit for work for the second shift, 18 July 2023. The medical procedure did not, however, take place. Accordingly, sick pay cannot be relevant for that shift.
- 4.3.13. In relation to the shift which would have started on 17 July 2023, even if the claimant had been unfit for work due to the need to rest for the scheduled procedure, the contract states that as it is the first day it would not be paid in any event. The claimant did not, in fact, produce medical evidence to suggest that he had been told or advised by his doctor, to rest prior to the medical procedure. Accordingly, it is difficult to see how the claimant's failure to work the shift due to commence on 17 July 2023 could be found to be on medical grounds.
- 4.3.14. The claimant suggested, in his evidence, that there was a pattern of paying drivers for medical appointments such that it had become an implied contractual right to be paid. In support of this the claimant produced a single payslip which stated a days' pay had been *"authorised"* for him in the past. The claimant stated that this was for a day when he had to attend a hospital appointment in Newcastle.
- 4.3.15. The claimant stated in evidence there had been other instances, but he could not find any payslips to evidence them.
- 4.3.16. The claimant also produced a copy of an email from his trade union representative. In that email the representative stated two things of relevance. Firstly, he stated had been paid for medical appointments in the past. Secondly, he explained that understood that there was no contractual right to be paid.

- 4.3.17. No explanation was given of the circumstances in which the representative was paid for medical appointments he attended. The representative did not appear as a witness.
- 4.3.18. The claimant suggested that his trade union representative was afraid that if he appeared as a witness it would damage his relationship with the respondent. This appears to the Employment Tribunal to be unlikely given the nature of the work that trade union representatives undertake. Regardless, little weight can be given to the untested evidence of a witness who does not appear, especially when that evidence lacks any context or background.
- 4.3.19. Even if the trade union representative's email was taken as persuasive evidence, that would have to include the confirmation it contained that there was no right to payment for medical appointments. That would strongly suggest that it was not well-known that there was such a right.
- 4.3.20. In summary, the claimant has only produced proper evidence of a single instance when he was paid when attending a hospital appointment. That single instance is not sufficient to imply a contractual term that contradicts a clear written policy in the relevant handbook. The claimant has produced untested evidence that payments were made to at least one other person in the past, but that person, who was the trade union representative, did not understand he or the claimant had any right to such payments. This does not meet the requirement of being a well-established and well-known practice, which is what would be needed to imply a contractual right that would be inconsistent with what is expressly stated in the employee handbook.
- 4.3.21. Accordingly, the finding of this Employment Tribunal is that the claimant has failed to produce evidence that wages were properly payable to him for the shifts he did not work on 17 and 18 July 2023. Given that finding, his claim cannot succeed and is dismissed.

Employment Judge Buzzard

16 January 2025

Judgment sent to the parties on:
28 January 2025

For the Tribunal:

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