



EMPLOYMENT TRIBUNALS

BETWEEN

Mr Waqas Hussain (Claimant)	and	DHL Services Limited (Respondent)
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Held at: Birmingham

On: 4 and 24 April 2019

Before: Employment Judge T Coghlin QC

Representation:

Claimant: In person

Respondent: Mr Matthew Yates, solicitor

JUDGMENT

The claimant's claim for unauthorised deductions from wages fails and is dismissed.

REASONS

Introduction

1. The respondent, a logistics company, employs the claimant at its site in Solihull.
2. The claimant's claim is for unauthorised deductions from wages contrary to section 13 of the Employment Rights Act 1996 ("ERA"). It concerns the payment of a particular kind of sickness pay which is paid by the respondent to some of its staff, known as accident at work pay ("AAW pay"). Following an injury which he sustained at work on 9 November 2017, the claimant was paid AAW pay for the period up to 18 April 2018. He says that the respondent made unauthorised deductions from his wages by failing to continue with payment of AAW pay for the period 18 April 2018 to 15 August 2018. The respondent's case is that this is not a claim which the tribunal has jurisdiction to determine and that, in any case, it is not made out on its facts.
3. The case was listed before me for half a day on 4 April 2019. The time estimate proved inadequate and the matter was relisted, part-heard, for a full day on 24 April 2019.
4. The claimant gave evidence himself, and called as a witness Jason Hogan, Convenor for the Unite union in the West Midlands. The respondent called as witnesses Mr Steve Keeley, Senior Operations Manager; Ms Meg Farnworth, Head of Business Improvement (Automotive); and Mr Ian Farish, General Manager. The claimant represented himself, and the respondent was represented by Mr Matthew Yates. I am grateful to them both, and to all the witnesses who came to give evidence.

The facts

5. The claimant began work for the respondent as a warehouse operative in March 2015, initially on an agency basis, and then under a contract of

employment dated September 2016. He had an excellent attendance record until 9 November 2017 when he was injured in an accident at work on in which he tripped and fell and hurt his back. At that point he began a period of absence from work. It is his pay during that period of absence which is the subject of this claim.

Contractual and other provisions as to sick pay and AAW pay

6. The claimant's contract of employment contains, at clause 6, various provisions relating to sickness absence reporting. So far as concerns sick pay, it simply cross-refers to the individual's "Single Site, Collective Agreement, Union Agreement or National Agreement" and adds that "Any payment of company sick pay includes any entitlement to Statutory Sick Pay (SSP)."

7. AAW pay seems to have been introduced by way of a letter dated 20 February 2012 sent by Peter Mills, HR Business Partner, to Mr R James and Mrs C Tallentire, Regional Industrial Organisers for Unite, and which by its heading made clear that it was a formal wage offer. I understood it to be common ground that this applied to the claimant's employment and set out terms of payment in relation to him; both parties relied on its terms. Under the heading "Improvements in Benefits", it provided as follows:

"Accident at Work Pay

The Company has accepted the union's claim of accident pay to be paid from the first day of absence, regardless of length of service and for the first 4 weeks, after which the case would be reviewed. This payment is subject to the individual fully participating in any initial accident investigation that is required."

8. The document made no provision for the rate at which AAW pay was to be paid. However it was common ground before me that AAW pay is always paid at the level of full pay, including shift allowance and attendance allowance. It is therefore different from ordinary Company Sick Pay ("CSP") which is paid at basic rate. It seems clear therefore that there must have been some pre-existing documentation, or at the very least some prior discussion, giving further detail of what AAW pay is and how it originated. However no-one was able to point me to such documents or discussion.

9. I was referred to a collective agreement between the respondent and Unite dated 2013 (document C2, to which I shall refer as “the 2013 collective agreement.”). It made provision for what it described as “improved Company Sick Pay” in Appendix 3. It is common ground that these terms applied to the claimant’s employment at all relevant times. This states that CSP is paid for all contracted hours at basic rate and is inclusive of any entitlement to SSP. It provides for an entitlement increasing with length of service: for an employee such as the claimant with between 1 and 5 years’ service, the entitlement is to 6 weeks at full pay and 6 weeks at half pay. Those employees with over 10 years’ service are entitled to 26 weeks’ full pay and 26 weeks’ half pay.

10. Appendix 3 goes on to provide for the provision of extended payment of CSP:

“In the event of an employee suffering from a long term condition or a chronic illness covered by the Equality Act, where the employee has conformed with all absence reporting and (if appropriate) accident investigation processes and where the above entitlements are exhausted, a management panel (General Manager, Senior Manager, HRBP and two nominated Shop Stewards) will decide whether further sick entitlement will be applied (up to the maximum of 10 years’ service benefit). The Company is the ultimate decision maker in the event of a disagreement however this will not prevent the union or any individual from progressing any decision through the Company’s Grievance Procedure. The same arrangement will also be applied to circumstances where an employee with a previously excellent attendance record has an illness or injury that is not their own fault and the need for absence from work for a prolonged period is indisputable.

The panel will act in accordance with any appeals process to review relevant sickness matters. Examples where employees may be granted further sick entitlement cover include none blameworthy (*sic*) injury sustained in work where the employee is still in recovery, this may exclude conditions such as back pain and stress related issues which have an undetermined cause and/or recovery period.”

11. This policy makes no express mention of a separate benefit in the form of AAW pay.

12. I was also provided with the respondent’s Sickness Absence Management Policy dated September 2016 which it is agreed applied to the claimant’s employment. It contains, under the heading “Company Sick Pay – Rates”, the same provision as that which I have cited from Appendix 3 above, save that it stipulated that the panel referred to would comprise one shop steward rather than two.

13. It was the respondent's case, with which Mr Hogan agreed, that the Sickness Absence Management Policy dealt with CSP and not AAW pay. Mr Hogan's position was that the respondent's arrangements in respect of AAW pay should have mirrored those for CSP, but he did not say that there was an express term in staff contracts to that effect.

14. Mr Hogan pointed to minutes of a discussion dated 6 March 2015 between himself and Ray Reynolds, who at that time was the respondent's Operations Director. The notes of that discussion record the following:

"Accident at work pay discussed and the interpretation of the pay agreement with regards to the 4 week period.

RR [Ray Reynolds] confirmed that there are probably only 6-12 people that this affects each per year. He explained how going forwards the manager would pull together a pack and provide to him. RR stated that he would be happy to discuss each case with the Senior Steward. We would not be looking to set up a committee. Most cases are fairly simple. This way allows RR to audit the process and that the job has been done correctly. It looks at both welfare and paperwork.

SP [Simon Powell, a national officer from the union] agreed that it should be RR and the Senior Rep. Unite have committed to TC that they will help to bring people back to work.

JH [Jason Hogan] confirmed that he was good with that."

15. In March 2016 Mr Keeley began to use a 5 person review panel to review cases where AAW pay was being paid after the initial 4 week period had elapsed. This was a local initiative adopted by Mr Keeley, which applied only to cases arising on the FA1 night shift for which Mr Keeley had responsibility (which I understand was the shift on which the claimant was working when injured) and was not adopted elsewhere in the business at that time. It was not a contractual requirement that Mr Keeley follow this process. Mr Keeley's view was that the panel would give a fair view and review of the cases being discussed. It comprised Mr Keeley as senior operations manager; a health and safety manager; a manual handling assessor; a shop floor safety representative; and a senior union shop steward. The panel considered the issue of whether the injury had been the fault of the individual or not, and whether AAW pay should be stopped, continued or claimed back. However at some point prior to early March 2017 Mr Keeley, acting in accordance with advice received from the

respondent's human resources department, ceased this practice. From an email sent by Mr Keeley to Charles Kock, general manager, on 3 March 2017 it seems that Mr Keeley was unhappy with the lack of structure in this new process. Nevertheless Mr Keeley's evidence was that as of late 2017 and in 2018 was that was that any appropriate manager could review the case and that in the case of the claimant, Mr Keeley himself was able to carry out such a review.

Events during the claimant's period of absence

16. Immediately after his accident in November 2017 the claimant was taken to hospital by ambulance. He had an MRI scan. He later saw his GP and was signed off work. The GP's fit note recorded that the reason was "back pain after work injury." This fit note covered the period up to 30 November 2017, and a further fit note was subsequently issued, citing the same reason, covering the period 30 November 2017 to 3 January 2018.

17. On 22 November 2017 the claimant was referred to the respondent's occupational health (OH) advisor who examined him on 1 December 2017 and advised that the claimant was at that point unfit for work. The OH advisor wrote:

"Mr Hussain had an accident at work approximately three weeks ago. He reports that, when pulling a dolly backwards, he fell over onto his back and buttocks. His right leg reportedly went under the dolly, which impacted with his right shin. Mr Hussain attended hospital and x-rays were performed. He has remained under the care of his GP who has prescribed painkiller medication. Due to some more significant symptoms reported recently, Mr Hussain has now been referred to see a hospital specialist.

Today, Mr Hussain reports pain in his lower back and his left thigh. The pain is described as constant and sharp with pins and needles sensation during the day and night. The current painkiller medication is reported to be limited in its effect. No difficulty is now reported with the right shin."

18. The claimant at this stage was being paid ordinary CSP. On 3 January 2018 the claimant raised the matter with his senior operations manager, Mr Keeley, arguing that he should be on AAW pay. Mr Keeley replied on 4 January 2018:

"I was waiting on feedback from the health and safety manager Paul Johnson who advises on accident at work pay. The feedback he has provided is – Due to you not attending Everwell [the respondent's OH provider] you are currently on sick pay rather than accident at work pay. You were given the all clear from the hospital when you

attended from site for your shin, your sick note only advised back pain following works injury rather than a diagnosis of what is wrong with you. Once we have an Everwell report your pay will be reviewed by health and safety. I am not the decision maker on accident at work pay. You will continue to get sick pay until your case is reviewed. Your sick note ran out on 3/1/[18] so will need a new one this week if you are not fit to return to work.”

19. The claimant replied to Mr Keeley on 4 January 2018 pointing out, among other things, that he had not failed to see Everwell and indeed that the report produced by them had confirmed that he was unfit for work.

20. Another fit note was produced, signing the claimant off as unfit for the period from 3 January 2018 to 2 February 2018, again because of “back pain after work injury.”

21. On 9 January 2018 Mr Keeley emailed the claimant, who at that point was still absent from work, giving him the good news that he had asked for the claimant’s pay from the start of his period of absence to be retrospectively changed to the more generous AAW pay. Although Mr Keeley had said in his previous email that he was “not the decision maker on accident at work pay,” he now evidently considered that he was. The claimant was thereafter reimbursed the difference between CSP and AAW pay for that period. Mr Keeley added:

“From the 8/1/18 I have instructed your pay to be put through the portal as accident at work pay. This is not ongoing and will be reviewed again shortly following the following next steps.

Next steps for yourself will be to attend a health review meeting which we will write to you to confirm time and date and who with. You need to bring any results you may have from the hospital regarding your injury and will also look at getting you referred to the company physician who will request your medical records from your GP so we can fully understand any restrictions you may have when you return to work which may allow us to offer an amended duty plan to phase you back in.”

22. Another fit note was produced on 2 February 2018, again referring to “back pain after work injury”. The doctor checked the box to indicate that the claimant “may be fit for work taking account of the following advice”. In the subsequent section, the doctor checked all of the available options, namely a phased return to work, amended duties, altered hours and workplace adaptations; and the doctor then wrote “Avoid heavy lifting / pushing or pulling heavy objects.

Phased return from 5.2.18.” The doctor indicated that this would be the case for six weeks.

23. The claimant attended site on 5 February 2018. He discussed his situation and his restrictions with Mr Taylor. Mr Taylor suggested various alternative roles to the claimant, but the claimant said he felt he was not capable of doing any of them. He was sent home and resumed his period of sickness absence. He continued to be paid AAW pay.

24. On 12 February 2018 Mr Keeley, senior operations manager, emailed Richard McDonald, a senior manager and Mr Keeley’s own line manager, and Paul Johnson, senior safety manager, with regard to the claimant’s most recent fit note. He said:

“we need to review his pay. I am going to get him in to see the new Everwell nurse as [a] priority but I need to look at the review process on accident at work pay. Back pain in my eyes is not a defined injury especially as it started with shin and buttocks pain.”

25. Mr Johnson replied the next day, agreeing; he observed that the claimant’s sick note said there was to be a phased return from 5 February 2018 and so the claimant had not complied with the phased return to work. It is not clear to what extent Mr Johnson was aware of the circumstance of the claimant’s unsuccessful attempt to return on 5 February.

26. In an email dated 13 February 2018 the claimant told Mr Keeley that he had been speaking with his operations manager, Mark Taylor, who was arranging an OH appointment for him. For reasons which are not clear to me, this appointment was not made at that point, and no OH examination took place between December 2017 and June 2018.

27. The claimant remained off work and continued to be paid AAW pay. He was signed off work pursuant to a further fit note covering the period 16 March 2018 to 15 June 2018, again due to “back pain following a work injury.” This fit note was not before me but its existence and contents are evidenced by other documents (pages 58 and 98).

28. A health review meeting took place on 17 April 2018. The claimant was present, as were Mick Knowles, Operations Manager, and a note-taker. The claimant told Mr Knowles that his GP had referred him to a specialist and he was waiting for an appointment, and he had no date for an appointment yet. Mr Knowles told the claimant that there was work available for him as a trailer marshal, a role which would not involve lifting and which would enable the claimant to sit, and he would build up his hours gradually. The claimant said that he was still in pain, such that he needed to lie down during the day sometimes, and that although the role offered sounded good, he would need to see his specialist before agreeing. Mr Knowles told the claimant that his AAW pay would not be paid indefinitely and that it would stop at some point after being reviewed, to which the claimant replied that he was “not bothered about pay” and that he just wanted to get better. The claimant agreed to chase his GP for an appointment with the specialist, and Mr Knowles said that he would follow up on the OH appointment which Mr Taylor had mentioned to the claimant.
29. The next day, 18 April 2018, Mr Keeley met with Mr Johnson. There is no contemporaneous record of this discussion beyond a brief email sent that day (page 90), and the claimant disputes that it took place at all, but on balance I accept that it did take place. Mr Keeley, in consultation with Mr Johnson, decided at that meeting that the claimant’s AAW pay would end. There was no panel convened, nor was there any consultation with the union prior to this decision being taken.
30. Mr Keeley explained that his decision was based on a number of factors: that the claimant’s fit notes had simply said back pain, and that there was no diagnosis of an actual injury (Mr Keeley’s previously-expressed view, as noted above, being that “back pain in my eyes is not a defined injury”); that a specialist report had not yet materialised; that the claimant had had plenty of time to provide evidence of an actual diagnosis but had not done so; that the claimant had now obtained another fit note signing him off for 3 months so it was unlikely that he would be back within the reasonably near future; that the claimant had been offered every available amended duty with a view to getting him back to work (including on his attempted return on 5 February 2018); and that the claimant said that he would not do other roles till after seeing his specialist. He

told me that he asked himself the question, how much longer do we pay AAW pay when nothing has changed for five months?

31. The claimant found out that his AAW pay was stopped when he discovered a shortfall his pay. By an email sent on 19 April 2018 he raised his concern with Mr Keeley about the cessation of AAW pay. Mr Keeley responded the next day, giving brief reasons for the decision:

“AAW pay is for a 4 week period then reviewed. All of your sick notes just state back pain. We have no diagnosed injury on your doctors note (sic). No evidence of treatment for the last 5 months. If you can provide this to me then I will add it to your file but cannot see anything in your health reviews.”

32. The claimant replied by email on 24 April 2018. He told Mr Keeley that his GP had told him that if he needed evidence of treatment then a request would have to come from the respondent as his employer. He said

“if you need more information regarding my health [you’re] more than welcome to contact my GP. I give you my full consent to take any information on my health for the last five months...”

33. He added that he was still waiting for the specialist’s appointment for which his GP had referred him. He asked for AAW pay to be reinstated.

34. It does not appear that the respondent approached the claimant’s GP following receipt of this email.

35. Mr Keeley emailed the claimant on 2 May 2018 stating that the respondent was in the process of arranging an OH appointment. A new OH advisor had recently started, and Mr Keeley told me, and I accept, that there were some delays in arranging appointments with her. Mr Keeley said that the claimant’s case would be reviewed again once medical evidence had been received. For the time being, the claimant remained on CSP.

36. Mr Hogan, the Unite convenor, wrote to Mr Keeley on 3 May 2018 expressing his view that the correct procedure was not being followed, and that there should be consultation with the union prior to the cessation of AAW pay.

37. By email dated 10 May 2018 the claimant raised a formal grievance against the decision to cease payment of AAW pay. The claimant said that the accident at work had not been his fault, that if a GP report was required the company already had his consent to contact the GP, and that he was awaiting a specialist appointment. He also made the point that there had been no union official present at the meeting when it was decided to stop his AAW pay.

38. The claimant was examined by Moon Tait, the new OH advisor, on 12 June 2018, and Ms Tait produced a report that day. She summarised the history thus:

“As you are aware Mr Hussain is currently on long term absence from work following sustaining a work related musculoskeletal injury on his lower back sometime in November 2017. He reports that he received treatment from the hospital and currently he is under the care of his General Practitioner (GP) but he is not receiving any active treatment. Mr Hussain reports that he was referred for physiotherapy but attended only 2 sessions.”

39. Ms Tait noted certain urological symptoms which had developed. She said that the claimant was still waiting for a specialist appointment. She continued:

“On assessment Mr Hussain informs me that he is feeling better in himself and I noted the following:

- Mr Hussain was asymptomatic.
- He was able to sit throughout the consultation.
- He was fully mobile and stated that he can walk short distances.
- No issues with standing.
- He is able to drive as he drove from home for today’s appointment.
- He had full movement in his arms and legs.”

40. As to the claimant’s fitness to work, Ms Tait stated:

“Following my assessment, in my opinion Mr Hussain will be fit to return to work on a phased return, whilst he is waiting for a specialist appointment.”

41. However, later in the report Ms Tait seemed to contradict that. In response to the question “What is the likely date of return to work?” she said:

“At present I am unable to ascertain when he is likely to return to work. I understand that his sick note expires next week, and he will be going to see his GP for a further sick note,”

and under the heading “review” she wrote:

“I would like to review Mr Hussain in my clinic in 6-8 weeks’ time and I hope by that time he would have been seen by a specialist and ready to return to work.”

42. As to the reason for Mr Hussain’s absence from work, Ms Tait wrote this:

“Mr Hussain suffered with a musculoskeletal injury on his lower back which is currently contributing to his long-term sickness absence.”

43. She also noted that the claimant was taking mild oral analgesia which would be unlikely to affect his ability to carry out his normal duties.

44. It does not seem that the respondent sought to clarify the apparent contradiction in Ms Tait’s report as to whether the claimant was or was not fit to return to work at that stage.

45. The claimant visited his GP on 18 June 2018 and was signed off work for a further month. The reason given was “musculoskeletal and connective tissue diseases.”

46. There was a grievance meeting on 19 July 2018, chaired by Meg Farnworth, Head of Business Improvement (Automotive). The claimant was accompanied by Ivor Bradley from Unite. Ian Moss, HR Resolution Manager, was also present. The claimant explained that he was still awaiting a specialist appointment, having been referred “around 3 months ago”. There was a discussion about the OH report from June and whether it indicated that the claimant was fit: the claimant expressed the view that “the report says that I will be able to return after seeing a specialist but not before”, whereas Ms Farnworth said she read the report as confirming that the claimant was already fit to return. The claimant also said that he was unable to work because of the urological issue which had developed and which “may be due to my back injury.”

47. By a letter dated 3 August 2018 Ms Farnworth informed the claimant that his grievance was not upheld, save that a correction was needed in relation to the end date of payment of AAW pay: due to an error this had been stopped some

days before the decision taken on 18 April, and Ms Farnworth decided that this should be rectified so that it was paid up until 18 April.

48. On the question of procedure, Ms Farnworth found that the practice of having panels to review AAW pay had been a local practice which had been employed by Mr Keeley for a limited time and which had then been discontinued since it was not an effective way of determining claims, and it had not been taken up in other areas of the business, where AAW pay reviews were conducted by managers without any formal union consultation. On the substance of the matter, Ms Farnworth concluded that Mr Keeley's decision had been a reasonable one, that it seemed that claimant had been uncooperative in effecting a return to work, and that Mr Keeley's decision had subsequently been bolstered by the claimant's failure to return to work after the OH report from June 2018.
49. The claimant presented his ET1 on 13 August 2018, following an early conciliation period which lasted from 4 to 25 July 2018. The claimant also returned to work at around this time.
50. By letter dated 20 August 2018 the claimant appealed against Ms Farnworth's decision. An appeal meeting took place on 20 September 2018, chaired by Ian Farish, General Manager. Mr Hogan from Unite accompanied the claimant, and Sunita Dugh from HR was present.
51. During the meeting Mr Farish was under a misunderstanding. Mr Farish thought that the reason why AAW pay had been stopped was that the claimant had failed to meet with OH. As noted at paragraphs 18 to 19 above, this had indeed been a point raised in early January 2018, but had quickly fallen away; and it formed no part of Mr Keeley's decision in April 2018. It had also been mentioned during the course of the meeting with Ms Farnworth. This misunderstanding shaped some of the comments made by Mr Farish during the meeting. However by the time he came to make his decision, when he had looked into the matter more fully, he was no longer under this misapprehension.

52. Mr Farish reconvened the meeting on 22 November 2018 and after further discussion told the claimant that his decision was not to uphold his appeal (although he was critical of a lack of communication with the claimant once the decision to cease AWW pay had been made). Accordingly Ms Farnworth's decision stood. Mr Farish confirmed his decision in a letter dated 16 January 2019.

The statutory provisions

53. Section 23 of the ERA provides:

“(1) A worker may present a complaint to an employment tribunal —
(a) that his employer has made a deduction from his wages in contravention of section 13 ...”.

54. Section 13 ERA 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 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.”

Analysis and conclusions

55. The key question is whether AAW pay was “properly payable” by the respondent to the claimant in respect of the period from 18 April to 15 August 2018. If so, the amount owed to the claimant is agreed between the parties.

56. I take as my starting point the nature of the claimant’s entitlement to AAW pay. The only express contractual entitlement to such pay is that set out in the letter of 20 February 2012, to which I have referred above. The respondent does not dispute that there is a contractual entitlement to AAW pay for the first four weeks, but no breach is alleged in respect of that period: the claimant was in fact paid AAW pay for more than 5 months. After that first period of four weeks, the respondent has a discretion as to whether or not AAW pay would continue to be paid. The claimant’s contractual entitlement was only to have a “review” of AAW pay, and that the discretion be exercised in a lawful manner, namely

- a. in good faith and for its proper purpose;
- b. in a manner which was not perverse, capricious or irrational;
- c. in accordance with the implied duty of mutual trust and confidence (namely the obligation that the employer will not without reasonable and proper cause act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence which should exist between employer and employee);
- d. with no irrelevant considerations being taken into account and no necessarily relevant considerations being ignored.

57. The claim brought by the claimant is not one for breach of contract. Under the provisions of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 the employment tribunal would have no jurisdiction to consider such a claim, since the claimant’s employment is ongoing. The sole claim is therefore one for unauthorised deductions from wages brought under Part II of the ERA.

58. In **Coors Brewers Ltd v Adcock** [2007] ICR 983 Wall LJ, with whom Chadwick and Wilson LJJ agreed, held at [56] that the Part II regime is essentially designed for straightforward claims where the employee can point to a quantified loss. Accordingly the claimants' claim in that case failed where what they were really claiming for was a breach of contract which led to a claim for damages for loss of a chance.

59. In **Allsop v Christiani and Nielsen Ltd (In Administration)** UKEAT/0241/11 at [75] and [78], Cox J referred to **Coors** and observed that the regime of Part II ERA is:

“...designed for straightforward claims where the employee can show that he has not been paid quantified or quantifiable sums properly due to him under his contract. It cannot be used as the vehicle to advance claims for damages for breach of contract, consequent, for example, upon the non-exercise or allegedly capricious exercise of a contractual discretion.”

60. In **Agarwal v Cardiff University** [2018] EWCA Civ 2084 Underhill LJ emphasised at [18(2)] and [27] that the Tribunal has the jurisdiction, and is required, to determine “a question, of any character, as to whether the sum in question is ‘properly payable’.” I consider it at least arguable that this would include a case where (1) the employer acts unlawfully in the exercise of a contractual discretion and (2) on the facts of the case, as found by the Tribunal, that discretion, if properly exercised, would have had one possible outcome. Such an approach would not trespass against the Court of Appeal's decision in **Coors** since the sum would in reality be quantified. But what remains clear, following **Coors** and **Allsop**, is that a claim based on a flawed exercise of discretion cannot be brought as a wages claim under Part II ERA where it is in essence a claim for damages for a loss of a chance. Such a claim can only be brought as a claim for breach of contract.

61. There is considerable force in the claimant's criticism of the respondent's decision-making, in a number of respects.

- a. The respondent held against the claimant the fact that he had not obtained a specialist's appointment, or to obtain a more certain diagnosis, in circumstances where he had told the respondent that he

had been referred to a specialist by his GP and an appointment was awaited. The respondent seems simply to have assumed that the delay was attributable to the claimant as opposed to a delay in the machinery of the NHS which would not seem to be something which could properly be held against the claimant.

- b. It is questionable whether a clearer diagnosis was required than that which had been provided in the OH reports of 1 December 2017 and 12 June 2018. Furthermore if the respondent wished to obtain a clearer, fuller or more up-to-date diagnosis than was apparent from the claimant's GP fit notes, it could and should have obtained an OH report sooner, or sought clarification from the OH advisor and/or the claimant's GP, bearing in mind that the claimant had given his express consent for the respondent to do so. Although there was evidence of a long lead time in getting appointments with Everwell, this does not seem to be either a complete or a satisfactory explanation for the long delay in obtaining OH advice between February 2018, when the need for such advice was recognised by the Respondent, and June 2018, when an examination finally took place.
- c. The respondent overall formed the view that the claimant was not doing enough to get back to work. In the absence of clear and up to date occupational health evidence, or other medical evidence, as to the claimant's ability to do the various alternative roles which had been offered to him on 5 February 2018, it is doubtful that Mr Keeley had reasonable grounds to conclude that this was indeed a matter of the claimant being obstructive. There was also no attempt to clarify the apparent contradiction in the OH report from June 2018 as to whether the claimant was or was not then fit to commence a phased return to work.

62. It is arguable that these matters were sufficient individually or cumulatively to mean that the respondent's decision (either the key decision taken by Mr Keeley on 18 April 2018 or the failure subsequently to reverse it) was unlawful and a breach of contract, either on grounds of irrationality or one or more of

other grounds set out at paragraph 56.a56.d above. However I do not need to decide that question. This is because even if the claimant succeeded in showing a breach, it cannot be said that had the respondent acted lawfully it would certainly have paid him AAW pay in the period after 18 April 2018, so his claim, if he has one, must be for damages for breach of contract rather than a claim for wages.

63. The overarching reason for this, at a general level, is that the respondent had a broad discretion as to the payment of AAW pay. Even had it been satisfied that the claimant was genuinely unfit for work by reason of an accident at work, and was making all reasonable efforts to return, the respondent still had a discretion not to make further payments of AAW pay: he had after all enjoyed this benefit for 5 months, of which over 4 months was paid on a discretionary basis. There was no evidence of a practice of paying AAW pay being paid indefinitely or for any fixed period. It remains discretionary.

64. Moreover there were in this case a number of important variables. Even in the material provided to me, there was little by way of clear diagnosis of the claimant's condition; so even if the respondent had obtained a clearer or fuller diagnosis (for example from its OH advisor or a GP report or from a specialist) it is possible that it may not have been satisfied with that report. It is relevant to note that respondent's policy on payment of CSP, set out above, approaches back conditions with a degree of cautious scrutiny: it provides that payment beyond the normal entitlement "*may exclude conditions such as back pain and stress related issues which have an undetermined cause and/or recovery period.*" In the proper exercise of its discretion, the Respondent would have been entitled to require quite clear evidence of diagnosis, causation and prognosis, and it is not certain by any means that such evidence would have been forthcoming. That goes for the claimant's condition generally, but it is particularly true of the urological issue which formed part of the reason for the claimant's absence; there was no clear evidence presented to the Tribunal of the causation of this particular problem.

65. Likewise had the respondent given more careful consideration to the question of the claimant's efforts to get himself back to work, it is not certain that it would

have come to a different conclusion than it did. I do not know what would have been revealed by a further investigation as to the claimant's efforts to hasten the process of referral to a specialist. There was no evidence before me as to the dates on which the claimant had raised these matters with his GP, save for the claimant's recorded remark in July 2018, which is unhelpful to him in this context, that he had only been referred "around three months" earlier. Moreover the assessment of the claimant's readiness or reluctance to work, and of the continued payment of AAW pay in light of that assessment, would have been matters for the judgment and discretion of the respondent.

66. I would add that I do not accept the claimant's procedural attack on the respondent's decision-making. On the evidence before me I do not consider that there was a contractual entitlement to a decision being taken either by a panel or in consultation with the union or at a particular level of management. And even if there were a breach of such an entitlement, the claimant would face the same difficulty that I have already described: that it is impossible to be sure what would have happened had the breach not occurred. Had the correct procedure been followed, the same outcome might have been reached.

67. In summary, therefore, even if the claimant could establish that the respondent acted in breach of contract, his claim would be for damages, which would require the tribunal or court to consider the loss of the chance of achieving a different outcome. That, as **Coors** and **Allsop** make clear, is the province of a claim for breach of contract, not of a claim for unauthorised deductions from wages under Part II ERA.

68. The claimant's claim accordingly fails and is dismissed.

69. I would only add this. The payment of AAW pay is an important benefit offered by the respondent to its staff. It is regrettable that there is so little in writing to guide the respondent, its staff and the union as to how this benefit is intended to be operated in practice, in terms of what (if any) factors may be considered relevant to the exercise of the discretion and the process by which reviews are to be conducted. The resulting uncertainty does not seem to me to be in

anyone's interest, and I would hope that the respondent and the union might reflect on how some greater clarity and certainty might be introduced.

Employment Judge Coghlin QC

Signed on: 14 May 2019