

RESERVED JUDGMENT



EMPLOYMENT TRIBUNALS

CLAIMANT

RESPONDENT

MR L DAVIES

V

PETERS FOOD SERVICE LIMITED

HELD REMOTELY ON: 14 MAY 2021

BEFORE: EMPLOYMENT JUDGE S POVEY
(SITTING ALONE)

REPRESENTATION:

FOR THE CLAIMANT:

MR STEVENS (USDAW)

FOR THE RESPONDENT:

MR GEORGE (SOLICITOR)

RESERVED JUDGMENT

1. The claim of unlawful deductions from wages is not made out and is dismissed.

REASONS

These are the reasons for the reserved judgment of the Tribunal following the hearing of this matter on 14 May 2021.

1. This is a claim for unlawful deductions from wages brought by Lloyd Davies ('the Claimant') against his employer, Peters Food Service Limited ('the Respondent').

The Hearing

2. The hearing was conducted remotely. I heard evidence from the Claimant, who adopted his witness statement. For the Respondent, I heard from Michael Grimwood (Managing Director), Chris Terry (Finance Director) and Sally Williams (Human Resources Director). They each adopted their statements as evidence in chief. I was also provided with an agreed, paginated bundle of documents ('the Bundle').

RESERVED JUDGMENT

3. In addition, I also received oral submissions from Mr Stevens for the Claimant and written and oral submissions from Mr George for the Respondent.
4. In the course of the hearing, it became apparent that there were a number of other claims pending before the Employment Tribunal brought by employees of the Respondent and giving rise to common or related issues of fact or law. Following a number of case management directions and hearings, it was ordered that, pursuant to Rule 36 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedures) Regulations 2013 ('the Procedure Rules'), this claim was to be treated as the lead case for the following claims, all of which were stayed pending the decision contained within this judgment and reasons:

1600092/2021	Leigh Evans	v	Peters Food Service Limited
1600099/2021	Jonathan Jones	v	Peters Food Service Limited
1600196/2021	Gaynor Cornock	v	Peters Food Service Limited
1600239/2021	Alan Rees	v	Peters Food Service Limited
1600250/2021	Stefan Stoikovic	v	Peters Food Service Limited
1600289/2021	Michelle Roberts	v	Peters Food Service Limited
1602235/2021	Roger Phillips	v	Peters Food Service Limited
1602608/2021	Jonathan Jones	v	Peters Food Service Limited

5. A copy of this decision and reasons shall be sent to each of the parties in the above claims, per Rule 36(2) of the Procedure Rules and shall be binding upon them (subject to the provisions of Rule 36(3) of the Procedure Rules).

Background

6. The background of the claim is as follows (the following are not in dispute):
 - 6.1. The Claimant is employed as a Grade 5 Relief Team Leader. He has been employed by the Respondent since 2010.
 - 6.2. The Respondent operates a Company Sickness and Accident Benefit Scheme ('the Sickness Benefit Scheme'). In essence, the Sickness Benefit Scheme affords salaried staff a higher rate of sick pay that they would ordinarily receive under the Statutory Sick Pay ('SSP') scheme, by effectively paying them their usual wages ('Company Sick Pay'). There is no entitlement during the first 12 months of employment or during the first three days of sickness absence. Thereafter, entitlement is calculated according to length of service. Further details are to be found in each employees contract of employment.
 - 6.3. On the basis of the Claimant's length of service, he is entitled to eight weeks Company Sick Pay per year.
 - 6.4. In March 2020, the Respondent suspended the operation of the Sickness Benefit Scheme and informed its employees that only SSP would be paid for any sickness absence.

RESERVED JUDGMENT

- 6.5. On 21 October 2020, the Claimant tested positive for Covid-19 and was required to self-isolate. During his absence from work, he was paid SSP.
- 6.6. The Sickness Benefit Scheme was reinstated with effect from 1 February 2021.
- 6.7. Following a period of ACAS Early Conciliation, the Claimant filed his ET1 with the Tribunal on 14 January 2021. He claims that the Respondent was not permitted to suspend the operation of the Sickness Benefit Scheme. The decision to do so was in breach of his employment contract and the failure to pay him Company Sick Pay whilst he was self-isolating constituted an unlawful deduction from his wages.
- 6.8. The Respondent resists the claims in full, filing its ET3 on 15 March 2021. It avers that there was no contractual entitlement to Company Sick Pay. Payment was at the discretion of the Respondent and there was provision for the suspension of the Sickness Benefit Scheme.

The Issues

7. The parties agreed that the following issue required determination:
- 7.1. Was the Respondent entitled to suspend the operation of the Sickness Benefit Scheme in the manner that it did in March 2020?
8. If it was, it followed that the Claimant was not entitled to Company Sick Pay when he was absent in October 2020, there was no breach of contract and no unlawful deduction of wages. However, if the suspension were unlawful, the claim would succeed and I would be required to determine what remedy the Claimant is entitled to.

The Law

9. Section 13 of the Employment Rights Act 1996 ('ERA 1996'), so far as is relevant, states as follows:
- (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, ...
- ...
- (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,

RESERVED JUDGMENT

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....

...

10. For the purpose of section 13 of the ERA 1996, the definition of "wages" includes *"any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise"* (per section 27(1)(a) of the ERA 1996).
11. The Tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under section 13 of the ERA 1996 is properly payable, including an issue as to the meaning of the contract of employment: Agarwal v Cardiff University [2018] EWCA 2084.

Findings of Fact

12. The aims of the Sickness Benefit Scheme and exclusions from it are set out at Paragraph 1 ([39] of the Bundle):

POLICY

- a. The Scheme is intended to provide payment for periods of Temporary Total Disablement. This means that, to qualify for payment, the employee must be physically incapable of earning remuneration by carrying out work of any kind. Employees must be prepared to submit themselves for medical examination arranged by the Company, if required. The right is reserved to withhold benefits under the Scheme if it is considered that the circumstances justify such action. (This is at the sole discretion of the HR Manager.)

b. Exclusions

No payment will be made for any period of disability or injury which:

- is occasioned or contributed to by war (whether war be declared or not), riot, civil commotion or strikes;
- arises from an aviation accident of any kind, except when the employee is travelling as a fare-paying passenger in an aircraft operation by a regular airline;
- is the result of attempted suicide, mountaineering, high risk winter sports or racing (other than on foot)

However, an employee may still be eligible to receive SSP even though he/she is excluded from benefits under the Company Sickness Payment Scheme.

RESERVED JUDGMENT

13. As well as setting out how the entitlement to Company Sick Pay arises, the Sickness Benefit Scheme contains the following relevant provision at Paragraph 10 ([43] of the Bundle):

CONTROL OF LEVEL OF ABSENCE DUE TO SICKNESS

- a. Attendance levels will be reviewed continuously both on an overall and individual basis. Should levels of absenteeism reach an unsatisfactory level, or, if individuals are considered to be abusing the scheme, the Company reserves the right to withdraw the scheme as a whole or on an individual basis.

14. The Respondent also operates an Attendance Management Policy. Paragraph 8 includes the following regarding the payment of Company Sick Pay (at [103] of the Bundle):

8. Payment for Sickness or Injury

Company Sick Pay

If an employee is eligible to receive company sick pay, this will be set out in their contract of employment. Any Company sick pay is paid at the discretion of the company and is at the discretion of the HR Manager.

15. Clause 9 of the Claimant's contract of employment sets out his entitlement to Company Sick Pay, in line with the Sickness Benefit Scheme (at [32] – [33] of the Bundle).

16. As set out above, the Respondent suspended the operation of the Sickness Benefit Scheme with immediate effect in March 2020. Mr Grimwood explained that this was one of a package of measures implemented by the Respondent in the face of the emerging Covid-19 pandemic and the national lockdown, which came into force on 23 March 2020.

17. The Respondent informed its staff of the suspension of the Sickness Benefit Scheme in a notice from Mr Grimwood issued on 17 March 2020 (the day after the government had delivered its guidance to avoid non-essential travel, work from home where possible and advice on forthcoming measures regarding self-isolation). So far as relevant, the notice included the following at [45] of the Bundle (the Sickness Benefit Scheme is referred to as the "enhanced sick-pay scheme"):

The Government yesterday announced a series of measures for everybody to protect their health which it is expected will dramatically and understandably increase absence levels. What has not been made clear yet is what measures, if any, the Government is going to provide to help companies and people deal with the fall out of these measures.

This is obviously a very fast-moving crisis and as such, events are moving much quicker than anyone would expect creating huge uncertainty.

I will outline several measures that are going to have to be taken.

RESERVED JUDGMENT

Sick pay scheme:

The Company will pay Statutory Sick Pay (SSP) from day 1 of illness / self-isolation as the Government has required.

The "enhanced sick-pay scheme" is paid solely at the Company's discretion. It is a fact that the Company is not capable of paying enhanced sick pay in the current financial circumstances. As such the "enhanced sick pay scheme" will be withdrawn with immediate effect. If, or when the Government outlines any business support measures to mitigate the current circumstances this approach will be immediately reviewed. This is not a step that any of us wish to take but unfortunately it is wholly unavoidable. Where possible we will substitute holiday days to attempt to reduce the impact where people wish it. As a business we are truly sorry to be taking this step.

18. The Claimant referred in his witness statement to the fact that the Sickness Benefit Scheme was suspended "*without notice and without consultation*" (at Paragraph 6). Mr Grimwood did not dispute that, explaining that as the country went into lockdown, the Respondent was in danger of going into administration.
19. It was not in dispute that, when the Claimant was required to take sick leave in October 2020, he was only paid SSP (at [147] – [150] of the Bundle).

Analysis & Conclusions

20. In his submissions, Mr Stevens accepted that there is a discretionary element to the Sickness Benefit Scheme. It is limited to the payment of Company Sick Pay and, Mr Stevens argued, such discretion can only be applied on a case-by-case basis. It did not extend to the wholesale suspension of the Sickness Benefit Scheme, as happened on 17 March 2020.
21. In respect of the provisions of Paragraph 10 of the Sickness Benefit Scheme (wherein the Respondent "*reserves the right to withdraw the scheme as a whole*"), Mr Stevens contended that the notice of 17 March 2020 was not premised upon the reasons in Paragraph 10 which permitted withdrawal.
22. Reliance was also placed upon the Exclusions set out above in the Sickness Benefit Scheme, which did not include any reference to pandemic or allow for the scheme as a whole to be removed.
23. The Claimant also relied upon the following, from Clause 9 of his employment contract (at [33] of the Bundle):

Company sick pay will be made after the first three days of absence on each occurrence.
24. The Claimant submitted that the phrase "*will be made*" evidenced the mandatory nature of the Sickness Benefit Scheme generally and the payment of Company Sick Payment specifically.
25. I had a number of difficulties with the Claimant's arguments:

RESERVED JUDGMENT

- 25.1. Paragraph 10 of the Sickness Benefit Scheme permits withdrawal of the scheme *“as a whole or on an individual basis.”* Paragraph 10 in effect creates a two-stage approach to this ultimate sanction. First, there is a continuous review of attendance levels *“both on an overall and individual basis.”* From that on-going review, the scheme can be withdrawn *“[S]hould levels of absenteeism reach an unsatisfactory level...”* The wording of Paragraph 10 is clear. The power to withdraw is not limited to individual cases. It can be triggered having regard to overall absences and, importantly, Paragraph 10 affords the Respondent *“the right to withdraw the scheme as a whole...”*
- 25.2. The Respondent’s right to withdraw, as encompassed in Paragraph 10, is attendant upon levels of absenteeism. The notice issued on 17 March 2020 referred to the Respondent’s view that the announcements made the previous day *“will dramatically and understandably increase absence levels.”* There was, in my judgment, a clear explanation for why the scheme was being suspended and, importantly, it was by reference to absenteeism.
- 25.3. That reasoning was reinforced by the largely unchallenged evidence of Mr Grimwood as to the Respondent’s financial forecasts at the time (both in his written and oral evidence and his statement to staff at the time of the suspension at [46] of the Bundle). The Respondent, like so many businesses, was facing uncertainty and financial difficulties. A likely increase in sick leave was reasonable to forecast at the beginning of a pandemic. That would have generated a significant financial burden on the Respondent by the operation of the Sickness Benefit Scheme, at a time when the Respondent was teetering on the brink of administration.
- 25.4. In addition, the Sickness Benefit Scheme at its outset makes clear that Company Sick Pay can be withheld *“if it is considered that circumstances justify such action”*, a decision which is *“at the sole discretion of the HR Manager”* (a policy reinforced and repeated in the Absence Management Policy at Paragraph 8 and reproduced above).
- 25.5. My attention was not directed to any part of the Sickness Benefit Scheme, any part of the Claimant’s contract of employment or any other policy or contract which required the Respondent to consult or give advance notice of its decision to suspend operation of the scheme.
- 25.6. The Claimant’s arguments were not materially supported by reliance upon the Exclusions at Paragraph 1b of the Sickness Benefit Scheme. Like all contractual and policy clauses, they have to read in context. The purpose of these Exclusions is to expressly state those events and activities which fall outside of the scheme. These are not discretionary exceptions. They are mandated. As such, they are distinct from the rest of the scheme and in no way offend or contradict the discretionary powers available to the Respondent and explored above.

RESERVED JUDGMENT

- 25.7. Similarly, the Claimant's reliance on the terms of his employment contract must also be read in context. The sentence relied upon does not bear the weight attached to it by the Claimant. It does not create an obligation to pay Company Sick Pay in all circumstances. Rather, it confirms that Company Sick Pay will not be paid during the first three days of absence but only thereafter. It is consistent with the powers within the Sickness Benefit Scheme to withdraw or exclude entitlement on an individual or (in respect of withdrawal) wholesale basis. The contractual and policy documents have to be considered together. When they are, it is, in my judgment, clear that the obligation to pay Company Sick Pay after three days of absence is dependent upon the employee's absence not being excluded (by, for example, an injury whilst mountaineering) or upon the scheme having not been withdrawn, either from the individual employee (for abusing the scheme) or as a whole (because of unsatisfactory levels of absenteeism). To interpret the employment contract in the way the Claimant contends does not make sense when considered in context and is wholly inconsistent with the clear intent and scope of the Sickness Benefit Scheme.
26. For those reasons, I was unable to find that the Respondent had acted unlawfully in the manner and timing of the decision to suspend the operation of the Sickness Benefit Scheme.
27. There was one further matter which I considered, although the same was not expressly raised by the Claimant. In suspending the operation of the Sickness Benefit Scheme, the Respondent took pre-emptive action. The decision was based upon a likely increase in absence levels (and, by extension, an increase in Company Sick Pay). It was not based upon actual levels of absenteeism as of 17 March 2020. Was the Respondent permitted to act pre-emptively?
28. In my judgment, it was. Paragraph 10 of the Sickness Benefit Scheme could be construed to permit suspension based upon future absence levels although an argument could be similarly made to interpret the clause to the contrary. The instructive phrase "*[S]hould levels of absenteeism reach an unsatisfactory level*" is not, in my judgment, conclusive on the point. However, as detailed above, there are clear references at Paragraph 1a of the Sickness Benefit Scheme and Paragraph 8 of the Absence Management Policy to the discretionary nature of the scheme and the payment of Company Sick Pay. When read in conjunction with Paragraph 10, the Respondent was not acting outside of its powers or in breach of either the Sickness Benefit Scheme or the Claimant's contract of employment in suspending its operation with immediate effect on 17 March 2020.
29. In conclusion:
- 29.1. The Respondent was entitled to suspend the operation of the Sickness Benefit Scheme in the manner that it did and with immediate effect on 17 March 2020.

RESERVED JUDGMENT

29.2. In so doing, the Respondent was not acting outside of its powers under the Sickness Benefit Scheme nor was it acting in breach of the Claimant's contract of employment.

29.3. As such, the Claimant was only entitled to SSP from 17 March 2020 until the Sickness Benefit Scheme's re-introduction with effect from 1 February 2021.

29.4. There were no unlawful deductions from the Claimant's wages (as defined by section 13 of the ERA 1996) when he was paid SSP for his period of absence in October 2020.

30. For all those reasons, the claim for unlawful deductions is not made out and is dismissed.

Judgment entered into Register
And copies sent to the parties
On 23 July 2021

EMPLOYMENT JUDGE S POVEY

Dated: 21 July 2021

.....
for Secretary of the Tribunals

Mr N Roche