



# EMPLOYMENT TRIBUNALS

**Claimant:** P RING

**Respondent:** LONDON BOROUGH OF ENFIELD

**Heard at:** Watford Employment Tribunal (in person)

**On:** 18 November 2024

**Before:** Employment Judge Din (sitting alone)

## Appearances

For the Claimant: Representing himself

For the Respondent: M Lansman, counsel, instructed by the Respondent

## RESERVED JUDGMENT

- 1) The Respondent made unlawful deductions from the Claimant's wages and is ordered to pay to the Claimant:
  - a) Monthly deductions by the Respondent from the Claimant's wages from 15 December 2022 in respect of sick pay stated by the Respondent to be overpaid to the Claimant; and
  - b) Four days' wages for 22, 23, 26 and 27 June 2023.
- 2) The amounts payable by the Respondent are to be assessed.

## REASONS

### Introduction

1. The Claimant is employed by the Respondent as a multi-trade operative. The Claimant's employment with the Respondent started in November 2020 and is ongoing.
2. Early conciliation started on 16 June 2023 and ended on 25 June 2023.

3. By a claim form presented on 1 August 2023, the Claimant complained that he is owed holiday pay and arrears of pay. The Claimant asks for compensation.
4. By a response and Grounds of Resistance dated 3 October 2023, the Respondent resists the complaint.
5. The Tribunal is aware that there is a further claim between the parties (case number: 3306456 / 2024). The Tribunal has not looked at this further claim as part of this judgment.
6. On 17 June 2024, a case management hearing was held before Employment Judge Hutchings. At that hearing, Employment Judge Hutchings made various case management orders in preparation for a final hearing.
7. On 4 October 2024, a case management hearing was held before Employment Judge Cowen. This was due to be the date of the final hearing. However, it was postponed due to the Respondent's failure to comply with orders for preparation made at the 17 June 2024 case management hearing.
8. An application by the Respondent to postpone the 4 October 2024 hearing was made in writing on 2 October 2024. The application indicated that the current file manager at the Respondent responsible for the case had not been aware of the case management orders of 17 June 2024 until 19 August 2024. The application for postponement was rejected by Employment Judge Young on 3 October 2024.
9. At the 4 October 2024 hearing, the Respondent attempted to make a further application for the same reasons as contained in the letter of 2 October 2024. This time there was reference to there being "*exceptional circumstances*" as set out in Rule 30A(2)(c) of the Employment Tribunals Rules of Procedure 2013 (**Rules**). The Tribunal could not see that there were any additional reasons to renew the application, or to reconsider the decision of Employment Judge Young, nor did the Tribunal consider that there were "*exceptional circumstances*".
10. The Tribunal indicated then that it would consider a Preparation Time Order under Rules 76 and 79 of the Rules at the end of the next hearing in relation to the Claimant and, in particular, his wife's time, in dealing with the claim.
11. The final hearing was relisted for today and various case management orders were made by Employment Judge Cowen. It was explained to both parties that today's hearing should not be postponed unless the reasons are truly unforeseen and unavoidable. Should either party fail to prepare or attend the hearing, a strike out order may be made.

## Evidence and other materials

### Bundle of documents

12. There is a 488 page bundle setting out relevant materials (**Hearing Bundle**), along with three witness statements.

13. Additional materials that should have been part of the Hearing Bundle were provided.

#### Witness statements

14. The Tribunal is provided with a witness statement from the Claimant dated 29 October 2024 and the Tribunal heard from him.
15. On behalf of the Respondent, the Tribunal is provided with a witness statement from Tony Medall dated 14 November 2024 and one from Jemima Paddon dated 5 November 2024. The Tribunal heard from both of them.

#### **Application for strike out of claim**

16. On 17 November 2024, the Claimant sent an email to the Tribunal and the Respondent asking the Tribunal to strike out the Respondent's case.
17. The Claimant stated that they had already requested a strike out on 31 October 2024 as a result of the Respondent's non-compliance with case management orders.
18. The Claimant had, in accordance with case management orders, supplied all information to be contained in the Hearing Bundle. However, when the Claimant had received the Hearing Bundle from the Respondent, there were a number of documents missing. Following that, the Respondent provided a new version of the Hearing Bundle on 14 November 2024, the Thursday before the final hearing (today – Monday). As a result of this, the Claimant's wife (who works during the week) had to spend the weekend working through the new Hearing Bundle. The page numbers in each version of the Hearing Bundle were different. Also, there remained a number of documents missing from the Hearing Bundle.
19. In addition, there had been a delay in the Respondent serving its witness statements. The parties were ordered to exchange witness statements on 30 October 2024. The Claimant was contacted by the Respondent on 28 October 2024 requesting a delay. The Claimant declined this request and sent over his witness statement to the Respondent in accordance with the case management orders made on 4 October 2024. The Respondent only provided Ms Paddon's witness statement on 5 November 2024 and Mr Medall's witness statement, even later, on 15 November 2024. This latter statement was provided on the Friday before today's hearing.
20. Mr Lansman explained at the beginning of the hearing that there are certain documents missing from the Hearing Bundle. He apologised on behalf of his client and stated that any remaining issues in this regard would be resolved quickly.
21. With respect to the witness statements, Mr Lansman again apologised on behalf the Respondent. The Tribunal raised concerns about the Respondent's witnesses being able to review the Claimant's witness statement in advance of finalising their own. Mr Lansman explained that Ms Paddon's and Mr Medall's

witness statements did not respond to the Claimant's witness statement. Mr Lansman further stated that he would explore this point with Ms Paddon and Mr Medall to ensure that this had not occurred.

22. The Tribunal impressed on the Respondent that failing to comply with case management orders is a serious matter. This is particularly where an Employment Judge had previously criticised the Respondent for its failures.
23. The actions of the Respondent, who is represented, have put the Claimant, who is unrepresented, at a disadvantage. The Claimant complied with case management orders, the Respondent did not. As a result, the Claimant had to work over the weekend before the final hearing with a new, different and still incomplete Hearing Bundle. The Claimant then only received Mr Medall's witness statement one working day before the final hearing.
24. The relevant rules in relation to strike out are contained in Rule 37 of the Rules. At the hearing, the Tribunal explained that it will not strike out the Respondent's case. The reasons are as follows.
25. Although the Tribunal has considerable sympathy for the Claimant's position, and makes clear that the Respondent's conduct is unacceptable, the guiding consideration is the overriding objective to deal with cases fairly and justly.
26. The Tribunal has to look at all the circumstances, including the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is possible.
27. The issues with the Hearing Bundle were – belatedly – resolved at the final hearing. The Respondent's witness statements have not on their face been materially tainted by the Claimant's witness statement being provided in advance of them.
28. Strike out is a draconian measure. In light of all of the circumstances, the Tribunal considers that a fair hearing today is still possible, notwithstanding the issues that have been undoubtedly caused to the Claimant as a result of the Respondent's poor conduct.
29. The Tribunal will come back to the point regarding a Preparation Time Order under Rules 76 and 79 of the Rules. In the meantime, the Respondent was told that it should resolve any remaining issues with the Hearing Bundle without delay. In addition, the Tribunal said that it will be looking closely at the reliability of any witness evidence put forward by the Respondent in light of what has happened.

## Claims and issues

30. The claims concern the unlawful deduction for wages:
  - 30.1 A claim for monthly deductions (ongoing) the Respondent is making in respect of sick pay. The Respondent says it overpaid the Claimant's sick pay and is recovering the overpayment with monthly deductions.

30.2 Four days' wages for 22, 23, 26 and 27 June 2023 which the Claimant says was annual leave approved by the Respondent. The Respondent says that this was an unapproved absence.

31. As set out by Employment Judge Hutchings at the hearing on 17 June 2024, the issues are as follows:

31.1 Were the wages paid to the Claimant for June 2023 and for sick pay less than the wages he should have been paid;

31.2 Was any deduction required or authorised by statute;

31.3 Was any deduction required or authorised by a written term of the contract?

31.4 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

31.5 Did the Claimant agree in writing to the deduction before it was made?

## Law

32. The right not to suffer an unauthorised deduction is contained in section 13(1) of the Employment Rights Act 1996:

*“An employer shall not make a deduction of 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”.*

33. Section 23 of the Employment Rights Act 1996 gives a worker the right to complain to the Employment Tribunal of an unauthorised deduction of wages.

## Relevant findings of fact

### Background

34. The Claimant signed an employment contract with the Respondent on 22 November 2020 (**Employment Contract**).

35. The Employment contract states the following in respect of sickness absence:

**“14. Sickness Absence and Procedure**

*The relevant date for continuous service in respect of entitlement to occupational sick pay is 23 Nov 2020.*

*In case of incapacity for work your entitlement to sick pay is for the following periods:*

[...]

*During 2nd year of service 2 months' full pay and 2 months' half pay.*

*During 3rd year of service 4 months' full pay and 4 months' half pay.*

[...]

*The period during which sick pay shall be paid, and the rate of sick pay, in respect of any period of absence shall be calculated by deducting from the employees' entitlement on the first day the aggregate periods of paid absence during the twelve months immediately preceding the first day of absence...".*

36. The Claimant's employment contract also states the following:

**"23. Deductions from Pay**

*The Council may deduct pay for the following reasons:*

(i) ...

(ii) *Unauthorised leave of absence*

(iii) ...

(iv) *The Council may make deductions from your pay, or from any monies due to you, for any sums payable by you to the Council. This includes, but is not limited to, any overpayment of salary or any other benefits (for the purposes of this you will be deemed to have checked each and every payment to you and be aware of any overpayments), any outstanding loans, post entry training fees and, upon your employment ending, any leave which you have taken in excess of your entitlement."*

37. The Respondent has a "*Principles of Managing Absence and Attendance*" document. In accordance with this document, it is management's responsibility to ensure that absences are logged on the Council's systems and that absence is logged correctly.

**Sickness**

38. On 12 September 2022, the Claimant told his manager, Patrick Greenwood, that he could not work that day. This followed a family bereavement. The Claimant got an appointment with his GP for 16 September 2022 and saw his GP that day.
39. The Claimant collected a note from his GP on 19 September 2022 (**19 September GP Note**). The note is headed "*Statement for Fitness for Work*" and says that it was issued on 30 September 2022, although the assessment took place on 16 September 2022. On the basis of the evidence from both parties, the 30 September 2022 date is an error and should be 19 September 2022.

40. Mr Medall is the Interim Head of Repairs and Operations at the Respondent. He had management responsibility for the Claimant at the material times. Mr Medall states that the 19 September GP Note was, actually, handed to Mr Greenwood on 17 September 2022 and the events that the Claimant said took place on 19 September 2022 (described further below) actually took place on 17 September 2022. The Tribunal considers that the 19 September GP Note and the subsequent events took place on 19 September 2022 – not least as 17 September 2022 was a Saturday and it would have been remarked upon.
41. The 19 September GP Note says: “*you are not fit for work*” crossed out. Instead, it states that the Claimant “...*may be fit for work taking into account the following advice...Avoid tasks that involve fine motor skills or involve the use of heavy industrial [machinery]/tools*”. The 19 September GP Note says that “*This will be the case for 5 month(s)*”.
42. The Claimant says that he did not want to be signed off from work and believed that he would be going back into work the following Monday (21 September 2022). The Claimant believes that his GP was merely trying to protect the Claimant. There had been, as far as the Claimant was concerned, no change to the Claimant’s physical condition at this time. He was able to do the same tasks as he was previously – but the family bereavement (amongst other things) had caused the Claimant stress and anxiety that required a short period off work.
43. The Claimant says that he did not look at the 19 September GP Note before handing it to Mr Greenwood on 19 September 2022. Once the Claimant had handed it to Mr Greenwood, the Claimant says that he discussed a return to work, but with different duties, with Mr Greenwood. I have not heard from Mr Greenwood. The Tribunal considers that the discussion took place as described by the Claimant.
44. Mr Greenwood called Mr Medall in from an adjacent office. Mr Greenwood passed on the 19 September GP Note to Mr Medall. The Claimant states that Mr Medall immediately said that the Claimant could not return to work, as the Claimant was not fit to work, and sent the Claimant home.
45. Mr Medall makes the point that the Claimant had a number of sickness absences before September 2022 and had been the subject of an Occupational Health (OH) assessment. In an OH letter of 21 April 2022 (**21 April OH Letter**), OH referred to conditions suffered by the Claimant. It says that those conditions would cause the Claimant to need above average absence from work. Further, his conditions and treatment would cause him to work more slowly than may be anticipated. There was no reference to fine motor skills or to heavy machinery / tools. It does, however, say that the Claimant is “...*fit and able to continue in his role*”.
46. Mr Medall states that the Claimant’s role involved the carrying out of repairs, improvement works and snagging. In light of the 19 September GP Note, Mr Medall decided that the Claimant would not be able to complete any tasks set by his team, as all the tasks would have involved fine motor skills or use of heavy industrial machinery / tools.

47. Mr Medall states that he consulted the Respondent's HR team in this regard, but was not able to provide further evidence to support this. The Claimant asserts that Mr Medall did not contact HR in his presence and did not leave the room. Mr Medall agrees with the Claimant's contention that looked at the internet to assist him, but that this was as well as discussing the Claimant's situation with HR and relying on the 19 September GP Note. The Tribunal finds that Mr Medall did not immediately consult with HR. However (as seen below), he did so subsequently.
48. In light of the above, the Respondent states that the Claimant was placed on sick leave. The Claimant believes that he was placed on a medical suspension.
49. The Claimant does not agree that he could not continue to work at that point. He states that he did (and does) have difficulty with fine motor skills, but that he was able to carry out his work duties albeit it took him longer to do them – as set out in the 21 April OH Letter. The Claimant further states that he did not use heavy machinery / tools.
50. Mr Medall says that he did discuss further roles with the Claimant while the Claimant was away from work, but they would not be suitable for the Claimant and the Respondent.
51. The Claimant states that he heard nothing from Mr Greenwood and Mr Medall following his being placed on sick leave, despite a number of attempts. There are a number of WhatsApp messages from the Claimant to Mr Greenwood from 20 September 2022 to 5 October 2022 that appear to go unanswered.
52. Mr Medall referred the Claimant to OH during this period. On the basis of messages between Mr Medall and the Claimant at that time, it appears that the referral took place in early October 2022 and before 5 October 2022.
53. The Claimant's next OH assessment was on 23 November 2022. There have been subsequent ones on 1 February 2023, 12 September 2023, 12 February 2024 and 13 August 2024.
54. In a letter dated 23 November 2022 to Mr Medall (**23 November OH Letter**), OH states in a section headed "Background": *"As you are aware, Mr Ring has several ongoing issues that can affect his ability to work. These are essentially unchanged since his last assessment"*.
55. The 23 November OH Letter describes some of the Claimant's issues, adding *"More recently, [the Claimant] has developed depressive symptoms. These were triggered by the unexpected death of a close family member..."*. It says *"Given his recent symptoms, his general practitioner provided a fit note advising lighter duties. However, management have stood him down in response to this"*.
56. In the section of the 23 November OH Letter headed "Opinion", OH says *"Mr Ring is fit to continue in his role. However, he would benefit from being allocated amended, lighter duties"*. It then lists further detail in this regard – particularly what the Claimant could and could not do.



57. It adds: *“As stated previously, he will be slower than may otherwise be anticipated and could require more assistance than others to complete his duties. He will struggle with tasks requiring fine dexterity, due to his tremor”*. Then it says, *“However, he is fit and able to undertake the majority of his role, including the use of powered tools, providing that these do not have a lock able trigger (so that the tool stops if he lets go of it). He remains able to drive”*. The 23 November OH Letter then states: *“Given this, he would benefit from care in the allocation of his required tasks. He is unable, for example, to undertake scribing work for the above reason”*.
58. In answer to specific questions set out, the 23 November OH Letter says:
- “Is the employee fit to be at work?”***  
*Yes, as given above. I have suggested adjustments to support him with such in the text above.*
- [...]
- Will the operative being able to carry out all aspects of his job role as a multi trader safely?***  
*There are some tasks that are beyond his ability, as above. However, I believe that he should be able to undertake most of the role without undue difficulty, although he is liable to be slower than may be anticipated”*.
59. Mr Medall states that there were no lighter duties available. The Claimant says that he had previously been allocated lighter duties on occasion.
60. The Respondent sent a letter to the Claimant dated 30 November 2022 informing the Claimant of a stage 1 absence and attendance meeting. This meeting took place on 15 December 2022 (**Stage 1 Meeting**).
61. The Stage 1 Meeting was attended by the Claimant, a representative from the GMB union (Anderson Smith), Mr Medall and a member of the Respondent’s HR team (Danny Headford).
62. The notes of the Stage 1 Meeting were produced by Mr Headford. I did not hear from Mr Headford.
63. The notes of the Stage 1 Meeting describe lengthy discussions at that meeting as to what the Claimant could and could not do in light of the 19 September GP Note and the 23 November OH Letter. The notes of the Stage 1 Meeting are described on the front of them as *“Rough notes, not intended to be verbatim”*. The Claimant states that the notes were produced by, and deliberately favourable to, the Respondent. The Claimant says that at the meeting and elsewhere he maintained that he was fit to work – only that, as in his view demonstrated by the 21 April OH Letter and the 23 November OH Letter, it would take him longer to do tasks.
64. The notes of the Stage 1 Meeting say the Claimant *“...confirmed they could not hold a jigsaw, circular saw, etc.”*. The Claimant denies that this was said and says that he was (and is) able to use a jigsaw. The circular saw was later removed.

65. The Claimant states that the alternative roles that were discussed at the Stage 1 Meeting were not appropriate for him. He reiterated that he is a tradesman and he was fit to work.
66. The notes of the Stage 1 Meeting say that “[Mr Smith] *agreed that [the Claimant] was paid to carry out duties so must accept [the Claimant] was sick based on OH report and the medical note. [Mr Headford] explained if you are fit you would be expected to carry out your role. [Mr Smith] told [the Claimant] to accept they are not fit to work at present*”. The Claimant denies that Mr Smith made these comments – and says that these were inserted by the Respondent. As evidence, he refers to an email from Mr Smith to Mr Medall of 20 January 2023 stating that the Claimant was fit to work.
67. The Claimant adds that Mr Medall did not ask the Claimant for a return to work note from the Claimant’s GP until a meeting on 25 January 2023. The Claimant says that, following this, he promptly contacted his GP and received such a note on 27 January 2023 (**23 January GP Note**).
68. The 23 January GP Note says the following “*I can confirm that [the Claimant] had a telephone consultation with me on the 16/09/2022 complaining of symptoms consistent with depression and anxiety secondary to problems at work and a recent bereavement in his family. I offered him the option of taking some time [off] work, but he expressed a desire to work because it kept him busy and helped take his mind [off] his medical condition. I will also add that at no point did I feel that he was unfit to work*”.
69. The Claimant returned to work on 30 January 2023. Various adjustments have been put in place as a result of the Claimant’s OH assessments and further medical documentation provided by the Claimant to the Respondent.
70. Mr Medall rejects any suggestion that the Claimant was “suspended” for the period between September 2022 and January 2023, or that he had any reason for requiring the Claimant to take leave in that period other than that Mr Medall believed the Claimant was not fit to carry out his role.
71. The Claimant’s then line manager Thomas Tibbs recorded the Claimant’s sickness end date as 19 September 2022. The Respondent states that the Claimant was overpaid his salary in the period September 2022 and January 2023.
72. According to the Respondent, the error was identified in early 2023. Contact was made with the Claimant, who did not agree to a repayment plan. The Respondent then started to recover the amounts it says the Claimant owed (£3,019.46) through a 41-month instalment plan of £75 per month. This plan started on 28 November 2023.
73. This plan was based on calculations exhibited to Mr Medall’s witness statement. The Claimant is not disputing those figures, but does dispute that they should be deducted from his wages.

#### Holiday

74. On 9 June 2023, the Claimant sent an annual leave request by text message from his work phone to a supervisor, Riccardo Bergonzi. The Claimant says that he had a discussion with Mr Bergonzi about having the leave some 10 days before. The Claimant says that there was then a telephone conversation between the Claimant and Mr Bergonzi. During this conversation, the Claimant states that Mr Bergonzi confirmed that the Claimant could take the leave and that the Claimant should send the dates to Mr Bergonzi to remind Mr Bergonzi, and Mr Bergonzi would book the time off for the Claimant.
75. The text message that was sent by the Claimant on 9 June 2023 at 14:13 said *"Hi Ricky as discussed dates required as holiday 22nd 23rd 26th 27th June please"*.
76. The Claimant states that this was the way in which he booked all of his leave with the Respondent at this time. The Claimant regarded the discussion with Mr Bergonzi and Mr Bergonzi's verbal approval as the approval of his holiday. As requested by Mr Bergonzi, the Claimant then confirmed that by a text message.
77. The Tribunal did not hear from Mr Bergonzi, who is no longer with the Respondent.
78. Mr Medall states that Mr Bergonzi missed the text message and, as such the annual leave was not booked in or authorised. Mr Medall further states that he did not see the message until a long time after the message was sent and the Claimant had taken the leave.
79. The Respondent states that there was a procedure for requesting annual leave. The procedure was that whoever was seeking the holiday approval should come into the Respondent's office and speak to a manager or a supervisor to request annual leave for a specific date. It remained a management responsibility to ensure that absences were logged onto the Respondent's system and this was done correctly.
80. Requests would then be checked and considered by a manager on a system called "MI Portal". If leave was granted, the Claimant's work diary would be blocked out.
81. It is acknowledged by the Respondent that the procedure was not written.
82. The Claimant's annual leave on this occasion was not logged onto the MI Portal. When the Claimant did not attend work, on 27 June 2023 he was recorded as "Absent Without Leave". Following HR being notified, Ms Paddon asked if anyone had called the Claimant. Ms Paddon is an HR business partner at the Respondent. Ms Paddon states that Mr Medall indicated that the Claimant was called on 27 June 2023, who confirmed that he was on holiday. Ms Paddon states Mr Medall told the Claimant that the Claimant's leave was unauthorised and that there would need to be further discussions.
83. The Claimant says that he was called by Mr Tibbs on 27 June 2023 and the Claimant sent Mr Tibbs a screenshot of his text message to Mr Bergonzi. The

Claimant further states that, after being told that there would need to be an investigation into his absence, none took place despite promptings by the Claimant.

84. Following this, the Claimant did not receive payment for the relevant period in his July 2023 pay.

## Discussions and conclusions

85. Clause 14 of the Employment Contract sets out an employee's entitlement to sick pay. It also sets out the limits to the amount payable once a certain amount of sick pay has been paid.
86. Clause 23 sets out when the Respondent is entitled to make deductions from an employee's pay. It is not disputed that the Respondent has the, in principle, power to make deductions under the Claimant's Employment Contract. This includes when there has been the overpayment of sick pay under the Employment Contract.
87. Even though the Respondent has this in principle power, in coming to a conclusion on whether a deduction is authorised, the Tribunal is entitled to decide on the facts whether, in the relevant case, the Respondent is entitled to make the deduction (see Coors Brewers Ltd v Adcock [2007] EWCA Civ 19).
88. The Employment Contract does not provide much by of guidance as to when sick pay is payable under the Employment Contract other than saying "*In case of incapacity for work your entitled to sick pay is for the following periods*" (Clause 14 of the Employment Contract).
89. In respect of incapacity for work, Mr Lansman referred to section 151(4) of the Social Security Contributions and Benefits Act 1992 (**SSCBA 1992**). Section 151(1) SSCBA 1992 refers to the obligation to pay statutory sick pay where an employee has a day of incapacity for work. Section 151(4) SSCBA 1992 states that a day shall not be treated as a day of incapacity for work in relation to any contract of service unless on that day the employee concerned is, or is deemed to be, incapable by reason of some specific disease or bodily or mental disablement of doing work which he can reasonably be expected to do under that contract.
90. Although not determinative, Mr Lansman states that, using the SSCBA 1992 approach, and following the 19 September GP Note, the Respondent had the power to place the Claimant within clause 14 of the Employment Contract. This is because the 19 September GP Note says that the Claimant "may be" fit for work in light of the advice given. This entitled the Respondent to pay sick pay under clause 14 of the Employment Contract, and also to require the Claimant to take sick leave.
91. The Respondent then referred the Claimant to OH. These were honest, reasonable and correct decisions – and not a conspiracy against the Claimant (as, according to the Respondent, the Claimant appeared to suggest).

92. In terms of the duty to pay at common law, the terms of the contract are the starting point. The reference to the term “incapacity” in the Employment Contract means that whether or the Claimant fell within clause 14 of the Employment Contract depends on whether or not there was a case of incapacity for work.
93. Whether on its natural meaning, or under SSCBA 1992, incapacity for work is where the employee is incapable of working. An employer such as the Respondent should to be guided by the medical evidence available to it in this regard. It is reasonable for an employer in these circumstances to treat any ambiguity in favour of saying that the employee is not fit for work.
94. The 19 September GP Note says that the Claimant may be fit for work (in contrast with the 21 April OH Letter, which said that he was fit for work), and the Claimant should avoid tasks involving fine motor skills or the use of heavy machinery / tools. This is not definitive as to whether or not the Claimant fell with the “incapacity for work” term. It was a judgement call for the Respondent.
95. The Respondent, through Mr Medall, decided that the Claimant was incapable of work at this point. He may not have consulted HR immediately, and may have used the internet to make his decision. However, he was entitled to make that decision on the basis of the 19 September GP Note. As such, he (and the Respondent) were entitled to regard the Claimant as falling within clause 14 of the Employment Contract at that time.
96. The 19 September GP Note was stated to last for five months. However, the Respondent (correctly) took steps to explore the situation further. A referral to OH took place in early October 2022. The OH assessment did not take place until 23 November 2022, clearly to the frustration of the Claimant. However, the Tribunal does not find that there was anything deliberate or malicious on the part of the Respondent that gave rise to the delay.
97. The 23 November OH Letter says that the Claimant is fit and able to undertake the majority of his role. This is materially different to the terms of the 19 September GP Note, which is shorter, provides little detail and only states that the Claimant “may be fit for work”.
98. As it is entitled to, the Respondent considered the 23 November OH Report and, by a letter dated 30 November 2022, set up a stage 1 absence and attendance meeting on 15 December 2022. There appears to have been considerable dispute at the Stage 1 Meeting, with further disputes over what was recorded in the notes of that meeting. What is clear is that the Claimant forcefully told the Respondent that he was fit for work, and this was supported by the 23 November OH Report. There was also discussion about alternative roles and the possibility of redeployment of the Claimant.
99. There was a delay between the 23 November OH Letter and the Stage 1 Meeting. It was reasonable for the Respondent to consider the content of the 23 November OH report, to discuss it internally, to consider it with the Claimant and to analyse what steps to take in light of the circumstances. In light of this, the Tribunal does not consider that the delay was unreasonable.

100. As at 15 December 2022, however, the Tribunal finds that the Respondent recognised, or should have recognised, that the Claimant did not fall within the term “incapacity” as set out in clause 14 of the Employment Contract. It follows that any further absence enforced by the Respondent from that date on the same grounds would fall outside clause 14 of the Employment Contract. The Claimant should, therefore, have been paid his standard wage from 15 December 2022 onwards and the Respondent is not entitled to make the deductions from wages in relation to overpaid sick pay that it did make from that point.

#### Holiday

101. With respect to leave taken on 22, 23, 26 and 27 June 2023, the Claimant’s version of events is not disputed by the Respondent. The Claimant states that he had conversations with a supervisor at the Respondent, Mr Bergonzi, about the leave and then confirmed this by text message with Mr Bergonzi at Mr Bergonzi’s request.
102. It is correct to say, as the Respondent states, that when holiday is taken is determined by the employer and the Respondent had a procedure for employees seeking leave. According to the Respondent, this procedure consisted of the relevant employee coming into a specified Respondent office and requesting leave from a manager or a supervisor to request annual leave for a specific date. The Respondent argues that it was implausible that no procedure would be in operation.
103. I did not hear from Mr Bergonzi. In any event, the Tribunal has no reason to doubt the Claimant’s evidence. The Claimant did contact a supervisor. It was not done at the specific office, but the Tribunal finds that contact was made. This is evidenced by the text message of 9 June 2023 at 14:13, which said “*Hi Ricky as discussed dates required as holiday...*”. The Tribunal finds that the “*as discussed*” section of the message refers back to a previous conversation about the same topic.
104. In light of this, the Tribunal finds that the Claimant did seek and obtain authorisation for the annual leave from a supervisor. It was reasonable for the Claimant to rely on the verbal confirmation from Mr Bergonzi as approval, particularly as the Claimant had (as requested) sent a text message as a follow up. There was no requirement on the Claimant to await or receive any acknowledgement of that text message.
105. The substance of the Respondent’s procedure (which was unwritten) was to seek permission from a manager or supervisor. This happened. It was then management’s responsibility to log the leave request. The only potential failure to follow procedure on the part of the Claimant was the Claimant not going into the specified Respondent office to make the request. This cannot be grounds for the deduction of wages in this case. If there was a material failure, it was in the failure by management to log the absence once it had been told about it and approved it.

106. In light of this, the Respondent is not entitled to make the deductions from wages in relation to holiday that it did make.

## **Remedy**

107. The amount to be paid by the Respondent is to be assessed. Further directions in this regard will follow separately.

## **Other matters**

108. As stated by Employment Judge Cowen, the final hearing on 4 October 2024 was postponed due to the Respondent's failure to comply with orders for preparation contained in case management orders made on 17 June 2024.

109. Employment Judge Cowen made further orders on 4 October 2024. A number of these concerning disclosure, preparation of the Hearing Bundle and witness statements were also breached by the Respondent.

110. Under Rule 76 of the Rules, the Tribunal may make a preparation time order where a party has been in breach of any order.

111. Under Rule 79 of the Rules sets out the amount of any preparation time order.

112. At the hearing, I heard from the Claimant and the Respondent in this regard.

113. Now that the final merits hearing is complete and judgment on the merits has been given, the Tribunal will provide separately the parties with further directions as to representations in relation to:

113.1 Whether or not a preparation time order should be made;

113.2 If there is to be such an order to be made, the amount of any preparation time order.

**Employment Judge Din**

10 December 2024

Reserved judgment and reasons  
sent to the parties on:

17 December 2024

For the Employment Tribunals: