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EMPLOYMENT TRIBUNALS

Claimant: Mr D Fabisz
Respondent: SG Technologies Limited
Heard at: East London Hearing Centre
On: 27 September 2016
Before: Employment Judge Hyde (sitting alone)

Representation

Claimant: In person
Interpreter (Polish – English) Miss E Syta
Respondent: Mr C Hunt (Production Manager)

JUDGMENT having been sent to the parties on 13 October 2016 and written reasons having been requested in writing dated 20 October 2016 in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The reasons for the above Judgment are set out here only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost, and only to the extent that it is proportionate to do so.

2 The claim which was presented on 24 May 2016 was an application by the Claimant for pay in respect of two periods of sickness absence during his employment with the Respondent. (The pronoun “they” is used hereafter when referring to the Respondent).

3 The Tribunal spent some considerable time at the commencement of the hearing compiling bundles and relevant documents from those produced by both the Claimant and the Respondent, as no agreed bundle had been compiled. As well as the claim and response forms, the Tribunal considered the Employee Handbook and various documents produced by the parties as follows:

- 3.1 Copy Employee Handbook acceptance form signed by the Claimant and dated 9 October 2014 (R1);
- 3.2 Polish Medical report dated 25 January 2016 (C1);
- 3.3 Post Office receipt confirming postage of special delivery package on 28.01.16 (C4) – Polish medical report;
- 3.4 Special delivery proof of delivery to Respondent's address on 29.01.16 at 09.17 (C2), signed for by "L Gray";
- 3.5 GP report addressed to the Respondent and "To Whom It May Concern", undated but stamped as received by the Respondent on 4 February 2016 (C5);
- 3.6 Invoice dated 5 February 2016 for interpreting services (C6);
- 3.7 Email from Claimant dated 23 February 2016 to sales@sgtec.com sending certified translation of Polish medical report (C8);
- 3.8 Certified translation of sick note/certificate dated 23 February 2016 (C9);
- 3.9 Email from Claimant dated 29 February 2016 to sales@sgtec.com sending medical report (C7);
- 3.10 Medical report written in English on Polish form dated 29 February 2016 (C3);
- 3.11 3 March 2016 letter to the Respondent from Messrs attwaters jameson hill, solicitors on behalf of the Claimant, requesting payment to the Claimant of SSP (C10);
- 3.12 4 March 2016 proof of posting at Post Office to Respondent of second medical report and first medical report translation from Polish (C12);
- 3.13 Proof of delivery of (C12) above, signed for by "Westgate" on 9 March 2016 at 0907am (C11);
- 3.14 Letter dated 16 March 2016 from Messrs Ansons, solicitors acting on behalf of the Respondent sent by email to the Claimant's solicitors challenging Claimant's compliance with the Respondent's Absence Management Policy;
- 3.15 21 March 2016 Return to Work interview record – referred inter alia to Respondent not having received a UK fit note and having received "Polish medical reports only";
- 3.16 Sample Polish medical certificate produced by the Respondent – in much shorter form than the documents produced by the Claimant.

3.17 British GP's statement of fitness for work dated 14 April 2016 certifying Claimant's unfitness from 14 April to 13 May 2016 (C13), delivered to Respondent by Special Delivery signed for on 15 April 2016 at 0908am.

4 The Respondent relied on two witnesses: Mr Steven Westgate, Cell Leader, and Mr Colin Hunt, Production Manager, both of whom relied on witness statements as their evidence in chief, signed and dated 20 September 2016.

5 The Tribunal's findings about the dates of posting and delivery of the above documents were based mainly on the Claimant's evidence about what was posted, and on the correlation of the reference numbers on the certificates of posting and the Post Office's delivery records in the bundle.

6 By the end of the hearing it was not in dispute that the Claimant worked for the Respondent from about 2011 to 16 May 2016 when he resigned. He worked as a process operator. It was agreed that he had been on authorised leave from the Respondent from 18 January to 29 January 2016 inclusive. His first day back at work at the end of this agreed leave was to have been 1 February 2016. In the event the Claimant was incapacitated while abroad and he could not return on that date. He had a blood circulation condition which meant he could not undertake the journey back to the UK.

7 The Respondent did not consider that he had complied sufficiently with their processes for notification of sickness absence and therefore withheld sick pay from the Claimant ("the first sickness absence").

8 It was agreed that the Claimant then returned to work for the Respondent on 31 March 2016. He continued performing his job until he was taken ill or unable to continue due to a recurrence of the same condition. He was then on sick leave again from 14 April to 13 May 2016 ("the second sickness absence"). The Respondent declined to pay him for his absence during this period of absence also. At the hearing, the Respondent's defence was based on advice received to the effect that statutory sick pay could not be paid if an employee had not been at work for the eight weeks preceding the incident of sickness.

9 At the hearing, although this had not been clarified prior to this, the Respondent confirmed that they did not challenge the genuineness of the Claimant's illness.

10 I found that the Claimant provided evidence by way of a medical report which was written in English while he was abroad on his holiday in Poland which was dated 27 January and which was received by the Respondent Company on 29 January 2016. It was apparent that this (and possibly other relevant documents later sent to the Respondent by the Claimant) did not come to the attention of the Claimant's manager, the Production Manager, Mr Hunt promptly, but it was received and signed for by someone on behalf of the Respondent.

11 Contrary to the account given in solicitor's correspondence on behalf of the Respondent and in the response form, the Tribunal found that the Claimant then had a telephone conversation with the Production Manager on 2 February 2016. This was Mr Hunt's evidence at the hearing and was also set out in his witness statement.

12 It was not disputed that the Claimant had not telephoned on 1 February 2016 but as the Claimant explained, he had by then sent a full medical report indicating how long he would be indisposed for and what the reason for the indisposition was. To that extent he had not complied with the letter of the Respondent's process, but the Tribunal considered that he had put the Respondent in the position that they needed to be under their sickness notification policies, in terms of knowledge of the Claimant's condition and how long it would last etc.

13 During the telephone conversation between the Claimant and Mr Hunt (not between Mr Hunt and the Claimant's wife as the Respondent incorrectly stated elsewhere), the Claimant referred to the medical report having been sent. Mr Hunt had not received it yet. Following the conversation with the Claimant, Mr Hunt made enquiries and the medical report came to his attention sometime after this telephone call.

14 The Claimant gathered from the telephone conversation that the Respondent did not consider that they had been given adequate notice of or information about the Claimant's state of health and his absence. The Claimant therefore arranged through his wife or partner who was present in the United Kingdom to obtain a letter from his GP in the United Kingdom in which the GP also confirmed that the Claimant had a pre-existing condition which appeared to have flared up during his holiday in Poland and in short verified the contents of the Polish medical report.

15 At no stage thereafter did the Respondent communicate with the Claimant to confirm that they had received either the first medical report or indeed the second sent by his GP.

16 There was a dispute as to whether Mr Hunt had asked the Claimant to contact the Respondent weekly to keep them informed. However, the Tribunal noted that it was quite clear that the medical evidence before the Respondent identified the periods of ill health that were certified. In any event the Tribunal further noted that there was a discrepancy between this position which the Respondent took during the hearing and the contents of the letter which was written to the Claimant's solicitors on 16 March 2016 which made no mention of weekly reporting but which referred to the Claimant needing to report about his condition daily.

17 The Handbook required contact with the manager on the first day, but thereafter simply requested regular contact, to let the manager know how the employee was and when he/she expected to be able to return to work.

18 The Tribunal considered that albeit the sick pay scheme was expressly non-contractual, it was necessary to imply into the Claimant's contract, a term that the Respondent would not exercise its discretion to withhold sick pay capriciously or unreasonably. Such a term was also consistent with the term of mutual trust and confidence implied into all employment contracts. It was in the Tribunal's view so obvious that the parties must have intended it ('the officious bystander' test), if they were asked about this. The Claimant's contemporaneous attempts to claim the payment and more importantly, Mr Hunt's evidence referred to below that sick pay would usually have been payable to the Claimant supported this finding.

19 The Tribunal did not consider that the Respondent could reasonably or properly

complain about the Claimant failing to keep them informed during the first period of sickness absence in a manner which was consistent with their policy. They had been sent sufficient information in the written reports of the doctors to understand the nature of the Claimant's ailment, to be able to plan for the Claimant's absence, and to constitute compliance with the reporting procedures recommended at pages 12 to 13 of the Employee Handbook.

20 The next issue which arose was in relation to payment for the second period of absence. The Tribunal rejected the Respondent's reason for not paying the Claimant contractual sick pay because, as was inherent in their case on this point, the requirement of 8 weeks at work before the incident of sick leave related to entitlement to statutory sick pay. This was not a matter which was canvassed in the policy documents or procedures which were made available to me.

21 The Handbook provided separately for entitlement to company sick pay ("csp") (p13), including any entitlement to ssp. It was said to be "important" that the reporting procedures were followed in order to be eligible for csp. This did not signify in the Tribunal's view a requirement that the letter of the reporting procedures was complied with by the employee as a condition of eligibility.

22 In determining this issue the Tribunal considered the Employee Handbook a copy of which was produced by the Respondent.

23 The Respondent's position was that the sick pay notification provisions were not contractual. However, as Mr Hunt stated, it was the Respondent's case that this was pay which would normally be paid although the Respondent clearly wanted the notification procedures to be complied with, for understandable reasons.

24 In all the circumstances, the Tribunal considered that the Claimant should have been paid for the second period of sickness absence also. By providing the information which he did by way of written medical reports before the expiry of any self certification period (7 days), he had exceeded the requirements of the spirit of the Handbook and there was no good reason for him not to receive the payment.

25 The Tribunal further ordered the Respondent to reimburse the Claimant for the issue and hearing fees paid to the Tribunal (£160 and £230 respectively) by way of an order for costs in accordance with the usual practice where a Claimant succeeds in the substantive claims, having regard to the terms of Rules 75(1)(b), 76(4) and 78(1)(c) of the Employment Tribunal Rules 2013, and to the Judgment in favour of the Claimant.

Employment Judge Hyde

7th June 2017