



EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same.”

Claimant

Respondent

Mrs Toni Zinzan

v Cinnabar Support & Living Limited

Heard at: Watford by CVP

On: 15 February 2022

Before: Employment Judge Alliott sitting alone

Appearances

For the Claimant: Mr Zinzan (husband)

For the Respondent: Did not attend

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim for unauthorised deduction of wages and breach of contract is well-founded and the respondent is ordered to pay her the gross sum of £5,017.61 (subject to tax and National Insurance deductions).

REASONS

The respondent's absence

1. This full merits hearing was listed on 22 August 2021. The respondent has therefore had nearly six months to prepare.
2. I am told that in September 2021 Regional Employment Judge Foxwell denied a postponement application by the respondent. The basis of the application was that a partner of a director was ill and the refusal was on the basis that others could give instructions and guidance on behalf of the respondent.
3. On 8 February 2022, Mr Alastair Cook, on behalf of the respondent, emailed the tribunal as follows:

‘Unfortunately our witness in the above case is not well and will not be able to attend the virtual hearing.

I am attaching a sick note.

I would respectfully request a postponement to the case.’

4. The sick note appears to be from a clinic in Spain. It is dated 27 January 2022 and refers to Mr Rajendra Kanani currently suffering from general anxiety disorder. It states that he is currently unfit for work. It does not indicate that he is unfit to attend the hearing remotely and give evidence.
5. On 14 February 2022, Regional Employment Judge Foxwell refused the application to postpone. It had not been copied to the claimant and the comment was made that the respondent, being a large organisation, can provide another witness. The respondent was notified that the hearing was at 12 noon today.
6. Also, on 14 February 2022, the claimant objected to the postponement. Mr Cook emailed the tribunal as follows:

“We understand the claimant has made an objection to our request to postpone.

Unfortunately due to Mr Kanani’s sickness it is impossible for our witness to attend and further, he is responsible for pulling together any further defence bundle information.

Surely it would be unfair and unjust for this matter to proceed at this juncture.

Mr Kanani has personally nursed his wife through intensive care and ‘long covid’ and the effects have taken their toll mentally upon him.’

7. That email was placed before Regional Employment Judge Foxwell who directed that the application would be considered at the commencement of this hearing at 12 noon. Mr Cook was notified of this by email on 14 February 2022.
8. At 12 noon today the respondent was not in attendance. Accordingly, I adjourned in order to try and contact the respondent/Mr Cook. At 12.05 the clerk called the respondent on the mobile telephone number on the claim form and left a message on answerphone. At 12.06 the clerk called the landline on the claim form and was put through to a receptionist. She was told that all staff were working from home and that she would try and get a message to Mr Cook.
9. I resumed this hearing at 12.30. No contact had been made by Mr Cook or the respondent.
10. In my judgment, Mr Cook is aware of this hearing and was notified that if he wanted to continue with his application to postpone then he would have to attend today. I have concluded that he has deliberately decided not to attend. Accordingly, I have decided to proceed with this hearing in the absence of the respondent pursuant to Rule 47, Employment Tribunal’s (Constitution and Rules of Procedure) Regulations 2013.

The claim

11. On 22 January 2021 the claimant informed the respondent that she was sick and provided a doctor’s fit note for two weeks. She provided a further two fit notes from her doctor on 5 February 2021 for two weeks and on 19

February 2021 for two weeks. I find that the claimant was absent from work for six weeks and that the whole of this period was covered by a doctor's fit note certificate.

12. The claimant's contract of employment provides as follows:-

'There is also a home sick pay scheme, which is paid in tandem with SSP on condition that the sick pay rules contained in 'The Employee Handbook' are complied with. The scheme provides for the payment of up to 6 weeks basic pay, inclusive of SSP, in any rolling 12 month period.

...

If the above entitlement is exhausted, you will revert to SSP only. The continuation or variation of this scheme is purely at the discretion of the home.'

13. The Employee Handbook provides as follows:-

"Sickness and injury

Notification of absence

If you are absent from work without prior authorisation, you or someone on your behalf should notify the Duty Manager by phone at least one hour prior to your normal start time on the first day of absence.... Any unauthorised absence must be properly explained in that first contact and, if the absence continues, you must keep us fully informed. This applies to both short and long-term situations and you will be expected to contact us on a daily basis during the first week and weekly thereafter.

Period of absence

If your sickness is for more than 7 calendar days then you must provide the home with a doctor's medical certificate. You must continue to provide medical certificates to cover the whole of the absence period.'

14. For the whole of her six week sickness the respondent only paid the claimant statutory sick pay amounting to £520.39. The respondent's pleaded justification for this is that the claimant did not follow the process set out in the Employee Handbook. Reference is made to the claimant failing to contact management daily and appears to seek to rely on the reference to having a discretion as to whether to continue or vary the scheme.
15. Halfway through the period of sickness absence the claimant queried why she was not being paid her full pay. On 11 February 2021 the respondent replied stating that it had a policy that it would only pay contractual sick pay after one year's full employment. When it was pointed out that this was not a contractual clause, the respondent asserted that it never paid full contractual sick pay during the first year of an employee's employment and replied upon its contractual discretion asserting that it had varied the contract such that full contractual pay was not paid during the first 12 months of employment.
16. At no time prior to the end of the claimant's sickness absence did the respondent suggest that her failure to report in daily during the first week of her sickness absence was a reason not to pay her her sick pay.

17. I find that the claimant had a contractual entitlement to six weeks sick pay based on her basic salary of £48,000 pa.
18. I find that the discretion to terminate or vary the Home Sickness Scheme was subject to implied terms that it would only be done on reasonable notice and not during a period of sickness absence. I find that these terms are implied by virtue of the 'Officious Bystander' test and also in order to give business efficacy to that clause. I find that at the time of the making of the contract, had someone suggested that the respondent could withdraw contractual sick pay halfway through a period of six weeks sickness absence, both parties would have immediately and unanimously said that that could not happen as it would be unfair. An employee should have advance notice of their rights during sickness absence.
19. The claimant accepted that she did not contact the respondent daily during the first week of her absence. She explained that this was because she had been advised to rest and not aggravate her condition by such contact. The claimant did maintain contact by submitting fit notes. I find that as a matter of fact the respondent did not withhold contractual pay on this ground. Further, I find that any such breach was not fundamental and did not discharge the respondent from the contractual obligation to pay her full contractual sick pay.
20. Accordingly, I find that the respondent made unauthorised deduction of the claimant's wages and was in breach of contract.
21. $£48,000 \div 52 = £923.07 \times 6 = £5,538 - £520.39 \text{ SSP} = £5,017.61 \text{ gross.}$
22. Accordingly, there will be judgment for the claimant for the sum of £5,017.61 gross (such sum to be subject to tax and National Insurance).

Reconsideration

23. If required, the respondent can apply for reconsideration of this judgment. If the respondent does so, the respondent should indicate why it says it is necessary in the interests of justice for the judgment to be reconsidered and should provide a witness statement setting out precisely why it is that the respondent was not in attendance today.

Employment Judge Alliott

Date: 1/3/2022

Sent to the parties on: 3/3/2022

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For the Tribunal Office