

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 22 July 2005

Before

THE HONOURABLE MR JUSTICE BEAN

MR B M WARMAN

MR G H WRIGHT MBE

MR WILLIAM STEWART

APPELLANT

CARDIFF AND VALE NHS TRUST

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MS H WINSTONE
(Of Counsel)
Instructed by:
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For the Respondent

MR P WALLINGTON
(Of Counsel)
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SUMMARY

Unlawful Deduction from Wages

Employee certified fit to return to work from lengthy sickness absence so long as it was not in his old job – no suitable alternative work available – whether ready, willing and able to work and entitled to be paid.

THE HONOURABLE MR JUSTICE BEAN

1. On Tuesday 1 February Dr Rachel Davies sitting alone at the Employment Tribunal at Cardiff had before her Mr William Stewart's claims for unlawful deductions from wages and breach of contract. In a decision promulgated on 15 February she dismissed the claims, Mr Stewart now appeals to this Tribunal.

2. He was employed by the Respondents as a clinical scientist in the Medical Physics Department at the University Hospital of Wales. His employment began on 1 May 1979 and ended on 22 January 2004. His contract of employment incorporated Whitley Council terms and conditions for scientific and professional staff and a sickness policy of the Trust itself.

3. He first went off sick in September 2001. From that time until August 2002 his sickness ran concurrently with a disciplinary suspension for which he received full pay, so that the sick pay provisions of the Whitley Council agreement did not come into effect until the suspension ended in August 2002. He then received six months sick pay at full rate and a further six months at half pay. Until July 2003 his General Practitioner had certified him as unfit to return to work. As from 13 July 2003 that position changed, at least to some extent, as will appear from the documents to which we shall refer. He claims that he was entitled to full pay from 14 July 2003 until his employment ended on 22 January 2004 rather than merely half pay for a short period expiring on 7 September 2003.

4. Mr Stewart's contract of employment in 1979 is not before us (and would probably be irrelevant) but we have before us a contract of 12 April 1983 setting out the terms of his employment as from 1 May 1983. His post at that time was designated as Senior Physicist

UKEAT/0216/05/RN

(Bio-Engineering) and the Whitley Council professional and technical staff terms and conditions were expressly incorporated. A more up to date job specification (which is undated, but is agreed to be that in force in the final period of his employment) designates his post as Clinical Scientist within the Medical Physics and Bio-Engineering section and sets out very specific duties of the post.

5. The Whitley Council agreement paragraph 8104 provides so far as relevant that:

“an officer who is absent from duty owing to illness (which term is deemed to include injury or other disability) shall be entitled subject to the provisions of the following scheme and irrespective of any entitlement to statutory sick pay to receive occupational sick pay in accordance with the following scale...after completing five years of service, six months full pay and six months half pay.”

As we have already pointed out that entitlement became exhausted on 7 September 2003 and Mr Wallington for the Respondent employers is plainly right to contend that paragraph 8104 both defines and limits the entitlement to sick pay, that is to say, payment to an officer who is absent from duty owing to illness.

6. However, the employer’s sickness policy included a section “Sickness, Procedure, Long-term Sickness or Incapacity”. Paragraph 5.3(1), headed “Redeployment”, stated:

“When a situation is reached where there is no likely return to work in the foreseeable future to the existing post, consideration should be given to re-deployment. Alternatives on the basis of medical advice in type, hours, location and nature of work should be considered. However, consideration will be confined to a funded post”.

The learned Chairman found as a fact that there were no such posts available. Mr Stewart had specified the types of post to which he would be interested in being re-deployed, namely specialized computer posts, and there were none available.

7. The sickness policies contained a number of annexes including Annex 5 which is at the heart of the case presented by Ms Winstone for the Appellant. Headed “Extended Paid Leave of Absence on Health Grounds” it states:

“There may be occasions when an employee’s GP certifies the individual as fit to return to work while the advice of the Trust’s occupational health advisor says that they remain unfit to work. It shall be for the occupational health advisor to discuss with the relevant GP the reasons for the difference in opinion and lead to joint decision. The employee concerned will be paid as if they were at work until the issue is resolved.”

There follows a slightly Delphic paragraph about staff in contact with certain infected diseases which concludes by stating:

“It is important to emphasise that such spells should not be classified as sickness absence.”

That paragraph does not apply to Mr Stewart but Ms Winstone invited us to take the last sentence and the fact that a paragraph is included under the heading “Extended Paid Leave of Absence on Health Grounds” as being an aid to interpretation of the previous paragraph.

8. We turn to the letters from the Occupational Health Physician to the Trust, Dr Dennis Williams and the Claimant’s General Practitioner Dr Stephen Glascoe. On 30 June 2003 Dr Williams expressed the opinion that Mr Stewart was not eligible for ill-health retirement on the grounds of the anxiety and depression from which he was suffering. He continued,

“I do feel however that it could be unacceptable to him to return to his current post, and Mr Stewart perceived too many problems within the department and it is likely to increase his anxiety again and possibly cause him to relapse.

Mr Stewart himself would like to consider a redeployment although he is unable to give me any suggestion as to where he could be placed. For my part I feel that Mr Stewart’s mental state is virtually stable at the present time, but he is ineligible for ill-health retirement and would be fit to return to work if a suitable post could be found away from his current department.”

On 14 July 2003, Dr Williams wrote:

“I have now been in touch with Mr Stewart’s General Practitioner and he fully agreed with my impression of Mr Stewart in that he is fit for work but would be unfit to return to his current post in Medical Physics. This being the case therefore we have both decided it would be wise for Mr Stewart to remain off work until a suitable redeployment be found.”

9. Dr Glascoe on 4 August wrote:

“I have treated this man for a quite severe depression for the last several months. He has now recovered, though I fear a return to his former workplace in the medical physics directorate would cause a significant risk of relapse. In no way would it be appropriate for him to go back to work there.”

Dr Glascoe was asked to confirm an interpretation placed by the employer’s human resources department on that letter and replied on 12 August:

“My letter about the above patient (Mr Stewart) is not open to any interpretation other than the words that are extant within it.

Those are my comments, and they are definitive.”

10. We consider that Dr Williams’ statement in his letter of 14 July was accurate, that is, that both doctors were of the view that Mr Stewart was fit for work but would be unfit to return to his current post in medical physics, and that therefore both doctors considered that it would be wise for him to remain off work until suitable redeployment was found. The opinion of both doctors, in other words, was the same.

11. Ms Winstone argues that the first sentence of Annexure 5 to the Employer’s Sick Policy conferred on the Appellant a contractual entitlement to be paid. But this is not, as we see it, a case where the employee’s General Practitioner certified him as fit to work while the Occupational Health Adviser considered him unfit to work. There was no “issue to be resolved” (to use the language of Annexure 5) between the two doctors. The true position according to both doctors was that Mr Williams was fit to work provided that it was not in his previous post.

12. It therefore seems to us that Annexure 5 cannot entitle Mr Stewart to recover such payments for the period between 14 July 2003 and the termination of his employment. Ms Winstone referred us to the decision of this Tribunal, Lord Johnston presiding, in **Beveridge v** UKEAT/0216/05/RN

KLM UL Ltd [2000] IRLR 765. In that case Mrs Beveridge informed her employers following a lengthy period of sickness and absence that she was fit to return to work and produced a certificate from her doctor to that effect. However, the employers refused to take her back until some six weeks later, even though their own doctor was also satisfied that she was fit for work. There was no difference of opinion between the doctors in her case, nor any doubt about which post she was ready, willing and able to return to. The employment tribunal chairman, we think rather surprisingly, dismissed her claim. This Tribunal held that an employee who offers her services to her employer is entitled at common law to be paid unless a specific condition of the contract regulates otherwise. In its judgment the Tribunal said:

“In the present case we consider that the employee could do no more, in respect of her side of the mutual contract, than proffering her services against a background of a certificate of good health. It was thus for the employer to show that in this context the contract expressly entitled the employer to withhold payment. There is no such provision in this contract.”

They allowed the appeal and found for the employee.

13. Ms Winstone relies on this case, as does Mr Wallington. We do not consider that it affords any assistance to Mr Stewart. Mrs Beveridge was ready, willing and able to perform her usual job. Mr Stewart, in July 2003, was not. He was ready and willing to perform some other job, but his contract of employment was specific as to the job he was paid to do. There was a redeployment policy, but as we have already stated, it was confined to funded posts which were vacant and here there were none. The **Beveridge** case provides no support for the proposition that Mr Stewart was entitled to be paid because he was ready and willing to do another job if another job were available, when in fact it was not.

14. Ms Winstone also referred us to **Mears v Safecar Security** [1982] ICR 626 a division of the Court of Appeal. That also with respect does not assist her. It disapproved the venerable UKEAT/0216/05/RN

authority (by employment law standards) of **Orman v Saville Sportswear Ltd** [1960] 1 WLR 1055 in which Pilcher J had held that where the contract was silent as to what was to happen in regard to sick pay there was a presumption that the employee was entitled to be paid while off sick. The Court of Appeal said that this appeal tribunal had been right to hold that an employment tribunal (or for that matter court) should approach the question of entitlement or otherwise to sick pay by considering the facts and evidence in each case with an open mind unprejudiced by any preconception, presumption or assumption (see per Stephenson LJ at page 647C). This case as we see it is a question of interpreting the contractual document, with no presumption either way.

15. Ms Winstone has not persuaded us that the tribunal chairman erred in law in finding that there was no contractual entitlement, whether under the contract of employment itself, the Whitley Council terms incorporated into it, or the Trust sickness procedures, for Mr Stewart to be paid in circumstances when he was not ready, willing and physically able to resume his previous position and there was no suitable alternative position to which he could be redeployed. We therefore dismiss this appeal.