



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103521/2022

5

**Final Hearing held by Cloud Video Platform in Glasgow
on 9 September and 3 October 2022**

Employment Judge M Robison

10 **Mr E Kavira**

**Claimant
Represented by:
Ms E Campbell -
Solicitor**

15 **Lanarkshire Health Board**

**Respondent
Represented by:
Mr D James -
Counsel**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim for unlawful deduction from wages is not well-founded and is dismissed.

REASONS

1. The claimant lodged a claim in the Employment Tribunal on 27 June 2022,
25 claiming unlawful deductions from wages. The respondent resists the claim.
2. The claim relates to a failure to pay sick pay which the respondent asserts was due to unauthorised absence. The claimant is alleged to have failed to comply with the respondent's sickness absence policy, and in particular to supply the necessary documentation while absent abroad with covid.
- 30 3. The sole issue to be determined is whether the failure by the respondent to pay sick pay to the claimant is an unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 (ERA).

4. The Tribunal heard evidence from the claimant; and from Mr Ben Mason, senior practitioner perioperative services and Ms Audrey Bevan, HR officer for the respondent.

5. The Tribunal was referred to a joint file of productions with documents referred to in this judgment by page number.

Findings in fact

6. The Tribunal finds the following material and relevant facts proved, admitted or agreed based on the evidence heard and the documents referred to.

Contract of Employment

10 7. On 8 March 2018, the claimant was issued with a contract of employment in regard to the post of registered nurse at Wishaw General Hospital to commence 26 March 2018 (61).

8. Under the heading at paragraph 6, “pay band and basic pay”, the contract stated that,

15 “NHS Lanarkshire operates with public money, and as such has a duty to recover any overpayments or sums owed to it. NHS Lanarkshire is entitled to deduct from your pay any sums due to them without prior consultation” (62).

9. Under paragraph 14 headed “sickness” it stated that:

20 • “during the fourth and fifth years of service, sick pay will be five months’ full pay and five months’ half pay”.

• “full pay is inclusive of any statutory sickness, injuries, allowances or compensation benefits, and must not exceed full pay”.

25 • “Occupational sick pay is dependent upon you complying with NHS Lanarkshire’s Sickness Absence Policy, which forms part of your contract. Failure to comply with the policy could result in your absence being classified as unauthorised resulting in no pay. NHS Lanarkshire reserved the right to withhold payment or deduct from your salary a day’s pay for each day of unauthorised absence. If you have already

received your salary, NHS Lanarkshire reserves the right to deduct the amount overpaid from your following week/month's salary or from other sums due to you on termination of employment" (66).

Respondent's policies

5 10. NHS Scotland's Workforce Attendance Policy sets out the procedure for reporting absence and states,

"where the employee fails to notify or provide appropriate certification this may result in a loss of pay and referral to other workforce policies" (116).

11. Under "absence certification" it states:

10 "where the absence lasts 7 calendar days or less an employee can self-certify. Where an absence period lasts more than 7 calendar days, a medical certificate (e.g. a Fit Note/Med 3 or Med 10 certificate issued by a General Practitioner or other Medical Practitioner) is required. This must be provided to the manager as soon as possible. In cases where there are multiple Fit Notes
15 these should cover the whole period of the medically certificated absence and be submitted to the manager in a timely manner for service delivery and pay purposes" (116).

12. This policy is accompanied by a guide for employees which includes in the preamble the statement, "consideration will be given to the individual
20 circumstances of each employee when applying the attendance policy" (137).

Holiday in Africa and sickness absence

13. The claimant went on holiday to Africa commencing 5 November 2021. He was due to return to work on 5 December 2021.

14. On 3 December 2021, when he was due to return to the UK, he required to
25 take a covid test before boarding the plane in Uganda. He tested positive. He was advised to self isolate for 14 days.

15. On 3 December 2021, he e-mailed his manager, Mr Ben Mason, to advise him of this development (154). Mr Mason responded later that day to ask for an update closer to the time he was able to travel and to let him know if he required

any additional support (154). The claimant was placed on special leave at that time for 14 days in line with practice relating to staff with covid.

16. On 4 December 2021, the claimant responded, "I'm frightened as I'm awaiting to find out which variant it is and what course of action will follow afterward" (352).
17. On 20 December 2021, Mr Mason asked for an update by e-mail (153). Given no reply, on 21 December 2021, he expressed concern that he had not heard from the claimant since 3 December 2021 and asked again for an update (153). Attempts were made to contact the claimant by telephone.
18. On 22 December 2022, Mr Mason was advised by the claimant's emergency contact that they had not heard from him for the last two weeks.
19. By letter dated 23 December 2021 (152) sent recorded delivery and by e-mail, Mr Mason asked whether the claimant had not been in contact because he had resigned and asked for a written resignation. The letter advised that because the claimant had not made contact this was in breach of the sickness absence policy and that his absence since 18 December 2021 was unauthorised and would not be paid. He was asked to contact him to discuss his non-compliance. He was advised that if he failed to contact him by 31 December 2021 he would be regarded as acting in breach of his contract of employment which the respondent would be entitled to terminate without notice (153).
20. By e-mail dated 28 December 2021 to Mr Mason and copied to Ms Bevan the claimant advised that he had been hospitalised since the last time he had e-mailed, with covid and apparent pneumonia. He said that he "had no recollection of what happened from 4th next until the 27th of December 2021". He advised that he had not resigned from his job position, and that, "I'm still in Uganda and I will plan my return back in due course when I get the green light from the covid19 testing team" (347).
21. By e-mail dated 3 January 2022, the claimant e-mailed Mr Mason "to touch base" and update him on the progress of his health, advising that he was recovering at a slow pace and would be updated what comes next at the weekend (347).

22. By e-mail dated 10 January 2022 the claimant advised Mr Mason that he had “been seen by the medic today but nothing greatly filtered out in terms of me being better and fit to travel yet. I’m getting better and gaining strength every day the way I’m feeling and I will keep you posted as appropriate” (155).
- 5 23. By e-mail dated 11 January 2022 Mr Mason asked him to continue to maintain contact with the department and to provide an update of his status during his period of absence. He also advised that his NMC registration was due to be revalidated by 31 January 2022. This was a process all nurses were required to complete every three year (155).
- 10 24. By e-mail dated 14 January 2022, Mr Mason replied to the claimant as follows:
“I am happy to hear that you are getting better, I hope your health is continuing to improve. How are you currently feeling? Your Covid related absence commenced on the 6th December 2021. In order for me to continue to support you during this absence there are several actions I require you to complete: a)
15 maintain contact with the department to provide updates regarding your absence b) submit Fit Notes completed by a medical practitioner detailing the specific reason for your absence, the expected length of absence and an expiry date. I am also requesting an update and indication of when you will be authorised and fit to travel safely?” (162).
- 20 25. By e-mail dated 16 January 2022 the claimant advised Mr Mason that he had contacted NMC for an extension to revalidate his NMC registration (165) and that he was feeling better and had been given a rough indication of being able to travel safety in two weeks’ time (167).
- 25 26. On 19 January 2022, the claimant forwarded an email to Mr Mason, as soon as he received it, confirming that his extension for his NMC revaluation had been granted (170).
27. By e-mail dated 19 January 2022, Mr Mason reminded the claimant about the information sought in his e-mail of 14 January 2022 and that he had still not supplied a fit note.

28. The claimant replied by e-mail on 19 January 2022 to Mr Mason that “I will submit a fit note when I’m given one by the appropriate personnel as it is beyond my jurisdiction” (172).
29. Mr Mason relied on 19 January stating,
- 5 “You are correct a Fit Note is required to be completed by a Medical Practitioner. My e-mail dated 14 January outlines that your current absence commenced on the 6th December 2021. To date you have not submitted any evidence to support your absence. In order for the organisation to continue to support you during this absence I require evidence of a Fit Note. I am therefore
- 10 requesting that a Fit Note detailing the specific reason for your absence, the expected length of absence and an expiry date is submitted to me via email by 5 pm Friday 21st 2022” (172).
30. The claimant responded by e-mail dated 20 January 2022 stating only “I can not be given a fit note because they don’t have one” (172).
- 15 31. By e-mail dated 20 January 2022, Mr Mason advised that,
- “A Medical Practitioner that was involved in the team overseeing your care... should provide evidence to support your absence. I suggest that you contact the Hospital request documented evidence and submit it to me by 5 pm Friday 21st 2022. If there is no evidence provided, there is potential for this absence
- 20 to be recorded as unauthorised and therefore unpaid” (171).
32. By e-mail dated 21 January 2022 the claimant expressed concern about the threat to pay him band 3 if he did not get his NMC revalidation and the threat not to pay him sick pay if he did not supply a fit note by that date (171).
33. Mr Mason responded by e-mail dated 21 January 2022, stating,
- 25 “I am sorry that you feel threatened. I have attached the Once for Scotland Attendance Management Guide for Employees and the NHSL Support for Staff Absent with long COVID. In order for me to continue to support you during this absence I need to see medical evidence. I am now offering you an extension until 5 pm of Wednesday 26th January to allow you to submit the medical
- 30 evidence in support of your absence.”

34. Mr Mason sent a letter by recorded delivery to the claimant's home address in Glasgow and by e-mail dated 27 January 2022 (181) as follows:

5 "I write further to my letter of 21.1.2021 and my emails sent 19.1.22 and 21.1.22 in which you were advised of your responsibilities for reporting your absence.

10 In the e-mails you were asked to make contact with me by 5 pm on 21.2.22, I extended this to 5 pm Wednesday 26.1.22 and to date I have not heard from you and I still have no evidence to support your absence from work. Your absence is in breach of your Contract of Employment and your pay has been stopped from 18.12.21. As previously advised NHS Lanarkshire will be entitled to terminate your Contract of Employment without notice on the grounds that you have failed to comply with the Once for Scotland Attendance Policy.

15 I would like to make contact with the department to provide updates on the following; your wellbeing; your current fitness to travel status, your planned return to the UK, your plan to return to work and your current progress with the NMC revalidation process. I would like to arrange a meeting to discuss your non-compliance with the reporting procedure and continued absence. This can be arranged once you have confirmed the above details".

20 35. By e-mail dated 28 January 2022 Mr Mason advised payroll of the claimant's unauthorised absence from 18.12.21(182). He was advised on 31 January by e-mail that meant the claimant had been overpaid for the full month of January and for 14/31 days for December (182).

36. By e-mail dated 28 January Mr Mason wrote to the claimant referring to his e-mail of 21 January and noting that he had not had a response, and stating,

25 "I had advised you that in line with the NHS Scotland Attendance Policy you need to provide medical evidence of your reason for absence from 18.12.21. This is to enable NHS Lanarkshire to record your absence as sick leave and pay you appropriately for this. You will be aware that you can self-certify for the first 7 days of absence. Alternatively if your absence was related to Covid, this can be recorded as Special Leave, again with appropriate medical
30 evidence. Without medical evidence for your reason for absence, I am left in

the position that I cannot record your absence as either sick leave or special leave and therefore have no alternative other than to record your absence as unauthorised and therefore unpaid. This will be from 18.12.21 to present” (185).

- 5 37. He suggested a meeting to discuss his current absence and asked when he was due to return to Scotland; and separately whether he needed help completing his NMC validation.
38. Mr Mason e-mailed again on 4 February 2022 attaching the above e-mail and why he had still not contacted him. Having contacted his next of kin, he was
10 told he had not heard either but confirmed that he was still overseas. He advised that the attendance policy required regular contact and any failure may impact his continued employment. He asked him to make contact with Ailsa Connelly, the chief nurse, by 18 February 2022 (given he was to be on annual leave) (184).
- 15 39. By e-mail dated 18 February 2022, the claimant advised Mr Mason that he was back in the country and had tried to phone him (193). In Mr Mason’s absence on holiday, Ailsa Connelly responded and asked when he would be fit enough to return to work, pointing out that they had not heard from him by the deadline and that he had not supplied medical evidence for his on-going absence.
- 20 40. On his return from holiday on 21 February 2022, Mr Mason emailed the claimant asking him to get in touch that day between 2 and 2.20 pm to discuss his absence (191).
41. The claimant responded by e-mail that same day, stating, “I will be in hospital to give blood sample and check up for malaria/treatment around 14.30 to
25 16pm. I’m not sure how long it will take. Would there be another suitable time to call you back” (191).
42. The claimant spoke to Mr Mason on the telephone on 22 February 2022 when he advised that he still had not provided the requisite medical evidence to support his absence.

43. On 23 February 2022, the claimant spoke again on the telephone to Mr Mason when he advised that he had been discharged from hospital but was keeping himself under observation for 48 hours. Mr Mason advised that he would be referred to occupational health because he had two previous hospital admissions with malaria, that he would be fast tracked, and that he should get back in touch once he had spoken to them. He also advised that because they still had not received any evidence to support his absence his pay had been suspended for February because of the absence which was deemed unauthorised.
44. On 23 February 2022 the claimant e-mailed Mr Mason expressing concern that he had carried out his threat to withhold payment, when he had advised him that he would bring in medical evidence to support his absence (197). In a subsequent e-mail dated 24 February 2022 he stated that “If anything health wise happens to me from now on until my return to work as I’m at home in the condition I’m in, I will hold you responsible for it” (196)
45. Mr Mason sought advice from Ms Bevan about how he should respond given this suggestion that he was threatening his health, and on her advice (195) advised that in line with the attendance policy, for any absence for longer than seven calendar days staff are required to provide a medical certificate; and that since he had not provided it his absence from 18 December 2021 was considered unauthorised and therefore unpaid; that his absence would be considered and recorded as authorised from the point he provided medical evidence, which he should provide as soon as possible (199).
46. The claimant met with Mr Mason towards close of the day on Friday 25 February when he handed in medical certificates which were in French (150/151). Those medical reports were completed by a Dr Alain Karangu Njanguile, and were both dated 22 December 2021. There is reference to the claimant having been in hospital between 3 and 22 December 2021. The certificate also states, “son état nécessite un repos physique et mental d’au moins 45 jours soit du 20/12/2021 au 18/2/22 ». The medical report also states that the claimant had “covid-19 Moderee” and “Paludisme grave” and concludes “nous recommandons un repos et un control medical pares 1 mois”.

47. On Monday 28 February 2022 Mr Mason sought advice from Ms Bevan because he understood these medical reports to relate to the period 23 December 2021 to 18 February 2022 which meant the claimant would have to submit further documents (215).
- 5 48. Ms Bevan advised that “as we’ve discussed a number of times, given the requests made to Eugene to provide timeous fit notes, I would recommend that you accept fit notes only from the date that he submits them and don’t backdate” (216). On her advice, Mr Mason advised the claimant on 1 March 2022 that until they had received a fit note that covered his current absence
10 that it remained uncertified and unauthorised (225).
49. The claimant replied on 2 March 2022 advising that he has spoken to his GP about the fit notes and they had advised that he self-certify for the first seven days that is from 18 to 24 February 2022; and they advised they would issue fit notes to cover the rest of the remaining days from 25 February 2022
15 onwards until the day he returned to work. He asked Mr Mason to e-mail him the self certification form if they could not accept that e-mail as a self-certificate (223).
50. Mr Mason replied on 2 March 2022 with advice about how to access the self certification form and attaching a blank copy self-certification to complete and
20 return (228).
51. The claimant replied on 2 March 2022 expressing concern that he had presented medical certificates but they still refused to pay him; he stated that his current absence from work from 22 February 2022 was not due to being unwell but because he was told he could not return to work until he had been
25 seen by occupational health. Later that day the claimant forwarded an HMRC SSP form.
52. By e-mail of 3 March 2022, Mr Mason advised that self certification was not appropriate because his absence started in December 2021 and that he would need to provide a timeous fit note for his current absence covering him from
30 GP assessment onwards. He advised that once they receive the fit note his

absence could change from uncertified/unauthorised to certified/authorised/paid in line with NHSL policies (232).

53. The claimant in an e-mail dated 3 March 2022 asked for clarity about whether he still wanted a fit note from his GP starting from December 2021 (231).

5 54. Mr Mason responded on 4 March 2022 again attaching the attendance management policy and advising the claimant was required to provide evidence to support his absence as detailed in that policy. He advised that HR had confirmed that self certification was not appropriate because his absence started in December 2021, and “the organisation requires you to submit a fit note completed by your GP to provide cover from the 19/2/22 onwards....in
10 line with NHSL policies” (231).

55. On Friday 4 March 2022 at 19.30 (that is after close of business on that date) the claimant e-mailed Mr Mason (239) attaching a fit note for the period from 18 February 2022 to 25 March 2022 and asked if there was anything else he
15 required.

56. After taking advice from HR (236/237), Mr Mason replied to the claimant on 8 March 2022, advising that he had amended his absence to record sick leave from 7 March 2022 and updated HR. He advised that “From the dates 18th December 2021 to 18th February 2022 this is unauthorised leave and therefore
20 no pay. From the dates 19th February 2022 to 6th March 2022 (the fit note [having been] provided on 7 March) this is unauthorised leave and therefore no pay. From the 7th March 2022 onwards this is recorded as sickness absence including the specific details in your Fit Note” (238).

57. By e-mail dated 23 March, the claimant expressed the view that he considered
25 this decision to be “short sighted”, “unprofessional” and “aggressive”. He forwarded an e-mail (dated 3 March 2022) which confirmed that his revalidation had been extended to 17 March and that paperwork had to be submitted by that date which meant that his registration remained effective (264).

58. On 10 April 2022, the claimant submitted a fit note for the period from 25 March
30 to 14 April 2022 (276).

59. On 11 April 2022, the claimant telephoned Mr Mason to advise that he was fit to return to work from 12 April 2022 on supported phased return basis but that he could not afford to do so. Mr Mason confirmed having taken advice from HR (273) that there was no provision to support him to attend work (275).
- 5 60. Around this time the claimant liaised with his union representative who in turn had discussions with Mr Mason (280) and it was agreed that the claimant would return to work but take a period of annual leave first. As the latest fit note ended on 15 April, he took annual leave week beginning 18 April 2022. This allowed him to be paid as a band 5 from 7 March 2022 to pay day on 27 April. An
10 agreement was reached for a phased return to work from that date (280).
61. By letter dated 4 May 2022, the claimant was advised that he had been overpaid due to payroll being given late notification of unpaid absence for the period from 18 December 2021 to 31 January 2022, resulting in a net overpayment of £2,647.48. A mandate was attached for the claimant to sign
15 his agreement to repay this overpaid sum.
62. The claimant wrote a letter in response (dated 1 July 2022) disputing the recording of unpaid leave, and asserting that it should have been recorded as sick leave, and declining to sign the mandate.
63. The claimant resigned effective on 6 July 2022.
- 20 64. In order to recoup the overpayments which the respondent asserted were made in respect of unauthorised absence in December 2021 and January 2022, the claimant had the sum of £1,968.16 (net) deducted from his wages in February 2022, the sum of £282 (net) deducted in March 2022 and the sum of £2,194.06 (net) deducted in July 2022.

25 **Relevant law and issue for determination**

65. There was no disagreement between the parties about the applicable law.
66. Section 13 of the Employment Rights Act 1996 (ERA) states that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is authorised by a statutory provision or a relevant provision of
30 the worker's contract or he has the worker's consent.

67. By 14(1)(a) ERA it is specifically provided that the general prohibition does not apply if the deduction relates to an overpayment of wages.
68. Section 13(3) ERA states that a worker must establish that he has been paid less than the amount that is “properly payable”. The onus of proof is therefore
5 on the employee.
69. Nor is there any dispute that the sickness absence policy formed part of the claimant’s contract. This was clear from the terms of the contract which cross reference the respondent’s sickness absence policy and which state that
10 “Failure to comply with the policy could result in your absence being classified as unauthorised resulting in no pay”.
70. The respondent submitted that the issue is whether the claimant complied with the contractual sickness absence policy and submitted that if he had not, then these are lawful deductions. The claimant argued that the evidence supports the contention that the claimant did supply medical evidence to support his
15 absences, and he did so timeously.
71. The crux of the case is the provisions of the sickness absence policy, and the requirements for notification and the conditions attached. In essence, an employee must notify absence and provide appropriate certification. The key provision is headed “absence certification” and states that for absences over
20 seven days a medical certificate must be provided to the manager “as soon as possible”.
72. What this case comes down to then is simply whether the claimant lodged appropriate medical evidence “as soon as possible” as he was required to by the terms of this contract.

25 **Respondent’s submissions**

73. There was a good deal of disputed evidence in this case. Mr James in particular argued that the evidence of the claimant should not be relied on because of the following material inconsistencies:
- When the claimant emailed on 3 December 2021, he said that he was
30 in Uganda, and that he travelled to Congo after a few days. His evidence

was that it took a week or more to travel back to Uganda from Congo (by bus) and there was no evidence that he travelled by plane. However, the medical report which he produced asserts that he was hospitalised there on 3 December 2022. This would be before he could have got in Congo and inconsistent with his oral evidence that he had travelled to Congo to stay with family after a few days in Uganda.

5

- The claimant said that he was discharged on 24 December 2021; but this medical report states that it was 22 December 2021. He said in evidence that he first started to function on 28 December.

10

- In the e-mail of 28 December he said that he had “no recollection of what happened from 4th next until 27 of December 2021”. He said that he was still in Uganda in the e-mail. In evidence he said that he meant to say Congo; but provided no explanation about why he had made that mistake.

15

- The claimant said on one occasion in December 2021 that he had covid and on the second occasion that he was admitted with malaria; whereas in the e-mail of 28 December, he says he was hospitalised with covid19 and apparent pneumonia too. However he makes no mention of pneumonia in his oral evidence. The medical report lodged is dated 22 December 2021 and states that the claimant had covid19 with a secondary diagnosis of “paludisme grave” which the claimant accepted was malaria; there is no mention there of pneumonia.

20

- These documents indicate that he was hospitalised from 3 December to 22 December 2021. The claimant’s case was that the doctors would not issue medical reports until his course of treatment had finished; but here both medical reports are dated 22 December 2022. It makes sense that documents would be issued on discharge from hospital. However the claimant’s evidence was that he finished treatment long after 22 December 2021.

25

30

- In any event, he said that the documents were issued on finishing treatment, and the latest that could be according to these medical

reports was 18 February 2022. However the claimant states that he was back in the UK by then so that he could not be issued documents on that date. There is no date given as to when he finished treatment.

- 5 • the claimant asserted in oral evidence that he could not supply photos of the medical reports because the respondent would not accept photos. However, the claimant sent photographs of fit notes to Mr Mason in March 2022.
- 10 • The claimant also asserted in oral evidence that Mr Mason had told him that he could self certify, but this is contradicted by the oral evidence of Mr Mason that it was the claimant's GP who told him and also by various e-mails. Further the claimant in an e-mail to Mr Mason states that he had spoken to his GP regarding fit notes and they had advised him to self-certify; so it was not Mr Mason who suggested it.
- 15 • The claimant said in oral evidence that he was in hospital in Scotland on his return for a number of days but in cross examination he said it was only on 21 February 2022. That is supported by a contemporaneous email which was sent by the claimant to Mr Mason on 21 February 2022 where he says he will be in hospital; which indicates that he was not currently in hospital.

20 74. Mr James submitted that the claimant had the medical evidence in December, and thus long before February. Since the claimant accepted in evidence that he had a camera on his phone, he could have sent photographs of the medical certificates. Mr Mason was clear that he required these but the claimant chose not to send them. In any event, the claimant provided no explanation to Mr
25 Mason of the difficulties he was in; he just said that the hospital did not provide fit notes.

75. On the claimant's return he could have provided information or medical documents covering his absence at that point because the documents only cover up to 18 February 2022. Given that he was hospitalised in Scotland, he
30 could have provided medical certificates at that time. The claimant says that Mr Mason did not ask for further information or give the correct information

regarding self-certification but that is neither here nor there given the requirements of his contract.

76. While the decision not to backdate was Ms Bevan's; she said he had repeatedly been told that he had to submit documents timeously; but she had given correct guidance as to the contractual position.

77. At the point the claimant provided current medical documents the respondent authorised paid sick leave, but they were entitled not to back date because the claimant had been in breach of contract. Their actions were entirely justified in line with the contractual terms, and the claimant therefore had no legal entitlement to sick pay.

78. Mr James submitted that the Tribunal should not accept the claimant's evidence that he could not supply medical evidence sooner. However, in any event, taking the documents at face value, he had not provided them as soon as possible. There was no need to make further findings in fact beyond that, and there was no need to speculate as to his motives.

79. He submitted on the narrow question of whether the claimant complied with his contract, taking the documents at face value, the inevitable conclusion is that the claimant did not provide the documents as soon as possible.

Claimant's submissions

80. Ms Campbell submitted that the claimant's evidence should be believed, that the claimant had, in the circumstances, submitted evidence "as soon as possible". In particular, the Tribunal should take account of the fact that the claimant was unwell and found himself in difficult circumstances. Any discrepancies in his evidence should be put down to the effects of his illness.

81. With regard to the reference in the e-mail of 28 December 2021, the claimant explained in evidence that he had made an error by referencing Uganda rather than Congo. Given that this was at a time when he was still suffering the effects of covid, it should be accepted as an innocent mistake.

82. She submitted that, given the medical certificate was in French not English that the Tribunal should not speculate about its meaning, since the Tribunal had not heard evidence from the medical experts.
83. His evidence, supported by his e-mails, was that he could not get a fit note and there would be no motive for him to withhold fit notes if he did have them in his possession.
84. Although the medical report was dated 22 December 2021, the claimant's evidence was that it could not be released until February, which is the end of his treatment.
85. Further the respondent accepted the medical reports as authentic at the time. They did not question whether they were genuine, but rather the reason for withholding pay was because they were not submitted timeously.
86. The respondent speculates that the claimant was hospitalised two times, but that is not suggested by these medical reports; this should not distract from the claimant's explanation and his evidence should be believed.
87. Further, Ms Campbell disputes the e-mail which the respondent relies on to submit that the claimant was not being honest about his stay in hospital in Glasgow. Stating he "will be" in hospital might mean that he is there and that he may require to stay for a number of days. This should not be used to discredit the claimant.
88. With regard to getting in contact, the claimant's evidence was that he was unwell for much of January and therefore that it was not possible for him to have been in contact because of his illness and his circumstances. This was a traumatic period in the life of the claimant and account should be taken of that to explain his different recollection of events. This should not be relied on to suggest that the claimant was dishonest.

Tribunal deliberations and decision

89. The only claim in this case is a claim for unlawful deductions from wages in respect of contractual sick pay. That is the only matter with which I am concerned. That is notwithstanding that I heard evidence relating to

misunderstandings around the claimant's re-registration with NMC, and was aware of the claimant's other concerns regarding the way that he was treated by the respondent, and that he had subsequently resigned.

5 90. I took on board the claimant's submissions, and I was troubled why the claimant would fail to send in documentary evidence of his illness if he had it in his possession since it was in his best interests to do so. Mr James, quite rightly, said that he could not speculate as to motive, since he could not point to any evidence to support an ulterior motive on the part of the claimant, beyond the reference in an e-mail to Uganda, which the claimant said was a
10 mistake since he was in Congo.

91. However, notwithstanding a lack of motive, or at least a lack of clarity about a motive, I came to the view that the claimant could have provided medical evidence before the evidence was submitted by him on 25 February 2022. I concluded that the claimant had not lodged the relevant evidence "as soon as
15 possible" for the following reasons.

92. Ms Campbell argued that the respondent had not questioned the authenticity of the medical reports. She urged me not to place over reliance on the medical certificates because they were in French and the medical practitioner who wrote them had not given evidence.

20 93. I would not however have expected to hear from the medical practitioner, because medical evidence to support sickness absence would usually speak for itself. Accepting that the medical reports are authentic, the difficulty for the claimant is that they are dated 22 December 2021.

25 94. If I understood the claimant's evidence correctly, he suggested that he could not get a copy of the medical reports until his course of treatment had completed. However, the claimant's evidence that these reports were not actually issued to him until the end of his course of treatment is not plausible. There is no date on the medical reports to indicate that they were not issued until later than the date that they were signed. Even accepting that procedures
30 may be different in other countries, it is at the very least surprising that such reports would be issued after his discharge from hospital, but not given to the

claimant until the end of any course of treatment. There is apparently no reference in the medical reports to the date his treatment ended.

- 5 95. I understood from the claimant's evidence that his course of treatment ended on 18 February 2022, but the claimant's evidence was that he was back in the UK by 18 February 2022.
- 10 96. The medical reports are dated 22 December 2021. Taking what is stated there at face value, I conclude that these reports were issued on that date. The claimant apparently made no effort to get copies of these to the respondent. It is apparent, even if he had intermittent access to wifi and charge for his phone, that he would have been able to contact the respondent and send photographs using his phone camera (as he had done subsequently for the fit note when he was back in the UK).
- 15 97. The claimant's evidence was that he did not believe that photographs would be accepted because he had previously been advised that. The respondent's witness evidence was that they did prefer paper copies of medical certificates, but that rule had been relaxed during the pandemic. It seems to me that given that the claimant was being pressed for medical reports, and what was at stake if he did not submit them, that he should have made every effort to get them to the respondent even as a holding position.
- 20 98. Even if the claimant did not have the medical reports, even if he did not have access to wifi or battery on his phone, he was however back in this country on 18 February. I agreed with the respondent that the claimant at the very least should have then immediately sought to have obtained medical evidence about his condition then to justify his absence. He did not however hand over those medical certificates obtained in Africa in until 25 February 2022.
- 25 99. The claimant's evidence was that he was being told that he could not get medical certificates in Africa until he was discharged. However, I took account of the fact that the claimant did not make that clear when he was able to contact Mr Mason by e-mail. In particular, the e-mails which he sends are rather vague and not a direct response to the requirements which Mr Mason explained on numerous occasions. There are only two references to his difficulties, when he
- 30

said in an e-mail on 19 January that he would submit a fit note when he was “given one by the appropriate personnel as it is beyond my jurisdiction”, and then on 20 January, “I can not be given a fit note because they don’t have one”. He made not reference then, and otherwise made no attempt to explain to Mr Mason his difficulties, and in particular he did not advise Mr Mason that a medical certificate could not be issued until he had finished his course of treatment.

5

10

15

100. In any event, the claimant did not hand in medical certificates for the period from 18 February 2022, when he was in the UK, until 4 March 2022. Ms Campbell relied on the guide for employees which accompanied the sickness absence policy (137) which includes in the preamble the statement, “consideration will be given to the individual circumstances of each employee when applying the attendance policy”. She took issue with Ms Bevan’s decision not to backdate their decision when it was within her discretion to do so.

101. However, as Mr James argued, the key question in this case is whether the claimant was in breach of contract in failing to supply the medical information as soon as possible.

20

102. I accept the respondent’s submission that the claimant in this case was in breach of contract by not submitting medical certificates to justify his sickness absence “as soon as possible”. The claimant’s failure to do so was in breach of contract. In such circumstances, the deductions were permitted by his contract. That being the case the respondent was entitled to deduct wages and seek repayment in accordance with the terms of the policy and the contract.

25

103. The claimant's claim that there has been an unlawful deduction from wages is not well-founded and therefore the claim is dismissed.

5 **Employment Judge: M Robison**
 Date of Judgment: 18 November 2022
 Entered in register: 18 November 2022
 and copied to parties