Neutral Citation No: [2019] NICA 50 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC11065** ***Delivered: 02/10/2019***

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM THE INDUSTRIAL TRIBUNALS

_____

Between:

CATERPILLAR (NI) LIMITED

Appellant;

and

DEREK MARSHALL

Respondent.

_____

Before: Stephens LJ, Treacy LJ and McCloskey LJ

_____

McCloskey LJ (delivering the judgment of the court)

Introduction

[1] Caterpillar (NI) Limited (hereinafter "*the Appellant*") appeals against the decision of the Industrial Tribunal in proceedings in which Derek Marshall ("*the Respondent*"), an employee of the Appellant, succeeded in his case to the following extent (per the decision of the Tribunal):

> "*(1)* [He was] *not medically suspended from work within the meaning of Article 96 of the Employment Rights (NI) Order 1996.*
>
> *(2) The respondent made an unlawful deduction from the wages of Derek Marshall. The respondent is ordered to pay him the sum of £238.*"

The conjoined claim of a second claimant, Ian Falconer, was dismissed. There is no appeal before this court in his case. Nor is there any appeal by the Respondent.

Statement of Agreed Facts

[2] The proceedings before the Tribunal were conducted on the basis of a statement of agreed facts. This contains the following salient elements:

(a) The Respondent has been employed by the Appellant as a paint specialist at the Appellant's plant since 07 November 1994.

(b) On 24 January 2018 a health surveillance assessment of the Respondent was carried out by an occupational health nurse contracted to the Appellant.

(c) On 25 January 2018 the nurse reported that the Respondent was "*… fit for all aspects of his job apart from working at heights. I have advised him to see his GP and added him to the OHP list.*"

(d) On the same date in a discussion with the Respondent, his line manager observed that working at heights was an integral part of the Respondent's employment, advising him that there were no alternative vacancies and instructing him to leave work.

(e) The Respondent was in consequence absent from work from 13.00 hours on 25 January (a Thursday) to 18 February 2018 (a Monday).

(f) The Appellant classified the Respondent's absence from work as an unpaid half day "pass out" on 25 January 2018 and attracting contractual sick pay in respect of the period 26 January to 18 February 2018. During the first three days of the latter period, known as "waiting days", no contractual sick pay or statutory sick pay was paid to the Respondent.

(g) From 29 January to 18 February 2018 the Respondent received contractual sick pay equivalent to his full pay. (See *infra*).

[3] In addition to the foregoing, it is appropriate to add the following uncontroversial facts:

(a) The Appellant at all material times considered the Respondent to be suffering from the "*illness*" of high blood pressure and that this rendered him unfit for his full range of duties.

(b) Having attended the surgery the previous day, on 26 January 2018 the Respondent was assessed by his General Medical Practitioner, who certified without qualification that he was not fit for work for a period of four weeks, beginning the previous day, by reason of "*hypertension*".

(c) On 15 February 2018 the General Practitioner further medically certified that the Respondent, having been absent from work due to "*high blood pressure*", was fit to return to work, his condition being "*controlled with medication*".

(d) On 20 February 2018 the occupational nurse engaged by the Appellant, noting that the Respondent's General Practitioner had assessed "*sustained hypertension*" following an initial 24 hour monitoring test and had prescribed appropriate medication, which continued, advised that he was "*… fit for the full remit of his role as the high blood pressure is now adequately controlled and he is asymptomatic*".

Relevant Statutory Provisions

[4] There are two provisions of the Employment Rights (NI) Order 1996 ("*the 1996 Order*") of significance. The first is Article 45:

> "(1) An employer shall not make a deduction from 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.
>
> (2) In this Article "relevant provision", in relation to a worker's contract, means a provision of the contract comprised-
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by

him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Paragraph (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this Article a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this Article an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This Article does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

[5] The second is Article 96:

"(1) An employee who is suspended from work by his employer on medical grounds is entitled to be paid by his employer remuneration while he is so suspended for a period not exceeding twenty-six weeks.

(2) For the purposes of this Part an employee is suspended from work on medical grounds if he is suspended from work in consequence of-

(a) a requirement imposed by or under any statutory provision, or

(b) a recommendation in a provision of a code of practice issued or approved under Article 18 of the Health and Safety at Work (Northern Ireland) Order 1978,

and the provision is for the time being specified in paragraph (3).

(3) The provisions referred to in paragraph (2) are-

Regulation 2 of the Manufacture and Decoration of Pottery Regulations SR (UK) 1913/2,
Regulation 25 of the Ionising Radiations Regulations (Northern Ireland) SR (NI) 2017/229,
Regulation 16 of the Control of Lead at Work Regulations (Northern Ireland) SR (NI) 1986/36,
Regulation 11 of the Control of Substances Hazardous to Health Regulations (Northern Ireland) SR (NI) 1995/51.

(4) The Department may by order add provisions to or remove provisions from the list of provisions specified in paragraph (3).

(5) For the purposes of this Part an employee shall be regarded as suspended from work on medical grounds only if and for so long as he-

(a) continues to be employed by his employer, but

(b) is not provided with work or does not perform the work he normally performed before the suspension."

Linked to Article 96 is section 151 of the Social Security Contributions and Benefits (NI) Act 1992 (the "*1992 Act*"):

"*(1) Statutory sick pay shall not be payable for the first three qualifying days in any period of entitlement.*"

The concept of the "*three waiting days*" (see further *infra*) seems to derive from this statutory provision.

The Contract of Employment

[6] There are two documents in the bundle of evidence bearing on the contract of employment governing the legal relationship between the parties. The first is the Respondent's job description, upon which nothing turns. The second is the Appellant's document entitled "*Human Resources Policy – Hourly Time Away From Work*" (the "*sickness absence policy*"). This contains a series of familiar medical terms –

> "*Statement of fitness for work …. illness at work …. Medical certificates …. sickness or injury …. non-medical reason ….*"

Also worthy of note is the statement:

> *"Company Sick Pay ("CSP") will only be paid in cases of absence due to illness, injury or disease."*

[7] There is a discrete section of the sickness absence policy entitled "*Statutory Sick Pay/Company Sick Pay*". This states *inter alia*:

> "*Statutory sick pay (SSP) will be paid for up to 28 weeks of sickness absence in accordance with the rules of SSP. The payment of SSP is treated in the same way as pay and is subject to PAYE and National Insurance Contributions ….*
>
> *Company sick pay (CSP) will only be paid in cases of absence due to illness, injury or disease. To be eligible employees must have more than 12 months service. Payments will only be made to employees who have complied with absence control, absence notification and Occupational Health procedures …*
>
> *Payments made under the scheme, where applicable, will be pro rata to full normal basic weekly earnings (excluding overtime and shift premiums). SSP will be offset against CSP ie the amount of CSP and SSP will not be greater than normal basic earnings …*
>
> *The payment of CSP is treated in the same way as pay and is subject to PAYE and National Insurance Contributions …*
>
> *No payment will be made for the first three days of absence (waiting days).*"

There follows a short section which makes clear that payment is dependent upon the individual employee's service. Thus, for example, there will be no payment for those

of less than 12 months service. In contrast, employees with more than 24 months service (such as the Respondent) have an entitlement to full pay for eight weeks, followed by half pay for eight weeks. Also to be noted is an appendix detailing types of absence which exclude an employee from the Sick Pay Scheme.

The Tribunal's Decision

[8] As appears from the particulars of claim appended to the Respondent's Form ET1 the formulation of the complaint to the Tribunal was that the Appellant had unlawfully failed to remunerate the Respondent while he was suspended on medical grounds, contrary to Article 96 of the 1996 Order. The Tribunal rejected this claim. However it concluded that the Appellant's failure to remunerate the Respondent during the first 3 days of his absence from work constituted an unlawful deduction of wages under Article 45. The Appellant was ordered to pay the Respondent £238 accordingly. In the wake of the Tribunal's decision the Appellant conceded the Respondent's entitlement to be paid in respect of the aforementioned half day and has made the appropriate payment. There is no appeal by the Respondent.

[9] The Tribunal's focus on the first 3½ days of the Respondents total period of absence from employment is explained by the following passage in the statement of agreed facts:

> "Monday 29 January 2018 - Wednesday 31 January 2018 were his three unpaid waiting days in line with the rules of the occupational sick pay policy and thereafter he received occupational sick pay at the rate of his full pay from Thursday 01 February to Thursday 15 February 2018 inclusive. He returned to work on his next scheduled work day being Monday 19 February 2018."

(From the above one deduces that Friday 26 January 2018 was not one of the Respondent's normal working days).

[10] The Tribunal identified two issues namely (a) whether the claimants were medically suspended from work within the meaning of Article 96 of the 1996 Order and (b) whether an unlawful deduction from their wages had been made under Article 45 of the 1996 Order. (In passing, only the second of these issues arises in this appeal).

[11] Having found that –

> "*… it was reasonable for the Respondent to conclude that there was a clear possibility of harm to the claimants if they*

> *had been permitted to continue to work at height, however modest that might have been.*"

and, further, that –

> "*… the circumstances of this case fall outside the scope of Article 96 of the 1996 Order.*"

the Tribunal then made this finding relating to deduction from wages:

> "*… the non-payment of the half day on 25 January 2017 and the first three days of sickness absence as 'waiting days' from Mr Marshall's pay were a deduction from wages.*"

[12] The Tribunal next posed the question of whether this deduction from wages was lawful, suggesting that the answer "*… depends upon whether or not it constitutes a part of the claimant's contract*". This is followed by the first (and only) reference to "*the policy*" in the decision:

> "*The situation in this case does not appear to the Tribunal to have been anticipated by the Respondent when the policy was drafted, and cannot in the view of the Tribunal be properly inferred from its contents.*"

There follows the conclusion:

> "*The Tribunal therefore concludes that* ***it*** *cannot properly be construed as part of* [Mr Marshall's] *contract. In the absence of* ***any other implied*** [sic] *or other consent on his part, the Tribunal concludes that it was done on both occasions (namely the unpaid half day on 25 January and the three waiting days deduction) without lawful authority, and each was an unlawful deduction for the purposes of Article 45. The Respondent is therefore ordered to pay to Mr Marshall the sum of £238, representing those 3.5 days net pay.*"

The Appeal

[13] The somewhat diffuse terms of the Notice of Appeal were helpfully refined and clarified in the submissions of Mr Martin Wolfe QC, representing the Appellant. Mr Wolfe developed the central contention that the Tribunal had erred in law by failing to conclude that the admitted deductions from the Respondent's wages during the three day period under scrutiny were in accordance with the sickness

absence policy, which formed part of the Respondent's contract of employment with the Appellant.

[14] Mr Michael Potter (of counsel) on behalf of the Respondent, while accepting that his client had applied for and received CSP during the whole of his absence excepting the first three full days, disputed that this was the only recourse available to him, contractually or otherwise, in the circumstances prevailing. His submission was that the Respondent's entitlement to his regular pay (which was at a higher level than CSP) was unaffected by the events relating to his departure from work on 25 January 2018 and endured throughout the entirety of his absence until his return to work on 19 February 2018. This was the centre piece of Mr Potter's argument, to which I shall return in [17] below.

Consideration and Conclusions

[15] The starting point is uncontentious. It was common case before the Tribunal that the sickness absence policy formed part of the Respondent's contract of employment, by incorporation. While there are repeated statements in both parties' skeleton arguments that the central issue in this appeal is whether the policy applied to the Respondent in the circumstances in which he found himself during the three day period under scrutiny, I consider that the real issue both at first instance and on appeal was, and is, one of construction of the policy. The question of whether the policy applied to the non-payment of wages during the three days in question depends upon how its terms are construed. The exercise of construction must, logically, precede that of application. The construction of any document is a question of law for the court or tribunal concerned: *Re McFarland* [2004] UKHL 17 at [25], per Lord Steyn.

[16] The Respondent asserted an entitlement to CSP under the sickness absence policy. Paragraphs 9 to 12 of the policy are clearly directed to CSP. Paragraph 11 states unequivocally that there will be no payment during the first three days of absence. Thus within a document agreed by both parties to form part of the contract of employment there was a clear prohibition on payment of CSP to the Respondent during the three days in question. The case has at all times proceeded on the footing that the non-payment of wages to the respondent during the first three full days was allegedly a "*deduction from wages*" within the meaning of Article 45 (1) of the 1996 Order. Thus the ultimate question for the Tribunal should have been whether the non-payment of wages to the Respondent was "*required or authorised to be made*"[the statutory language] by paragraph 11 of the policy. But the Tribunal did not set about its task in this manner. I consider that this question invites but one possible answer, namely an affirmative one, given the unambiguous terms of paragraph 11, subject to Mr Potter's arguments considered *infra.*

[17] As appears from a combination of the agreed facts rehearsed above and [8] – [9] hereof, Mr Potter's argument, rehearsed at [14] above, does not reflect the case made by the Respondent at first instance. It is an unvarnished new case. Applying

first principles, the Tribunal cannot be faulted for deciding the Respondent's case as formulated and presented, while not deciding the new case which surfaced in this court for the first time. While I consider that this new case is canvassed in an evidential and legal vacuum I shall nonetheless address the main tenets of Mr Potter's submissions to this court.

[18] The decided cases relating to "*no clear contractual basis for a deduction in pay*" (per Mr Potter's skeleton argument) have no significance given the unequivocal terms of paragraph 11 of the policy. The further submission that the Respondent had an entitlement to full pay "*pending clarification of his fitness to work at heights by a doctor or the company finding suitable alternative work in the meantime*" (per Mr Potter' skeleton argument) is made in an evidential and legal void. The next ensuing submission, namely that the sick pay claim "*would not have been made if the company had accurately explained the correct contractual position* "leads nowhere, given the analysis of the "*correct contractual position*" above.

[19] The same analysis applies to the repeated assertion that the Respondent "*remained ready and willing and able to work*". Even if correct – and it has no evidential basis – this assertion is rendered legally irrelevant by the agreed and incontestable facts. In particular, on the first day of the period under scrutiny, 25 January 2018, a medical professional in the Respondent's workplace assessed him unfit for work for specified duties and his own GP did likewise as regards all duties the following day, backdated to the previous day, for a prospective period of four weeks. Finally, there is no plausible scope for the application of the contractual principle of "*unavoidable impediment*" given all of the foregoing.

[20] The Tribunal's main conclusion regarding the sickness absence policy was that it did not apply to the situation in which the Respondent found himself during the first three full days of his absence from work. For the reasons elaborated above the Tribunal erred in law in thus concluding. The Tribunal added that "*it*" – evidently the policy – "*… cannot properly be construed as part of his contract*". This is an aberrant conclusion. The case was presented to the Tribunal bilaterally on the consensual basis that the policy formed part of the Respondent's contract of employment, by incorporation. This was not a contentious issue and no evidence was laid upon which the Tribunal could justifiably conclude otherwise. The central task for the Tribunal was to construe the policy correctly in law. For the reasons explained it failed to do so.

[21] There is merit in Mr Potter's submission that the Appellant erred in classifying the Respondent's half day absence from work on 25 January 2018 as an unpaid "pass out", as this was a clear case of sickness absence. But this discrete issue evaporated following the Tribunal's decision and is not before this court: see [8] above.

[22] Finally, it is appropriate to add the observation that this court concurs with the assumption, made from the first day of the underlying story and proceedings,

that the Respondent was at the material time suffering from an "illness" falling within the terms of the sickness absence policy: see [6] above. This term clearly invites an expansive interpretation.

Summary

[23] It was at all times common case that the sickness absence policy forms part of the Respondent's contract of employment with the Appellant. The Respondent's entitlement to remuneration throughout his period of absence from work was governed by this policy and he was paid in accordance with its provisions. In its decision the Tribunal did not engage with the relevant provisions of the policy and reached a bare, unreasoned conclusion which is unsustainable in law on the grounds elaborated above.

Omnibus conclusion and Order

[24] The appeal succeeds for the reasons given. That part of the Order of the Tribunal which found that the Appellant made an unlawful deduction from wages for the three "waiting days" is set aside. We invite counsel to agree a draft order for our consideration.

[25] We will hear submissions in relation to costs, if necessary on a date to be fixed, in the event of the parties being unable to reach agreement on this issue. Given the small sum of money at stake and the overriding objective generally, the court would urge consensual resolution of the costs issue.