EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Ian Skipp	**AND**	Eland Cables Limited

Heard at: London Central **On**: 1 December 2017

Before: Employment Judge H Clark (Sitting alone)

Representation
For the Claimant: Mr A Sendall (Counsel)
For the Respondent: Mr P Collyer (Consultant)

JUDGMENT

1. The Claimant's claims are not well-founded.

REASONS

1. By a Claim Form presented on 23 July 2017, the Claimant claims payments of Company sick pay due to him during his notice period. A Response Form dated 6 September 2017 resists the claim, asserting that payments of Company sick pay were discretionary.

2. For the purposes of this hearing I heard oral evidence from the Claimant in person and, on behalf of the Respondent, from its Finance Director, Jean-Sebastian Pelland. Both confirmed the contents of their written witness statements and were cross-examined on their evidence. I also took account of a written witness statement from Sarah May, the contents of which were not challenged by the Respondent.

3. At the start of the hearing Mr Sendall applied to amend the Claim Form to include a claim for breach of contract in the alternative to unlawful deduction from wages. This claim relied on the same facts as the unlawful deduction claim. The Respondent had no objection to the amendment and indeed the

Tribunal had categorised the Claimant's claim as one of breach of contract in any event. The narrative particulars appended to the Claimant's Claim Form, which he appears to have drafted himself, were capable of supporting either a claim for unlawful deduction from wages or breach of contract. In these circumstances there is no prejudice to the Respondent in allowing a formal amendment to the Claim Form to clarify that the claim is put in the alternative.

4. When the Tribunal was discussing the issues with the parties at the outset of the hearing, Mr Sendall made it clear that he would be arguing that the Claimant was on garden leave at the material time and, as a matter of law, he was, therefore, entitled to be paid his "normal pay", which included Company sick pay. Mr Collyer objected to this line of argument, which was not set out in the Claim Form. He invited the Tribunal to adjourn the hearing to enable him to research the point, amend the Response Form and potentially address the issue in the Respondent's witness evidence.

5. Whilst the Tribunal appreciated Mr Collyer's professional difficulty, in that he had not been given an opportunity to research the legal issue, it was not at all clear how the Respondent's evidence would need to be amended in response to what is essentially a legal argument. The witness statement of the Claimant does not address the point. In considering whether to postpone the hearing, the Tribunal must have regard to the overriding objective in the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, to do justice between the parties, which includes dealing with matters in a proportionate manner, avoiding delay and saving costs. The value of this claim is under £5,000 and, in the Tribunal's judgement, it would not be proportionate to postpone this hearing for further pleadings and evidence, when any potential prejudice to the Respondent can be dealt with by permitting Mr Collyer the time to file written closing submissions on the point of law raised by Mr Sendall.

6. Mr Sendall very fairly provided Mr Collyer with a copy of his written closing submissions during an adjournment for the Tribunal to read the documentation. Mr Collyer, therefore, had the opportunity to deal with any evidential issues which might arise in the hearing. In the circumstances, the Tribunal refused the Respondent's application for a postponement, but ordered that written closing submissions be filed 7 days after the hearing, with leave to both parties to respond to the other party's submission 7 days after that.

7. Both representatives filed their closing submissions by email on 8 December 2017 and their written responses to each other's submissions on 15 December 2017.

The Issues

8. The only issue before the Tribunal was as to whether the Claimant was entitled to be paid Company sick pay during his notice period. Although the Claim Form referred to a "discrimination" claim, it was clear that this related to the Claimant's proposed future employment for a competitor rather than for any reason related to a protected characteristic under the Equality Act 2010. This was not pursued in the hearing. The amount in issue, subject to liability, was £4,965.85, being the difference between the Claimant's normal net salary and the Statutory Sick Pay ("SSP") received by him during the relevant period.

The Law

9. In order to determine what was properly payable to the Claimant, the Tribunal must look to the principles of the law of contract. Interpretation of a contract is a matter of law. It is to be presumed that the parties intended what they set out in the contract and where an employer has a discretion in relation to a payment (such as a bonus or pay rise), that discretion should be exercised rationally and in good faith. This requirement has been expressed as an implied term that a discretion is not be "*exercised arbitrarily, capriciously or irrationally in the Wednesbury sense."* (*Brogden v Investec Bank plc [2016] EWCA Civ 1031 [2017] IRLR* 90 para 14 referring to *Braganza v BP Shipping Ltd [2015] UKSC 17).* In a public law context, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 CA* requires a decision maker to take account of relevant factors and ignore irrelevant ones in reaching a decision. The resultant decision should not be such that no reasonable decision maker could have reached it.

Findings of Fact

10. Most of the material facts in this case are not in dispute. The Claimant was a long serving employee of the Respondent, his employment having commenced on 1 May 1999. The Respondent is based in Highgate Road, London and is involved in the distribution of electrical cables, which are tested in a laboratory prior to being shipped around the world to 100 different countries. It has grown substantially in size during the period of the Claimant's employment.

11. The Claimant was employed as a Sales Manager. At the time of his resignation his salary was £50,412. He had always been paid Company sick

pay throughout his employment, albeit he was rarely ill (around 20 days in total). The relevant terms of the Claimant's contract with the Respondent were set out in a written contract dated 18 December 2013, which had been signed by the Claimant. This, contract, together with the Employee Handbook, set out all the terms of the Claimant's employment. The parties are agreed that the provision in the Claimant's contract concerning his entitlement to contractual sick pay was at paragraph 9.4, the relevant parts of which were as follows:

> "*You may be entitled to receive payment of Company sick pay during some or all of your absence for sickness or injury. Such company sick pay is based on your fixed salary in full (as set out in clause 4.1 above), subject to the deduction of tax and national insurance and other social security contributions as may be required, for a maximum aggregate period of incapacity for work in any rolling 12-month period in accordance with clause 9.4(b) below ("CSP") and is subject to the following conditions:*
>
> *(a) You shall fully comply with any company rules from time to time in relation to sickness notification procedures (as set in this clause 9 and in the Employee Handbook, including without limitation, the production of a self- certification certificate and/or doctor's certificate);*
> *(b) [provisions as to continuous service]*
> *(c) The Board's sole and absolute discretion.*
>
> Paragraph 9.8 sets out that, "*further details of the Company's sickness absence policy are shown in the Employee Handbook to which you should refer."*

It is common ground that the Employee Handbook does not mention payment of Company sick pay during the notice period.

12. An earlier version of the Claimant's contract provided a right to Company sick pay provided the correct notification and certification procedures were followed. Mr Pelland explained in evidence that whilst this provision was appropriate when the Respondent's workforce was very small (some 15 – 20 people), the Company had expanded to around 100 members of staff and it became necessary to introduce new contracts across the board.

13. Paragraph 11 of the Claimant's contract deals with termination of his employment and at paragraph 11.5 provides:

"*The company shall not be obliged to provide you with work at any time after notice shall have been given by either you or the Company, and the Company may, in its discretion, take any one or more of the following steps in respect of all or part of an unexpired period of notice:*

(a) Require you to comply with such conditions as it may specify in relation to attending at, or remaining away from, the place of business of the company or any group company;
(b) restrict you from contacting clients, customers, suppliers, providers (including service providers), distributors or agents of the company or any group company;
(c) assign you to other duties; or
(d) withdraw any powers vested in you."

14. By letter dated 18 January 2017, the Claimant gave notice of his resignation in the following terms: "*it is with regret I am informing you of my resignation effective from today (18/01/17) and as per my contract I am giving three months' notice which makes my last day 18/04/17. I have enjoyed my time with Eland and wish the company every success in the future*."

15. The Claimant's resignation was prompted by his having obtained another job with a competitor of the Respondent. The decision to find other work followed an illness on the part of the Claimant in November 2016 which his Doctor had attributed to stress at work. Whilst the Respondent had made an offer of increased salary and additional support to alleviate the Claimant's stress (including use of a therapist), the Claimant nonetheless resigned.

16. Mr Pelland, on behalf of the Respondent wrote on the 25th January 2017 accepting the Claimant's resignation and explained in accordance with clause 11.5 of his contract that he would not be required to attend work during the notice period unless specifically requested to do so and that he should, therefore, "*refrain from attending the offices or contacting any of our customers, suppliers, or employees. However, you will remain employed by the Company and must be available during normal working hours to deal with any work-related matters which may arise. The Company will provide you with work instructions and you are required to inform me as and when you have completed the work provided to you. You will continue to receive your normal salary and contractual benefits up to your final day of employment."* Mr Pelland then reminded the Claimant of his obligations under his contract, including the post termination restrictions. He ended the letter; "*you should immediately return any property belonging to us in good condition except those required to carry out any work instructions provided to you during your period of garden leave, which you will retain until 17 April 2017."*

17. The Claimant asserts it was the Respondent's actions during his notice period which triggered his absence with stress and anxiety, as he was asked to do work involving new clients which might have restricted his ability to work with his new employer due to a restraint of trade provision his contract. The Claimant was signed off sick by his GP with stress-related problems from 3 February 2017. He remained on sick leave for the balance of his notice.

18. The Claimant was not paid Company sick pay during his notice period, but statutory sick pay. He raised this with Mr Pelland in an email dated 28 February 2017 and, subsequently raised a formal grievance concerning the non-payment of Company sick pay on 10 March 2017. He had previously set out that he had received Company sick pay as a matter of routine throughout his employment, albeit this amounted to only around 20 days. He considered that had set a precedent and created an expectation the he would be paid full Company sick pay during his notice period.

19. Mr Pelland explained in an email dated 2nd March 2017 that, "*in our efforts to ensure fairness and consistency across the business, when exercising discretion in relation to CSP a significant factor considered is whether an employee has served notice. Therefore, I confirm that no CSP will be paid."*

20. When asked in evidence about the basis on which the Board would exercise its discretion in relation to sick pay, Mr Pelland explained there were a lot of different factors, mostly related to fairness of treatment across the work force. Examples of circumstances where Company sick pay would not generally be paid were; in the context of disciplinary proceedings, where employees were in the notice period and for new employees in the distribution centre. Consideration would also be given to an employee's attendance record and productivity. The Employee Handbook was last amended in June 2015 and it was felt that there should be a limit to the length of such a document, so the Respondent had not spelled out all of the circumstances in which the discretion might be exercised to pay SSP only.

21. Mr Pelland accepted that the Board did not meet to discuss every individual incident of employee sickness absence and whether Company sick pay should be paid. The Board did not make extensive use of minutes. There were three members of the Board, which held regular Board meetings, in particular, between the Managing Director and Finance Director. These were informal and sometimes would take place in a coffee shop. Business was regularly conducted without holding a formal Board meeting. Mr Pelland spoke to the Respondent's Managing Director about the Claimant's sick pay.

Whilst the Board's guiding principle was that Company sick pay was not paid to employees who had served their notice, he felt it was not entirely right to apply this policy without referring it to the Managing Director given the Claimant's long service.

22. A grievance hearing took place on 22 March 2017 at which the Claimant set out his contention that after 18 years of service he should have received Company sick pay during his notice period and that he should not have been asked to contact prospective customers as it potentially increased the number of customers with whom he could not deal in his new job, due to his restrictive covenant. He claimed this was the primary reason for his absence with stress.

23. In a written grievance outcome dated 7 April 2017 Mr Pelland set out that he had concluded that in relation to SSP/CSP, the Claimant was being *"treated consistently with other Eland personnel*" and that it was "*at the discretion of the company directors to decide when CSP is paid and that the company does not pay CSP to any employee during the notice period."*

24. The Respondent has provided documentary evidence to the Claimant of other employees who have not been paid Company sick pay during the notice period, albeit the two examples post-date the Claimant's resignation. One of those employees was Sarah May, who has provided a witness statement confirming the non-payment of her Company sick pay, albeit she raised a grievance concerning this non-payment and another issue, which the Respondent subsequently compromised. This meant she effectively received Company sick pay and on this basis, Ms May withdrew her grievance.

25. When challenged on the issue in cross-examination, Mr Pelland explained that there were a number of occasions prior to the Claimant's resignation where members of staff were not paid Company sick pay during their notice period. Mr Pelland had provided evidence from 2017 as he thought that would be the most relevant, but given the opportunity to do so, he would be able to provide examples from other years. He recalled an occasion, for instance a few years ago where an employee had cancer and was on sick leave for a year. Although this employee's strict contractual entitlement was to 12 weeks' of contractual sick pay, the Board in its discretion paid it for 12 months. There were examples from both 2015 and 2016 of employees who had not been paid Company sick pay during their notice period, one of whom Mr Pelland named, albeit he explained he could not be absolutely sure that he had remembered it correctly.

Submissions

26. The Claimant submits that there was no evidence that the Respondent had ever taken a decision not to pay Company sick pay to a member of staff during a notice period prior to the Claimant's handing in his notice. This policy is not contained either in the Claimant's contract or in any of the Respondent's written policies.

27. If there was such a policy, in reality, the Respondent did not exercise a discretion at all. Mr Pelland's evidence suggest that there was a settled policy not to pay Company sick pay during periods of notice. The fact that the Respondent invariably paid SSP only during notice periods undermines the Respondent's suggestion that any discretion was being exercised.

28. Alternatively, if a discretion was exercised, the Claimant's relevant individual circumstances were not taken into account. He was very long serving with an excellent absence record and his ill-health was caused by the Respondent's conduct towards him.

29. The fact that the Claimant was on garden leave was also highly relevant. To make a garden leave clause enforceable an employer is normally required to undertake to pay full pay and contractual benefits during the notice period (*William Hill Organisation Limited v Tucker [1999] ICR 291).* Applying a deduction to pay during the notice period would not amount to "normal pay", thus the purported exercise of discretion not to pay Company sick pay amounts to an unlawful deduction Claimant's wages.

30. The Respondent asserts that it had a general policy of not paying Company sick pay to employees who had given notice and that this had happened both before and after the Claimant's resignation. The Claimant's long service was taken into account in the exercise of the discretion by two of the Respondent's three Board members. The decision to pay him SSP only was an entirely reasonable one, which made commercial sense. The fact that the Respondent exercised its option under paragraph 11.5 of the Claimant's contract to require him to work from home with an undertaking to pay his normal pay and contractual benefits, meant that he was entitled to expect the Respondent to exercise its discretion concerning Company sick pay, but that did not mean that he had a contractual entitlement to receive Company sick pay.

Conclusions

31. The Claimant's first contention is that no discretion was exercised by the Respondent in relation to the payment of his Company sick pay, but that it was routinely paid as a matter of custom and practice. This is misplaced.

Whilst the Respondent's directors operated a general policy of paying Company sick pay to staff where they were eligible for it (as a means of encouraging a return to work), there were circumstances in which it was not paid (for instance, where productivity was low, where the employee concerned was on a disciplinary suspension or during the notice period). There were also circumstances where the Respondent paid Company sick pay beyond the contractual entitlement, for instance, where a member of staff was off work with cancer for a sustained period (albeit I accept Mr Sendall's submission that this involved a different exercise of discretion to that which was required in the instant case). The fact that the Respondent normally paid Company sick pay is not inconsistent with its being a discretionary payment.

32. I found Mr Pelland to be an entirely credible witness, who, for instance, volunteered the fact that, on reflection, the Respondent should perhaps set out its general policy of not paying Company sick pay during notice in the Employee Handbook. This was potentially a statement against the Respondent's interest, but also gave the impression of a man who could reflect on criticism and set out to deal fairly with employees. The fact that the various factors which the Respondent would or might take into account in exercising its discretion were not set out in writing in the Employee Handbook, does not mean they did not exist. It was clear from Mr Pelland's evidence that a variety of circumstances did bear on the exercise of the Respondent's discretion, but a view had been taken that it was not desirable to set them out in the Employee Handbook, which needed to be kept to a manageable length. The examples given by Mr Pelland in his evidence of potential factors which the Board would take into account (such as the existence of disciplinary proceedings, previous attendance record or productivity) were all cogent.

33. The Respondent asserts it had a general policy of not paying Company sick pay where members of staff had served notice on the Respondent. One of the reasons for paying Company sick pay is to encourage staff retention, which means that limiting such payments during a notice period is entirely rational. The Respondent's policy was not so rigid that Mr Pelland did not feel compelled to discuss the Claimant's particular circumstances with the Managing Director. If no discretion had been exercised at all, Mr Pelland would have had no reason to raise the matter with another Director. In the circumstances, I do not accept that the Respondent's policy was so rigid that no discretion was exercised. Having a set of general principles to guide the exercise of discretion does not amount to a fetter of that discretion, but quite legitimately ensures consistency of treatment between employees in similar circumstances.

34. The Claimant's alternative submission was that there was no evidence of any policy of restricting the payment of Company sick pay during the notice period and that if the Respondent did exercise its discretion, it did so irrationally. Whilst it is right that there was no documentary evidence before the Tribunal demonstrating circumstances in which the Respondent had exercised a discretion not to pay full Company sick pay to members of staff during their notice period before the Claimant (albeit there were two which post-dated his resignation), Mr Pelland was asked about the issue in cross-examination. His explanation was convincing. There were such examples and documentary evidence could be provided at a later stage if necessary. When the Claimant had asked for evidence of such cases, Mr Pelland had assumed that contemporary examples would be needed, which is why he provided cases from 2017. He provided the name of one member of staff who he recalled was not paid Company sick pay during his notice period towards the end of 2016, but could not be categorical about it. Mr Pelland's evidence came across as thoughtful but spontaneous and I accept his evidence that the Claimant was not the first employee to have been paid statutory sick pay only during his notice period, following the contractual amendments in 2013.

35. I also accept that Mr Pelland discussed his intention to pay the Claimant SSP during his notice period with the Respondent's Managing Director. His reasoning was that the Claimant was a long-serving employee, so he wanted to run the decision not to pay Company sick pay past his fellow Director. There was no formal Board meeting to discuss this, but this was not unusual and I accept that it would not be reasonable or practical to expect a full formal Board meeting to be convened every time an employee took sick leave. Contrary to the Claimant's submissions, the Respondent did take account of the Claimant's length of service in the exercise of its discretion, albeit it was not sufficient to displace the Respondent's general policy of not paying Company sick pay during notice.

36. There is no medical evidence concerning the causation of the Claimant's illness. The four GP's statements of fitness for work record his condition as a "stress-related problem", but do not attribute a cause or refer to "work-related" stress, as such statements sometimes do. The fact that the Claimant's absence with stress came immediately after the Respondent's request that he work on new customers during his notice period and the realisation on the part of Claimant that this might have an impact on his new employment is consistent with the Claimant's assertion that this was the trigger for his stress. However, in the absence of medical evidence to this effect, I cannot be satisfied that the Respondent's conduct "caused" the Claimant's ill-health.

37. Even if the Respondent's request that the Claimant work on new business was the trigger for his illness, there is no suggestion that this was an unlawful request on the part of the Respondent. The Respondent was entitled to require the Claimant to work during his notice period "*to perform such duties as required from time to time, in order to assist in the business of the Company*." (paragraph 2.2 of the contract*)*. Part of his role as a Sales Manager related to new business. Whilst the Claimant might have wanted to limit the scope of his post-termination restrictions in his new role (for understandable reasons), the Respondent had cogent reasons for assigning the Claimant work on potential new business and was not in breach of contract in doing so. Thus, even if the Claimant's sickness absence was a reaction to an instruction by the Respondent which he found stressful, this was for reasons related to his future employment with a competitor of the Respondent rather than a result of culpable behaviour on the part of the Respondent. There was no suggestion that the work he was being asked to do by the Respondent was intrinsically stressful.

38. In the circumstances, I do not accept Mr Sendall's submission that the cause of the Claimant's ill-health (whatever that was) was or should have been a relevant circumstance to the exercise of the Respondent's discretion in relation to Company sick pay in this case. There might be circumstances in which a failure to take account of the reason for an employee's sickness absence would be unreasonable, but, in *Braganza* terms, it was not irrational for the Respondent to fail to take account of the alleged cause of the Claimant's sickness in the exercise of its discretion in this case, particularly in the absence of medical evidence attributing such a cause.

39. The fact that an employee has a good attendance record and limited sickness during employment is a potentially relevant factor to the exercise of a discretion to pay contractual sick pay in a given case. The alternative would also be the case, for instance, if a non-disabled employee invariably had 3 months' off sick in every 12-month period, it might be rational to restrict the payment of Company sick pay. However, that does not mean that failing to pay this Claimant Company sick pay during his notice period was irrational or Wednesbury unreasonable. There are such obvious commercial reasons for an employer to restrict the payment of Company sick pay when an employee has taken a decision to leave his or her employment. By definition, one of the retention incentives provided by the employer has failed, so it is entirely rational for an employer to withdraw such an incentive when an employee has expressed a settled intention to leave. There might be rational reasons to pay Company sick pay nonetheless, perhaps to preserve goodwill, but not such powerful reasons to displace the rational exercise of discretion to pay SSP only.

40. The fact that the Respondent exercised its contractual power to require the Claimant to work from home during his notice period did not, in my judgment, fetter its ability to exercise the discretion whether to pay Company sick pay. The Claimant was being required to perform duties by the Respondent during his notice period. This was not classically "garden leave" but an assignment of different duties and an alternative work place. There is no statutory definition of "garden leave", although it is normally associated with a period where an employee is not required to carry out any work for his or her employer, but is permitted to remain at home (to tend their garden), albeit they continue to owe duties of fidelity and are prevented from undertaking other work.

41. Even if the Claimant was on "garden leave" (in the *William Hill v Tucker* sense) during his notice period, he was entitled to be paid his normal pay. This would not result in an automatic entitlement to Company sick pay, but for the Respondent to exercise a discretion concerning the payment of sick pay rationally and in good faith. The Claimant's contractual entitlement was always to Company sick pay in the Board's discretion. Regardless of whether the Respondent had exercised its power under the contract to require the Claimant to work from home, once the Claimant had given notice, the Respondent was entitled to take into account the fact that the Claimant was leaving its employment in the exercise of any discretion under his contract. This would be the case whether he was working out his notice in the office or working or sitting out his notice at home. The material change in his circumstances was that he had given notice to terminate his employment and was off sick during that notice period. There is nothing in *William Hill v Tucker* which would require the Respondent to treat the Claimant as if he were not working out his notice for pay or other purposes. The requirement to pay normal contractual pay ensures that an employee is not placed in a worse position financially by being placed on garden leave as opposed to being permitted to work out his or her notice.

42. Any other result would be curious as it would produce a situation where the Respondent would be able to withhold Company sick pay in its discretion if the Claimant was working out his notice period in the office in the usual way, but, would be obliged to pay full Company sick pay in circumstances where the Claimant was not otherwise being required to work whilst on garden leave.

43. In all the circumstances, the Respondent did not exercise its discretion in relation to the payment of Company sick pay irrationally during the Claimant's notice period. It took account of its general policy of not paying Company sick pay to employees during their notice period and considered whether it should be disapplied in the Claimant's circumstances given his length of

service. There is no evidence of bad faith in its decision and in determining it should not disapply its entirely rational general policy, it arrived at a decision which cannot be said to be one which no reasonable employer could have reached, such as to give rise to a breach of contract or an unlawful deduction from wages. Accordingly, the Claimant's claims are not well-founded.

Employment Judge H Clark on 3 January 2018