



EMPLOYMENT TRIBUNALS

Claimant: Mr Christopher Martin

Respondent: Openreach Limited

Heard at: East London Hearing Centre (via Cloud Video Platform)

On: 20 January 2023

Before: Employment Judge R Barrowclough (sitting alone)

Representations:
Claimant: Mr Cooper (Trade Union representative)
Respondents: Ms Khatun (In-house paralegal)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The Claimant's claim for unlawful deductions succeeds, and the Respondent is ordered to pay him £3,640.83, representing two months' gross pay.

REASONS

1. This is a claim for unlawful deductions where the Claimant claims arrears of pay over a period of approximately five months between August and December 2021, amounting to £5615.28 net, during which period he received no salary or other payments from the Respondent. The Respondent disputes that any such sums are due or to be paid.

2. I heard this case remotely over the course of the morning of Friday 20 January 2023, when the Claimant was represented by Mr Cooper of the CWU and gave evidence in support of his claim, and the Respondent by Ms Khatun, who called Mr Jim Pritchard, a field engineering recruitment manager with the Respondent, as her only witness.

3. The factual background to the matters in dispute was uncontroversial and largely agreed. The Claimant commenced employment with the Respondent as an apprentice network engineer on 8 February 2021. That is a full-time role which involves climbing, underground work, manual handling, and vocational driving, some of the duties being safety critical. As one would expect, the Respondent provides initial training for apprentices such as the Claimant, which I was told includes twelve weeks' classroom learning and between four and eight weeks' practical experience. However, whilst he was still a trainee and before his training had been concluded, the Claimant was signed off sick on 3 March 2021 after developing an ear infection, subsequently diagnosed as left-sided mastoiditis with vestibular symptoms of vertigo and unsteadiness. The Claimant did not subsequently return to work until 18 January 2022, although he was assigned to 'light duties' from 24 December 2021 up to the date of his return.

4. At the start of his employment with the Respondent, the Claimant had been provided with a contract of employment, which he had signed and agreed. A copy of that contract is at pages 54 to 59 in the agreed bundle, with a detailed statement of terms and conditions at pages 60 to 72. So far as relevant to this case, that provides (at page 66) that, being eligible for company sick pay (as it is accepted the Claimant was), he would receive full pay for up to three months' sickness absence, and thereafter half-pay for another three months' absence.

5. The parties agree that the Claimant was paid his company sick pay entitlement in full, which came to an end in August 2021, and that thereafter the Claimant was paid nothing by the Respondent up until 24 December that year, when he was restored to his full contractual rate of pay.

6. The Claimant provided a succession of fit notes covering his absence from 8 March 2021 onwards, copies of which are included in the bundle. He was signed off as not being fit for any work continuously from March until 15 August that year; and on 20 August as being fit for some unspecified work, although the potential options or adjustments included on the fit note were deleted (page 128). The period of that note expired on 3 September 2021, and the next fit note is dated 11 November 2021, signing the Claimant off as being unfit for any work from 6 to 30 November (page 129). Finally, on 6 December the Claimant was signed off from 1 to 28 December 2021, once again as being fit for some unspecified work, the potential options or adjustments included on the fit note being deleted (page 130).

7. During his sickness absence, the Claimant attended a number of absence reviews and/or meetings with the Respondent's managers, and as a result was referred to their Occupational Health advisers, who prepared five reports on the Claimant at various stages between May 2021 and January 2022, copies of each being included in the bundle.

8. The most significant entries in the OH reports are first of all in the 11 August report (page 168) when, in answer to the Respondent's question of '*Likely date of return to work?*', Dr Mackay Brown responded '*If a suitable alternative sedentary and non-safety critical role can be identified then Christopher would be fit to return to this, following a short period of phased return over 2 to 3 weeks*', also recommending that the Claimant be restricted from safety critical duties until further objective medical evidence had been obtained. Secondly, the short follow-up report dated 5 October from Dr Khan (page 171) adds little; but the next report, dated 25 October from Dr Kenny Tan (page 176), confirms that the Claimant had reported no symptoms of dizziness or vertigo since May, and that physical examination had revealed no issues with the Claimant's balance, with symptoms of dizziness/vertigo not

being reproduced clinically. Thirdly, in the report dated 9 January 2022 (page 184), Dr How states that the Claimant was fit to resume his full role including safety critical duties, although a personal risk assessment was advised for working at heights and driving work. As already noted, the Claimant had in fact returned to light duties and full pay on 24 December 2021, and to his full role on 18 January 2022, having collected one of the Respondent's vehicles the day before.

9. The Claimant's evidence was that whilst he had kept in regular contact with his line manager Mr Kevin Westall during his prolonged sickness absence, neither Mr Westall nor anyone else at the Respondent had contacted him in August 2021, after Dr Mackay Brown's report advising that he was fit to resume at least some duties or role had been received. No one at the Respondent had written to him or contacted him to explore the possibilities of his returning to work in some capacity. The Claimant had attended a 'second line manager review meeting' with Mr Pritchard in June 2021, and two further such meetings with him in October and December 2021, the latter being a phone conversation.

10. I did not hear from Mr Westall. Mr Pritchard's evidence was that he could not recall whether he had seen Dr Mackay Brown's report, a copy of which would have gone to Mr Westall, at the time it was received in August 2021; but that he would have done so at his next meeting with the Claimant in October that year. Mr Pritchard could not remember whether Mr Westall had raised with him the possibility of the Claimant's return to work in some capacity following his receipt of that report, although he might have done. In any event, Mr Pritchard said, Mr Westall should have contacted the Respondent's HR having seen the report, but did not know whether that had in fact happened. By the time of Mr Pritchard's meeting with the Claimant in October took place, the additional OH report dated 5 October had been received. Mr Pritchard said that he and the Claimant had discussed his possible return to work during their telephone conversation in mid-December, their proposed meeting earlier in that month having to be postponed due to Mr Pritchard's sudden unavailability, and as a result of which the Claimant was assigned to light duties, but did not think that any such conversation had taken place at their October meeting. It was possible that a note of the meeting had been taken by HR, but no such note was in the bundle. Mr Pritchard confirmed that had alternative duties or a different role been found for the Claimant in the period between August and December 2021, he would have been paid in full at his current contractual rate.

11. In my judgment, the Claimant was fit and able to return to work for the Respondent in at least some capacity for at least some of the period between 11 August and 24 December 2021. That is clear from both Dr Mackay Brown's report dated 11 August, the Claimant's fit note dated 20 August (which expired on 3 September and with no further such note until 11 November), and the later fit note dated 6 December. Plainly some steps should have been taken by the Respondent to address the issue of potential alternative employment for the Claimant on receipt of that report and the fit note shortly thereafter, as Mr Pritchard seems to accept; but it is clear that none were until much later in mid-December 2021.

12. Assessing for how much of that stated period the Claimant should be compensated is not entirely straightforward, and inevitably speculative to some extent. On the one hand, I bear in mind that it might well have taken some time to identify suitable alternative duties which were acceptable to and appropriate for the Claimant, and Mr Cooper in his closing submissions conceded that might have lasted until the beginning of September 2021. Additionally, and bearing in mind that the Claimant was originally signed off sick in early

March that year, and that his sick pay entitlement lasted in one form or another for six months, it appears likely that he was receiving sick pay at 50% of his contractual pay rate for the month of August. Finally, the Claimant was signed off as being unable to undertake any work at all for the period between 6 and 30 November in the fit note dated 11 November.

13. On the other hand, I bear in mind that the Respondent is a substantial employer, and that they were able to identify appropriate light duties for the Claimant reasonably swiftly following his telephone conversation with Mr Pritchard in mid-December 2021. It seems to me reasonable to conclude that the Respondent would have been able to come up with something similar at an earlier stage, had they then turned their minds to the issue. Additionally, it must be acknowledged that, prior to being signed off sick for most if not quite all of November, the Claimant had not submitted or been covered by any fit note for virtually the whole of September and October 2021, albeit further medical reports concerning him were then still awaited.

14. Doing the best I can in these circumstances, I have come to the conclusion that the fairest and most appropriate outcome is for the Claimant to be compensated for the loss of two months' wages which were unlawfully deducted or at least not paid at a time when the Claimant was able to work, and I order the Respondent to pay him the agreed gross sum of £3,640.83.

Employment Judge Barrowclough
Dated: 31 January 2023