Withholding company sick pay from employee suspected of malingering was a fundamental breach of contract

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In Singh v Metroline West Limited the Employment Appeal Tribunal decided that an employer had committed a fundamental breach of contract when it withheld company sick pay from an employee suspected of malingering.

What happened in this case?

Mr Singh was a bus driver for Metroline. On 24 January 2017, he was invited to a disciplinary meeting. The next day, he went off sick. His absence was certified by a Fit Note. He was also assessed by an occupational health advisor, who did not report that the illness was false. Although Metroline offered company sick pay, it decided only to pay statutory sick pay because it believed that Mr Singh had gone off sick simply to avoid the disciplinary meeting.

On 15 March 2017, Mr Singh resigned claiming constructive dismissal. He said that the company had seriously breached his contract of employment by failing to pay company sick pay. He brought various claims against Metroline in the Employment Tribunal. Although he succeeded in a claim for unlawful deduction from wages in respect of the failure to pay company sick pay, he failed in the related constructive dismissal claim (being the more valuable of the two claims since it covered losses flowing from the dismissal).

The Employment Tribunal looked at the relevant documentation and noted that the employment contract and the associated "Drivers' Handbook" both provided for the withholding of company sick pay where sickness absence was not genuine. However, this was only permissible where a "thorough investigation" had shown this to be the case. That had not

happened here. Metroline's Disciplinary Policy did provide for suspension without pay where the company had simply "deemed" an employee to have reported sick to avoid a disciplinary process. However, Metroline had not suspended Mr Singh.

The Tribunal concluded that Metroline had breached Mr Singh's employment contract. However, they decided that it was not a fundamental breach. They found that the decision to withhold company sick pay pending the disciplinary meeting did not reveal an intention no longer to be bound by the employment relationship. Rather, they were encouraging the continuance of the relationship by having Mr Singh engage in the disciplinary process. Since there was no fundamental breach, the constructive dismissal claim failed. Mr Singh appealed to the Employment Appeal Tribunal.

What did the EAT decide?

The EAT decided that the Tribunal had got it wrong in deciding that the breach of contract was not fundamental. The Tribunal's view seems to have been that in order for there to have been a fundamental breach the employer had to intend no longer to be bound by the terms of the contract in a way which meant that it no longer wished to continue the employment relationship at all.

The EAT said this was an error in law. In fact, what is required is an intention no longer to comply with the terms of the contract that is so serious as to go to the root of the employment contract. They gave the example of employer who wanted to keep its staff but pay them less. If the employer decided unilaterally to cut pay this would be a fundamental breach of contract, regardless of the desire to maintain the employment relationship.

The EAT also noted that the Tribunal had not considered two important cases of relevance. Firstly, in Cantor Fitzgerald v

Callaghan it was decided that whether non-payment of wages amounts to a fundamental breach may depend on whether the non-payment was deliberate. Secondly, in Roberts v Governing Body of Whitecross Schoolit was decided that a mistaken belief that there was a contractual power to reduce pay did not prevent there being a fundamental breach of contract. In this case, this meant that there was only one possible answer: Metroline had committed a fundamental breach of Mr Singh's employment contract.

What does this mean for employers?

This case highlights the perils for an employer of jumping the gun. If the employer had paused to gather evidence to substantiate its belief that Mr Singh was malingering, it would either have been able to withhold sick pay in accordance with its own terms, or potentially have moved to dismiss summarily on the grounds of dishonesty. Alternatively, if the imperative was simply to cut pay as quickly as possible, it could have relied on the provisions entitling suspension without pay. Unfortunately for the company, their hair trigger response landed them with a constructive dismissal claim. The decision also underlines that a fundamental breach of contract is the basis for a constructive dismissal claim; the employer's wider intentions are not relevant.

Employers who find themselves in this situation should also remember that it may still be possible to proceed with a disciplinary hearing, despite the fact that the employee has gone off sick. Disciplinary hearings can be modified to try to secure the sick employee's participation in the process. Examples of modifications include: where and how the hearing is held; who is allowed to accompany the employee; the role that any companion takes in the hearing; the structure and timing of the hearing; and the making of written submissions in addition to, or instead of, attending the hearing in person. In rare cases it may even be necessary to proceed with a disciplinary hearing without the employee present.

However, you should seek legal advice before proceeding down this route.

Singh v Metroline West Ltd

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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