



TC01997

Appeal number: TC/2011/04255

STATUTORY MATERNITY PAY – definition of ‘normal pay day’ and ‘day of payment’ – whether in a case when earnings were paid and received on different days the date of payment or the date of receipt counts – held the date of payment counts – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SANGHITA ARYAL DAHAL

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

**First
Respondents**

and

MCDONALD’S RESTAURANTS LIMITED

**Second
Respondents**

**TRIBUNAL: JUDGE JOHN WALTERS QC
IAN B ABRAMS**

Sitting in public at Bedford Square, London on 26 March 2012

The Appellant was not present or represented

Steve Duke, Officer of HM Revenue and Customs, for the Respondents

The Second Respondent was not present or represented

DECISION

1. When this appeal was called on for hearing there was representation only for the
5 First Respondents (HMRC). The Tribunal ascertained that letters (dated 13 January 2012) giving notice of the hearing had been sent to both the Appellant (Mrs Dahal) and to the Second Respondents (McDonalds). The Tribunal decided to proceed with the hearing pursuant to rule 33 of the Tribunals Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, considering that it was in the interests of justice to do so.

10 2. The Tribunal had before it a bundle of documents from which it appeared that Mrs Dahal had appealed against a decision issued by HMRC (Officer Art Chisholm) on 19 January 2011 under section 8 of the Social Security Contributions (Transfer of Functions etc.) Act 1999. The decision was that Mrs Dahal was not entitled to Statutory Maternity Pay (“SMP”) and that McDonalds was not liable to pay SMP to
15 her.

3. Before issuing the decision appealed against, HMRC had received information from both Mrs Dahal and McDonalds. McDonalds (and HMRC) accept that Mrs Dahal satisfies all the conditions for entitlement to SMP laid down in section 164 of the Social Security Contributions and Benefits Act 1992 (SCBA) except one. The
20 condition which McDonalds and HMRC contend Mrs Dahal does not satisfy is contained in section 164(2)(b) SCBA and is as follows:

‘that [the claimant woman’s] normal weekly earnings for the period of 8 weeks ending with the week immediately preceding the 14th week before the expected week of confinement are not less
25 than the lower earnings limit in force under section 5(1)(a) [SCBA] immediately before the commencement of the 14th week before the expected week of confinement’

4. The lower earnings limit (LEL) referred to was £97 at the relevant time.

5. The issue giving rise to the dispute focussed on the meaning of the expression ‘normal weekly earnings’ in section 164(2)(b) SCBA.

6. That expression is defined by reference to the definition of ‘normal pay day’ in
30 regulation 21(2) of the Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960) and the issue giving rise to the dispute is directly concerned with the construction of that definition. That definition (and the definition of ‘day of payment’) are as follows:

‘“normal pay day” means a day on which the terms of a woman’s contract of service require
35 her to be paid, or the practice in her employment is for her to be paid, of any payment is due to her;’

‘“day of payment” means a day on which the woman was paid.’

7. Mrs Dahal started her employment with McDonalds on 12 March 2008. Her normal working days were Monday, Wednesday, Friday and Saturday. Her normal
40 payment period was two-weekly, on a Saturday. She submitted to HMRC copies of her payslips from 22 May 2010 to 3 July 2010. They showed as “Pay Date” 22 May,

5 June, 19 June and 3 July, 2010 – all of which fell on a Saturday. The payslips also show that McDonalds paid her *via* BACS.

5 8. If all these pay dates were taken into account in calculating her ‘normal weekly earnings’ the result would be £100.905, being 1/8 of the total gross earnings reported on the payslips relating to these pay dates.

9. However McDonalds have indicated to HMRC that Mrs Dahal’s ‘normal pay day’ is the Thursday following the date (a Saturday) stated on the payslips. If this is correct the calculation for Mrs Dahal’s ‘normal weekly earnings’ takes account of gross earnings relative to payments made on 13 May, 27 May, 10 June and 24 June,
10 2010 – that is, it moves the period of calculation back by one two-week period. In the result, the pay relative to the payslip showing the “Pay Date” of 3 July 2010 falls out of the calculation and the pay relative to the payslip for the two-weekly period immediately before that relative to the “Pay Date” of 22 May 2010 comes into the calculation. According to McDonalds, the calculation of Mrs Dahal’s ‘normal weekly
15 earnings’ gives a result of £93.07875, being 1/8 of £744.63.

10. It can be seen that Mrs Dahal’s calculation gives ‘normal weekly earnings’ above the LEL, while McDonalds’ calculation gives ‘normal weekly earnings’ below the LEL.

11. HMRC asked to see Mrs Dahal’s bank statements and they showed that her net earnings were received on the Thursday after the relative ‘Pay Date’ as given on her
20 payslips.

12. HMRC took the view that Mrs Dahal’s ‘normal pay day’ and ‘day of payment’ was the Thursday when net pay was credited to her account, rather than the previous Saturday, which was the “Pay date” stated on her payslip. They take this view
25 because the Thursday ‘is the day you actually receive the payment’ – see, for example, HMRC’s letter to Mrs Dahal dated 6 May 2011).

13. Mr Duke supported this interpretation in his oral submission to us.

14. However, we reject that submission. Where, as in this case, there is a difference
30 between the date on which an employer pays its employee and the date when the employee receives payment, in our judgment the ‘normal pay day’ and the ‘date of payment’ is the date when the employer pays rather than the (different) date when the employee receives. The definitions cited above refer exclusively to payment, and not at all to receipt.

15. The best evidence we have of the date(s) of payment of Mrs Dahal’s earnings is
35 the payslips which show that her pay date was the Saturday.

16. We should add that we have not seen any contract providing for a pay day for Mrs Dahal, nor have we seen any bank statements showing when the payments were made by McDonalds. We make the point, however, that the date on which earnings are paid by McDonalds is a date in the direct control of the parties. If, as is the case
40 here, the net payment is received on a later date, the date of receipt is to an extent

random and outside the control of either McDonalds or Mrs Dahal and is not to be preferred as the correct date of payment for that reason also.

17. Dealing with the point on the best evidence we have, we decide that Mrs Dahal's dates of payment were the Saturdays for which she contended, with the result
5 that the correct calculations shows that her earnings for relevant purposes were above the LEL. We allow her appeal on this basis. She is entitled to be paid SMP by McDonalds.

18. We note that Mrs Dahal raised additional reasons why she thought her appeal should be allowed. She complained that McDonalds had discriminated against her
10 because they did not pay her for time she spent attending ante-natal appointments (particularly those on 26 May and 23 June 2010). She also contended that she should be given credit in the calculation of her 'normal weekly earnings' for payment that she did not receive because of her attendance at the ante-natal appointment on 26 May
15 2010. We cannot accept either of these submissions as a reason for allowing her appeal. The legislation which we must apply is only concerned with the actual payments of earnings made.

19. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal
20 against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**JOHN WALTERS QC
TRIBUNAL JUDGE**

RELEASE DATE: 18 April 2012