



**TC03642**

**Appeal number: TC/2013/02850**

***STATUTORY SICK PAY: Social Security (Contributions and Benefits) Act 1992;  
whether decision making as to an award of SSP was flawed - no***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PARETO RETAIL LTD**

**Appellant**

**- and -**

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

**First  
Respondents**

**-and-**

**JILL ANNETTE CAMPBELL**

**Second  
Respondent**

**TRIBUNAL: JUDGE CHRISTOPHER HACKING  
MRS GAY WEBB**

**Sitting in public at Manchester on 23 April 2014**

**Mr Adrian Costain, Managing Director of and for the Appellant.**

**Ms Sandi Connolly, a Case Presentation Officer, appeared for the First Respondents.**

**The Second Respondent appeared in person**

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## DECISION

1. This appeal concerns an award of Statutory Sick Pay (SSP) under the provisions of Part XI Social Security Contributions and Benefits Act 1992 (sections 151 et seq)
- 5 The decision of the First Respondents was that Statutory Sick Pay be awarded to the Second Respondent at the rate of £81.60 per week for the period from 20 February 2012 to 5 April 2012 and at the rate of £85.85 per week for the period from 6 April 2012 to 4 September 2012 and that the Appellant was liable to pay to the Second Respondent the sum of £2,379.52.
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2. Section 8 of the Social Security Contributions (Transfer of Functions etc) Act 1999 empowers an officer of HMRC to make decisions concerning SSP which fall to be made under the 1992 act referred to above.
- 15 3. An appeal lies to the tax tribunal under the Transfer of Functions and Revenue and Customs Appeal Order 2009. The function of the tribunal is to review the decision making process undertaken by HMRC and to consider whether there has been an error in public law terms in that process. The tribunal may only set the decision aside if it is satisfied that there has been such an error.
- 20 4. Both HMRC and Pareto Retail Ltd (Pareto) had helpfully prepared speaking briefs for the use of the tribunal. The brief from HMRC identified what it understood to be the main contentions of Pareto in relation to the matter under appeal. The issues so identified were confirmed by Mr Costain who accepted these matters as a starting point for his objections to the decision under appeal as more particularly elucidated in his own brief which was considered in detail by the tribunal during the course of the hearing.
- 25 5. The principal matters in dispute between the parties appeared to the tribunal to be:
- 30 (i) whether the decision to award SSP to Miss Campbell was flawed by reason of HMRC's failure to have proper regard to an offer said to have been made by Pareto to effect alterations to the nature of Miss Campbell's duties which would accommodate her particular disability; and
- 35 (ii) more generally, whether the decision making process was properly carried out as opposed to (as Mr Costain suggested) being simply undertaken as a "paper" operation which did not take into account the difficulties faced by small to medium sized organisations such as Pareto doing their best to deal fairly with the problems which arise when an employee encounters a disabling condition.
- 40 6. Neither Pareto nor HMRC called any witness evidence. Miss Campbell as the Second Respondent did not give evidence on her own behalf although both she and Mr Costain did respond to questions directed to them by the tribunal.
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7. Pareto was engaged in running a number of shops selling alcoholic and non alcoholic drinks and other items under the Bargain Booze franchise arrangements. Miss Campbell had worked for Pareto for some 10 years at each of its locations in and around Birkenhead on the Wirral.

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8. Mr Costain told the Tribunal that there had been an earlier long running dispute with Miss Campbell concerning SSP in 2012 when she took the full period of absence available to her. It was acknowledged by Mr Costain that this matter did not, however, relate in any way to the present claim.

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9. The issue with which the tribunal is concerned relates to a period of absence between 20 February 2012 and 4 September 2012 resulting from an injury to Miss Campbell's left wrist which had been broken and which, according to the evidence, required considerable medical attention during her absence.

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10. Mr Costain contended, on behalf of Pareto, that an offer made to Miss Campbell to return to work on the basis that she would only be required to undertake light duties was unreasonably refused as a consequence of which the employer's liability for SSP should have been limited (presumably to the date of the offer although this was not expressly stated).

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11. For her part Miss Campbell says that she was not fit to undertake even light duties. Miss Campbell also disputed that any clearly defined alternative offer of light duties was made to her by Pareto. She told the tribunal that she had asked her immediate line manager, Miss Prince, for a letter setting out what the light duties would be so that she could consult her medical advisers whether it was safe to return to work. No such letter had been forthcoming however and shortly thereafter Miss Prince left the company's employ.

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12. Mr Costain told the tribunal that he found it to be extraordinary that an injury to Miss Campbell's left wrist whilst she was naturally right handed would incapacitate her to the extent she had claimed. The sort of duties which Mr Costain had in mind included clerical accounting functions, keeping a watch for pilfering on the closed circuit television system installed at Pareto's locations and other similarly physically undemanding duties.

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13. Mr Costain has alleged that Miss Campbell had also unreasonably concealed from those who undertook medical examinations of her wrist for the purpose of assessing fitness for work that she was "a trained and accomplished Bookkeeper". Ms Campbell did not accept that this was the case.

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14. It was a significant part of Pareto's case that the offer of light duties was not properly taken into account by HMRC in its decision making process.

15. Miss Campbell's sickness record was said by Mr Costain to be the worst in the company over the past 17 years. Although he did not specifically articulate this complaint, it was clear to the tribunal that what Mr Costain was in substance

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suggesting was that Miss Campbell had simply played the SSP system to her personal advantage at the company's cost.

16. For HMRC it was said that Miss Campbell had first made known her incapacity to her employer on 20 February 2012. She had provided medical certificates from her GP and/or her Consultant Orthopaedic Surgeon covering the 28 weeks period of her SSP entitlement.

17. Because the claim to SSP was disputed Miss Campbell had had two separate assessments from an independent medical advisor who had concluded that Miss Campbell was unfit either to carry out her normal duties or the alternative light duties to which Mr Costain had referred.

18. It was on the basis of this medical evidence that HMRC made its decision. The suggestion that the second assessment which specifically addressed the possibility that Miss Campbell might be able to undertake light duties was no more than a "paper" exercise designed simply to validate the decision HMRC had already made was rejected by HMRC which contended that it was necessary and reasonable to ask for a second assessment in light of the offer of light duties. This was carried out without undue delay.

*The tribunal's consideration of the appeal and its decision*

19. The tribunal acknowledges and has some sympathy with Mr Costain's view that a left handed injury to a right handed person might be such that the employee concerned was wholly unable to carry out any duties at all. This claimed level of functional disability was something of a surprise to the tribunal. It is the case, for example, that such an injury, without more, would not satisfy the relevant descriptor of the Work Capability Assessment necessary to qualify for Employment and Support Allowance so that if Miss Campbell had been an applicant for that benefit it was more probable than not that she would be expected to look for employment taking account of the employer's duty to make such adjustments as might be needed to accommodate the her particular disability.

20. In support of his view that the injury did not preclude Miss Campbell from undertaking light duties and perhaps relevant to the question of Miss Campbell's good faith in this matter, Mr Costain had made the point that immediately on the expiry of the 28 week SSP period of entitlement Miss Campbell returned to work on full duties. Miss Campbell for her part had told the tribunal that she was a mother of 3 children and that she needed to get back to work to meet her household commitments. Mr Costain also referred to reports received of "Facebook" postings made by Miss Campbell in which it was apparent that despite her injury she had continued to be able to enjoy an active social life.

21. Be that as it may this is not a case concerning Employment and Support Allowance (although, interestingly, the same organisation contracted to make

assessments for ESA also undertook the two examinations commissioned in the case of Miss Campbell by HMRC).

22. The medical evidence in this appeal clearly supports the decision made by  
5 HMRC. That decision is also supported by the evidence from Miss Campbell's GP  
and Consultant. That this is so was not disputed by Mr Costain whose contention was  
that the medical evidence incorrectly assessed Ms Campbell's ability to undertake  
light duties.

10 23. The tribunal is not willing to go behind the quite clear and unambiguous  
medical evidence which was before it and, like HMRC, must accept it. It was open to  
Pareto to dispute the evidence by bringing evidence of its own but it did not do so. Mr  
Costain, at various points during the hearing, referred to the fact that his wife was a  
15 highly qualified Occupational Therapist with extensive knowledge and experience of  
hand transplant and remediation techniques. She could have come along to the  
tribunal to give evidence on the subject but did not do so. The tribunal did however  
take note of Mr Costain's point that Mrs Costain supported the view that Miss  
Campbell could reasonable have undertaken the light duties suggested or at least some  
of them.

20 24. The other main objection raised by Mr Costain to the decision made by HMRC  
in this appeal relates to the way in which HMRC conducted its enquiries and, more  
particularly, undertook the decision making process. It was Mr Costain's contention  
that the narrow approach to decision making adopted by HMRC, restricted as it was  
25 to the language of the relevant legislation, militated against a proper assessment of the  
merits or otherwise of the claims made by or on behalf of Miss Campbell in this  
appeal.

30 25. Mr Costain also contended with reference to Miss Campbell's GP's advice as to  
her incapacity that "the public body implementation of the "Fit Note" regime system  
substantially failed in this instance". He found "the quality and timeliness of the  
independent medical advice sought and received by the HMRC disputes team and the  
information they provided confusing and generally inadequate".

35 26. It is neither the intention nor function of this tribunal to comment on these  
observations. What the tribunal is required to do is to consider the decision made by  
HMRC and to either confirm it or to set it aside. It can only set it aside on public law  
principles if it is satisfied that the decision making process was flawed. This involves  
a consideration of whether HMRC took account of irrelevant matters or failed to take  
40 account of relevant matters. A decision might also be flawed if it is judged to be  
wholly unreasonable in accordance with what are known as the "Wednesbury "  
principles. An example might be a decision which was wholly at odds with all of the  
evidence before the decision maker.

45 27. It was Mr Costain's contention that HMRC failed to properly take account of  
the offer of light duties which it had made to Miss Campbell. That is a contention  
which the tribunal finds cannot reasonably be sustained as it was precisely for the

purpose of taking this offer into account that the second medical assessment of Miss Campbell's injury was commissioned by HMRC. The tribunal rejects the suggestion made by Mr Costain that this was no more than a "paper exercise" designed simply to validate HMRC's decision. It also rejects the allegation that Ms Campbell had in some way concealed from her medical advisers that she was a "trained and accomplished bookkeeper". It is unclear to the tribunal in what particular context this was said to be relevant. By the time of the second referral to First Respondents medical advisers the nature of the light duties proposed by Mr Costain had been made clear. It was the opinion of the advisers that Ms Campbell was unfit for those duties.

28. The tribunal finds that the decision made by HMRC and issued on 26 October 2012 (being the decision the details of which are set out in paragraph 1 above) was one it was entitled to make. It was a decision arrived at after a proper consideration of the facts and applying the relevant law. It was a decision which was made having proper regard to the medical advice of Miss Campbell's GP and consultant as well as to HMRC's own commissioned medical reports. It is the finding of the tribunal that there is no proper basis for the decision to be set aside and it is therefore confirmed.

29. This document contains full findings of fact and reasons for the decision set out above. Any party dissatisfied with either of the decisions has a right to apply for permission to appeal against it/them 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.

**CHRISTOPHER HACKING**

**TRIBUNAL JUDGE**

**RELEASE DATE: 28 May 2014**