



TC03959

Appeal number: TC/2013/04980

INCOME TAX – statutory sick pay – employment agency – employee off sick – no work available before sick pay liability arose – no- p45 identified date finished work- sick pay due – case dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TECH TRADE RECRUITING LTD

Appellant

- and -

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

Respondents

-and-

MR SZYMON NOWACKI

Respondent

**TRIBUNAL: JUDGE DAVID S PORTER
MR DAVID MOORE**

Sitting in public at Bedford House, Belfast on 5 August 2014

Mr David O'Callaghan, the managing director, appeared for the Appellant

Mrs Lindy Crawford, a presenting officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

1. Mr David O’Callaghan (Mr O’Callaghan) appealed on behalf of Tech Trade Recruiting Limited (the Company) against the Respondents’ (HMRC) decision of 14 November 2011 stating that Mr Syzmon Nowacki (Mr Nowacki) was entitled to £669.12 Statutory Sick Pay and that the Company was liable to pay it. The sum of £669.12 was reduced to £587.52 as credit had to be given for Mr Nowacki’s holiday pay. Mr O’Callaghan said that Mr Nowacki was a temporary worker employed under a contract of services, whose employment ceased on 6 May 2011. As a result any sick pay entitlement should be paid by Social Security and not the Company. HMRC said that Mr Nowacki was an employee of the company and as the P45, given to Mr Nowacki when he left the business, stated that his employment ceased on 27 June 2011 the Statutory Sick Pay was due from the Company

2. Mrs Lindy Crawford (Mrs Crawford) appeared for HMRC and produced a bundle of documents. Mr David O’Callaghan (Mr O’Callaghan) appeared for the appellant and gave also gave evidence. Mr Szymon Nowacki did not appear and had not been called to do so.

The Law

3. The Social Security Contributions and Benefits (Northern Ireland) Act 1992 (the Act) provides at:-

Section 147 (1) Where an employee has a day of incapacity for work in relation to his contract of service with an employer, that employer shall, if the conditions set out in sections 148 to 150 below are satisfied, be liable to make him, in accordance with the following provisions of this Part of this Act, a payment (to be known as “Statutory sick pay”) in respect of that day.

The qualifications are:

- The day must form part of a period of incapacity to work.
- The period of “incapacity to work” means four or more consecutive days.
- The days must be a ‘period of entitlement’ beginning with the period of incapacity and ending with whichever of the following first occurs:
 - The termination of that period of incapacity
 - The day the employee reaches his maximum entitlement under the Act.
 - The day his employment ends.
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- To be a qualifying day, the day must be a day on which the employer and employee have agreed that the employee should work or failing that the day determined in accordance with the regulations.

5 The employee must notify his employer within the time limit notified and specified by the employer or otherwise no later than 6 days of the incapacity.

- The notification shall contain such information as may reasonably be required to determine the duration of the sickness.

10 Section 118 of the Employment Rights (Northern Ireland) Order 1996 provides that an employee who is continuously employed for one month or more is entitled to one weeks' notice to determine his employment.

The Facts

15 4. Mr O'Callaghan told us that he had been working in the recruitment business for over 25 years. He had worked in Poland and in the former Czechoslovakia. As a result he had set up the Company to assist individuals from that part of the world to obtain employment in the United Kingdom. He explained that he took individuals onto his books and indicated that he would find them employment from time to time. There was no obligation for the individuals to stay with him and quite often they employed more than one business to find them work.

20 5. Mr O'Callaghan said that the Company provided a contract of services and he produced a copy of Mr Nowacki's contract dated 15 October 2007. The contract provides:

- Clause 2.2 "For the avoidance of doubt. These Terms shall not give rise to a contract of employment between the Employment Business (the Company) and the Temporary Worker (Mr Nowacki). The Temporary Worker is engaged as a self-employed worker, although the Employment Business is required to make statutory deductions from his remuneration in accordance with clause 4.1.
- Clause 4.1 provided that the Temporary Worker would be paid a daily rate agreed as a result of work being found for the Temporary Worker payable in arrears subject to the deduction of PAYE and appropriate NI contributions. No pay would be payable other than when the Temporary Worker was in employment with one of the Company's customers.
- Clause 6 provided that "The Temporary Worker may be eligible for Statutory Sick Pay provided that he meets the relevant statutory criteria. Mr O'Callaghan confirmed that he had paid Statutory Sick Pay to other Temporary Workers in the past and he was not averse to making such payments, where they were due.

6. It was clear that Mr Nowacki had worked for the Company for some time and Mr O'Callaghan was sympathetic to Mr Nowacki's requirements. Mr O'Callaghan also produced details of the Company's work sheets. The sheets were completed on behalf of a Temporary Worker by the Company's customers and on receipt of the work sheets from the customer, Mr O'Callaghan worked out the pay due to Mr Nowacki at his agreed rate. We were told that Mr Nowacki submitted a sick line covering two weeks starting from 20 April 2011. Mr O'Callaghan advised HMRC that Mr Nowacki returned to work on 27 April 2011. The 25 and 26 April had been Bank Holiday and the Company had paid 2 days holiday pay for that period. This meant that Mr Nowacki's waiting days were 20, 21 and 22 April, which did not amount to a 'period of incapacity for work'.

7. Mr Nowacki also submitted a sick line covering the period 4 May 2011 for two weeks. There is a Doctor's note dated 4 May 2011 in the bundle indicating that he might have been suffering from a hernia. Mr O'Callaghan produced a detail of Mr Nowacki's work sheet for the period ending 6 May 2011. This showed that he last worked for the Company's customer on Tuesday 3 May 2011. Mr O'Callaghan told us that this customer was one of his best customers for whom he did a great deal of work. Mr Nowacki worked in the customer's LKCO department and Mr O'Callaghan had been told by a Mr Winney, his contact at the company that as a result of a slackening off of work there was no longer a job for Mr Nowacki. We note from the work sheet that there were four other Temporary Workers working for the IKCO department. Those four appear to have continued to work for the IKCO department for the weeks ending 13 May 2011 and 20 May 2011. Mr O'Callaghan was not able to explain satisfactorily why that should be the case.

8. Mr O'Callaghan stated that as there was no further work available for Mr Nowacki his employment was terminated on 6 May 2011. On 17 December 2012, in a telephone conference meeting, Mr O'Callaghan had confirmed, at item 10 of the note that Mr Nowacki's position ceased to exist in June 2011 as the client had laid off a number of workers. The note is signed on 14 January 2013 by Mr O'Callaghan as a correct record. We have therefore decided that the department had not closed down in May.

9. Mr O'Callaghan said that Mr Nowacki's waiting days, before he was entitled to any sick pay, would have been 4, 5, and 6 May. As a result he had not obtained the necessary 4 days to qualify for Statutory Sick Pay. HMRC said that Mr Nowacki was employed until 27 June 2011 as evidenced by his P45. The P45 is dated 7 July 2011 and shows the leaving day as 27 June 2011. Mr O'Callaghan told us that, like many employers, he completed several P45s at the same time. He had completed Mr Nowacki's P45 sometime later and he had inserted the 27 June 2011 to assist Mr Nowacki in getting any tax back. We might have agreed with that if the P45 had also been dated 27 June 2011, on the basis that Mr O'Callaghan had filed in the same date as he completed the P45. Mr O'Callaghan has stated that Mr Nowacki stopped work on 4 May. He has decided to put a date of leaving in the P45 at a date different to the date of the completion of the P45 and he must, therefore, have put the 27 June 2011 in deliberately. He also confirmed the telephone conversation that Mr Nowacki was

unemployable from June 2011. We have decided that Mr Nowacki's employment ceased on 27 June 2010.

5 Submissions

10. Mrs Crawford submitted that Mr Norwacki was employed by the Company irrespective of what the purported contract of services said. HMRC had no evidence to show that Mr Nowacki's employment ceased on 6 May 2011. The P45 showed the finishing date was 27 June 2011. That period had been confirmed in the telephone conference and HMRC were correct in requiring the Company to pay the Statutory Sickness pay of £587.52 and the appeal should be dismissed.

11. Mr O'Callaghan submitted that he spoke a little Polish and Czech and that he had set his business up to assist workers from Eastern Europe to obtain employment. Mr Nowacki was entitled to Statutory Sick Pay and Social Security should pay it. The sick pay figure had been reduced as he had told HMRC about the holiday pay that he had paid. HMRC had initially confirmed that Statutory Sick Pay was not payable by the Company. They had then sought separate advice, within the department, and decided that it was due. Mr Nowacki was self-employed and as a result the Company was not obliged to pay any Statutory Sick Pay.

12. If that was not right, Mr Nowacki was dismissed on 6 May 2011 as the Company's customer no longer required his services. In those circumstances he had not fulfilled the 4 day incapacity period and the Company could not be liable for the Statutory Sick Pay. Mr O'Callaghan expressed concern as to whether Mr Nowacki had ever received his sickness pay, He stated that if he had known that he had not he would have paid him and awaited the outcome of this appeal. In all the circumstances the Company should not pay the Statutory Sickness Pay and the appeal should be allowed.

30 The Decision

13. We have considered the law and the facts and have decided that the Company should pay the Statutory Sickness Pay. We are satisfied that Mr Nowacki was employed by the Company. Although clause 4.1 of the contract states that Mr Nowacki is not the Company's employee, he undoubtedly is. The Company has to pay his PAYE and NI contribution. Further, Mr O'Callaghan confirmed to us that the rate of pay was fixed by the Company and was not the actual rate quoted to the customer. This was because it was necessary for the Company to make profit to stay in business. In any event Mr O'Callaghan told us about two previous occasions when the Company had paid the Statutory Sickness Pay. He also made it clear that he did not object to so doing, if the payment was legally required.

14. Whether the payment should be paid or not will depend on the termination date of Mr Nowacki's contract. We are satisfied that that date was 27 June 2011. Mr O'Callaghan told us that he had completed Mr Nowacki's P45 with a batch of others. We have no doubt that that was the case. However, he has clearly identified the termination date as 27 June 2011. That must have been a conscious decision as the P45 was completed on 7 July 2011. If the termination date had been 6 May, as suggested by him, why would he not have said so. His position is not helped by his signature, by way of confirmation, in the telephone conference that Mr Nowacki's employment must have ceased sometime in June because there was no further work for him at the Company's customer.

15. A P45 is an important document as it identifies to a new employer the tax position of the employee. If it is suggested that Mr Nowacki's employment ceased on 6 May 2011 then the dates for working out his tax position are incorrect. It was clear to us that Mr O'Callaghan had considerable experience in the running of his agency and was familiar with the income tax requirements for the completion of a P45. On the balance of probabilities we have decided that Mr Nowacki's contract of employment ceased on 27 June 2011. The Company must pay £587.52 the Statutory Sickness Pay and we dismiss the appeal.

16. 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 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.

DAVID S PORTER
TRIBUNAL JUDGE

RELEASE DATE: 27 August 2014