



TC05370

Appeal number: TC/2014/04818

NATIONAL INSURANCE CONTRIBUTIONS – entitlement to Statutory Sick Pay – period of incapacity – independent medical assessment – issues raised outside the Tribunal’s jurisdiction – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MISS ADAIM BERHE

Appellant

- and -

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

Respondents

ACCOMPLISHED CONTRACT SERVICES LTD

**Second
Respondent**

**TRIBUNAL: JUDGE HEIDI POON
CAROLINE DE ALBUQUERQUE**

Sitting in public at the Tribunal Centre, Fox Court, London, on 5 July 2016

No representation or attendance by the Appellant

Ms Linda Ramsay, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant, Miss Berhe, appealed against HMRC's decision issued on 28
5 July 2014 that she was not entitled to Statutory Sick Pay (SSP) for the period from 12
November 2013 to 22 November 2013. The decision was made in accordance of s 8
of the Social Security Contributions (Transfer of Functions, etc) Act 1999.

2. By letters dated 28 February and 3 March 2016, Miss Berhe applied to have the
case dealt with on the papers, to which HMRC agreed in writing on 15 March 2016.
10 The second respondent, Accomplished Contract Services Limited ('ACS'), which was
the employer of Miss Berhe at the relevant time, made no response to the application.

3. By letter dated 3 May 2016, the Tribunal confirmed that in the absence of an
agreement by the second respondent, the matter cannot be determined on the papers.
The case is categorised as 'standard' (not a default paper case), and in accordance
15 with the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009
(('Tribunal Rules'), 'the Tribunal must hold a hearing before making a decision which
disposes of proceedings, or part of the proceedings' unless 'each party has consented
to the matter being decided without a hearing' (Rule 29(1)(a)).

4. The letter of 3 May 2016 also informs the parties of the option to put any
20 evidence and submissions in writing in the event that any party chooses not to attend
the hearing.

Hearing in absence

5. There was no appearance of the appellant or the second respondent on the day
of the hearing. The Tribunal was satisfied that the appellant and the second
25 respondent had been notified of the hearing, and that no postponement application had
been made.

6. Miss Berhe has written to the Tribunal on 3 March 2016 to confirm that she
would like the appeal 'to continue without [her] attendance'.

7. The submissions from the second respondent had been made during the review
30 procedure by HMRC.

8. We considered the position in the light of Rules 2 and 33 of the Tribunal Rules,
and decided that it would be in the interests of justice to proceed with the hearing in
the absence of the appellant and the second respondent.

Factual background

9. On 16 December 2013, Miss Berhe telephoned HMRC to register a dispute
35 against ACS over her entitlement to SSP for the period from 1 to 22 November 2013.

10. On 17 December 2013, HMRC issued enquiry forms to Miss Berhe and ACS for completion.

11. Miss Berhe completed the questionnaire on 28 December 2013 and advised:

- (a) Employment with ACS started on 12 September 2011;
- 5 (b) Normal working days were Monday to Friday;
- (c) Paid 4-weekly on a Wednesday;
- (d) The date she became sick was 1 November 2013;
- (e) The date she last worked was 1 November 2013;
- (f) The date she first reported sick was 1 November 2013;
- 10 (g) The sickness ended on 22 November 2013;
- (h) The date of return to work was 25 November 2013

Enclosed with the questionnaire in support of her case were: (a) Statements of Fitness to work from her GP; (b) payslips from 23 August 2013 to 15 December 2013; (c) an email from her employer; (it is unclear which email is being enclosed).

15 12. The doctor's certificates are in the standard form Med 3 04/10 with the header: 'Statement of Fitness for Work for social security or Statutory Sick Pay'. The first form covers the period from 1 to 8 November 2013, and the doctor assessed the case on 1 November 2013 for the condition of 'Shoulder pain'. The second certificate covers the period from 12 to 22 November 2013, and the case was assessed on 12
20 November 2013 for the condition of 'feeling stressed'. In both instances, the doctor has ticked the statement: 'you are not fit for work'.

13. The four payslips provided by Miss Berhe show the following details:

- (1) Pay period 26 August 2013 to 22 September 2013, 8 shifts of 2.5 hours each worked between 10 September and 20 September 2013;
- 25 (2) Pay period 23 September to 20 October 2013, 20 shifts of 2.5 hours (two with overtime at 3 and 4 hours); 15 shifts of 8 hours each;
- (3) Pay period 21 October to 17 November 2013, 10 shifts of 2.5 hours to 1 November; 9 shifts of 8 hours to 31 October 2013;
- 30 (4) Pay period 18 November to 15 December 2013, 15 shifts of 2.5 hours worked between 25 November to 13 December 2013.

14. ACS contended that Miss Berhe's incapacity was only genuine for the period from 1 to 8 November 2013; that she worked on 1 November and reported sick during the shift. As regards the period from 12 to 22 November, ACS stated the following:

35 'Miss Berhe was on a probationary basis on a new role. It became apparent she wasn't able to complete tasks within this role. We replaced her and she continued her regular role.'

‘We believe the first absence was genuine but feel the stress related issue suffered was a result of Miss Berhe [being] unhappy that we removed her from the role she was unable to complete.’

5 15. ACS also enclosed a job description as required by Medical Services of Miss Berhe’s employment for her ‘regular role’ doing the 2.5-hour shift. The ‘job description’ took the form of the Daily Checklist of the cleaning duties that Miss Berhe was to perform for the reception, office, kitchen and vending areas of a business premises, including the emptying and removal of waste from bins.

10 16. In the absence of an agreement between the employer and the employee, the case was referred to Medical Services for an opinion as regards Miss Berhe’s capacity to work in the period from 1 to 22 November of 2103. Miss Berhe attended a medical assessment on 24 March 2014. The assessment report on 24 March 2014 runs on for six pages and covers many aspects of the worker’s health and fitness.

15 17. Based on the medical assessment report and the job description provided by ACS, Medical Services advised HMRC that from 1 November to 8 November 2013, Miss Berhe was incapable of her usual work, but was capable of her usual work from 12 November to 22 November 2013.

20 18. By letter dated 16 April 2014, HMRC related the opinion of Medical Services to Miss Berhe and advised that the second respondent was liable to pay the SSP for the period from 1 November to 8 November 2013, which amounts to £34.68.

19. By letter dated 24 April 2014, Miss Berhe contended that her incapacity for the period from 12 to 22 November 2014 was genuine due to the shock and anxiety she suffered from the change in her working pattern.

25 20. On 3 June 2014, HMRC issued a formal Notice of Decision to both parties, confirming that Miss Berhe’s first day of sickness was 2 November 2013; that for SSP purposes, only days where no work was carried out can be included as part of the period of incapacity for work.

30 21. On 20 June 2014, Miss Berhe wrote to HMRC in response to the formal Notice of Decision. She enclosed a copy of her prescription and her terms of employment with Andron, which was taken over by ACS and she was transferred as a TUPE from Andron to ACS. Miss Berhe’s stated her incapacity was stress related owing to her workload and unfair treatment; that she had never been informed that she was on a ‘probationary period’ following her transfer of employment to ACS as a ‘TUPE’ (ie: under the Transfer of Undertakings (Protection of Employment) Regulations 2006).

35 22. On the questionnaire to HMRC Miss Berhe stated her date of employment as starting from 12 September 2011 (counting from her employment with Andron before the TUPE arrangements), while ACS stated her date of employment as commencing on 1 August 2013 (the date of TUPE).

23. According to the 'Statement of Main Terms of Employment' with Andron, Miss Berhe's employment commenced on 12 September 2011, and her contractual hours were 2.5 hours from 5.00am to 7.30am, Monday to Friday.

5 24. Miss Berhe's ground of incapacity due to stress was referred to Medical Services for further consideration. On 18 July 2014, Medical Services upheld their assessment that Miss Berhe was capable for work from 12 to 22 November 2013.

25. Miss Berhe did not take up the offer of 28 July 2014 for an independent review, and had appealed to the Tribunal directly.

10 26. From documents submitted by Miss Berhe in support of her appeal, we note the following facts concerning Miss Berhe's employment with ACS:

15 (1) An email dated 28 October 2013 from Miss Hadlow of ACS states the following: 'Due to information we still need to update we are unable to re-issue any new contracts. Under TUPE your T&C remain the same. For HMRC purposes I can confirm you are now working full time for ACS. Monday to Friday 5:00am to 7.30am and 8:00am to 4.30am [*sic* pm]'.

(2) The email was in consequence of Miss Berhe taking on a 'new' 8-hour shift in addition to her regular 2.5-hour shift.

(3) Miss Berhe's shoulder sustained injury during the 2.5-hour shift on 1 November 2013 and could not work the 8-hour shift.

20 (4) Miss Berhe emailed Ms Hadlow to request a meeting on 9 November 2013. She returned to work on Monday 11 November and was asked to attend meetings with her supervisor and a director. It would seem that during these meetings on 11 November, she was notified that she was on probation, and that she was removed from the 8-hour shift.

25 (5) Grievance meetings took place between 12 November to 22 November 2013, with some protracted exchanges between employer and employee in between meetings.

30 (6) Miss Berhe stated in one of these communications with ACS that her sickness from 12 to 22 November 2013 was stress related; that her mental health was affected and this led to sickness.

35 (7) Miss Berhe also asserted she was a TUPE as she had previously worked for Andron which was taken over by ACS; that she was surprised to be dismissed as a probationer; that her shoulder injury was due to the rubbish waste she had to move, the weight of which required two people to shift; that work-related stress had been building up from issues in the workplace and with processes, from being given misleading and conflicting information by her employer, from behaviour which she felt was 'discriminatory', and from feeling 'harassed' during the grievance meetings which did not attempt to resolve matters.

The Law

27. The qualifying conditions for SSP are set out in ss 152-153 of the Social Security Contributions and Benefits Act 1992:

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‘152 (1) The first condition is that the day in question forms part of a period of incapacity for work.

(2) ... “period of incapacity” means any period of four or more consecutive days, each of which is a day of incapacity for work which are separated by a period of not more than 8 weeks shall be treated as a single period of incapacity for work.

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...

153 (1) The second condition is that the day in question falls within a period which is, as between the employee and his employer, a period of entitlement.

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(2) ... a period of entitlement ... is a period beginning with the commencement of a period of incapacity for work and ending with whichever of the following first occurs –

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(a) the termination of that period of incapacity for work;

(b) the day on which the employee reaches, as against the employer concerned, his maximum entitlement to statutory sick pay ...

(c) the day on which the employee’s contract of service with the employer concerned expires or is brought to an end;

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(d) in the case of an employee who is, or has been, pregnant, the day immediately preceding the beginning of the qualifying period.

28. The definition of ‘incapacity’ is as provided under regulation 2 of Statutory Sick Pay (General) Regulations 1982 (SI 1982/894):

‘Persons deemed incapable of work

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2(1) A person who is not incapable of work of which he can reasonably be expected to do under a particular contract of service may be deemed to be incapable of work of such a kind by reason of some specific disease or bodily or mental disablement for any day on which either –

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(a) (i) he is under medical care in respect of a disease or disablement as aforesaid,

(ii) it is stated by a registered medical practitioner that for precautionary or convalescent reasons consequential on such disease or disablement he should abstain from work, or form work of such a kind, and

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(iii) he does not work under that contract of service, or

(b) he is

(i) excluded or abstains from work, or from work of such a kind, pursuant to a request or notice in writing lawfully made under an enactment; or

(ii) otherwise prevented from working pursuant to an enactment,

5 by reason of it being known or reasonably suspected that he is infected or contaminated by, or has been in contact with a case of, a relevant infection or contamination.

10 2(2) A person who at the commencement of any day is, or thereafter on that day becomes, incapable of work of such a kind by reason of some specific disease or bodily or mental disablement, and

(a) on that day, under that contract of service, does no work, or no work except during a shift which ends on that day having begun on the previous day; and

15 (b) does not work under that contract of service during a shift which begins on that day and ends on the next,

shall be deemed to be incapable of work of such a kind by reason of that disease or bodily or mental disablement throughout that day.

29. Sub-sections 9(2) and (3) of the Social Security (Transfer of Functions, etc) Act 1999 provide that:

20 ‘(2) Where it appears to an officer of the Board that a matter before him involves a question of fact requiring special expertise, he may direct that in dealing with that matter he will have the assistance of one or more experts.

25 (3) In subsection (2) above “expert” means a person appearing to the officer of the Board to have knowledge or experience which would be relevant in determining the question of fact requiring special expertise.

The Appellant’s case

30. By notice dated 26 July 2014, Miss Berhe appealed to the Tribunal, stating her grounds of appeal as follows:

30 ‘I believe I am entitled to SSP for the period 12 November 2013 to 22 November 2013. I had already supplied my GP sick note to my employer and a copy was sent to HMRC. I do not believe that HMRC have considered the facts and evidence I had provided.

35 I had also supplied HMRC with documents including my physiotherapy appointments and my medication that I had been taking. Stress is also a health condition which they have not fully considered or taken seriously which can have affects [*sic*] in may [*sic*] or different ways which I personally experienced and suffered.’

31. In a three-page letter dated 24 April 2014, Miss Berhe gave details of her shoulder injury and the subsequent stress-related sickness. In another three-page letter dated 20 June 2014 to HMRC, Miss Berhe related similar facts – that she was a TUPE and was not informed of her being on probation until after the dismissal; that

that she had complained to the supervisor concerning difficulties with the waste; that the conflicting information and unfair treatment by ACS had left her 'feeling uncomfortable, discriminated and disrespected'; that 'ACS did not offer from the date of TUPE training or Health and Safety guidelines'. Miss Berhe indicated that she
5 'could have found more information on alternative ways to take the matter further or seek additional help or advice'.

HMRC's case

32. From the Statement of Case, HMRC submit that:

10 (1) Miss Berhe first became sick on 2 November 2013 and has been paid for the period from 2 November 2013 to 8 November 2013.

(2) For the period from 12 to 22 November 2013, the first qualifying condition was in dispute as the employer contended Miss Berhe's incapacity was not genuine.

15 (3) Based on the independent medical advice by Medical Services on three occasions, Miss Berhe would have been capable of carrying out her normal duties for the period in question.

(4) There is therefore no entitlement to SSP for the period 12 November 2013 to 22 November 2013.

20 33. In HMRC's decision letter of 3 June 2014 of three pages long, which was sent to both ACS and Miss Berhe, the officer explained that the opinion of Medical Services was sought because ACS cannot agree on the available medical evidence from Miss Berhe. In providing a medical opinion, Medical Services have considered the main activities involved in doing the job, and the independent medical report is not sent to either the employer or employee.

25 34. The decision officer also explained how the figure for Average Weekly Earnings (AWE) is calculated based on the payslips provided by Miss Berhe. Since the payslip dated 23 October 2013 shows earnings from both her part-time and full-time jobs, they are aggregated for NICs, the total earnings for the purpose of calculating her AWE are £1,603.50 making her AWE in the relevant period £200.44.

30 35. The daily rate of SSP applicable to AWE of £200.44 was £17.34 from 6 April 2013; Miss Berhe went off sick on Friday 1 November; Monday to Wednesday of 4, 5 and 6 November were waiting days, and SSP was payable for the two days of 7 and 8 November, giving a total entitlement of £34.68.

35 36. The letter also confirmed that for the purposes of SSP, the qualifying days are Monday to Friday as indicated by both ACS and Miss Berhe; this fact is therefore not in dispute between the employer and the employee.

Discussion

A change in contractual hours

37. The cause of the dispute, it would seem to us, arose at the juncture when ACS changed the hours Miss Berhe was contracted to do. We do not, however, have the
5 benefit of the appellant or the second respondent to clarify the contractual agreement and the changes thereof from 11 November 2013.

38. From the documents and the parties' representations, it would seem that on her return on 11 November 2013, Miss Berhe was notified by ACS that she would no longer be required to work the 8-hour shift. ACS considered that Miss Berhe was on
10 probation on the 8-hour shift, which commenced on 27 September 2013, and would not have considered the 8-hour shift as falling under TUPE. Out of necessity, ACS probably had contracted with a replacement worker to cover the six 8-hour shifts falling between 1 and 8 November before Miss Berhe returned on 11 November.

39. From 11 November 2013 onwards, as far as ACS was concerned, Miss Berhe
15 was contracted to work only the 2.5-hour shift. Those were the hours she worked for Andron before the TUPE arrangements, and the job description sent by ACS to Medical Services was for the 2.5-hour shift only.

40. For Miss Berhe, she seems to have considered herself under TUPE for both shifts. When she went to see her doctor on 12 November 2013, she might have
20 informed the doctor her normal working hours as comprising the two shifts. The doctor might have assessed Miss Berhe's capacity to work the 8-hour shift on top of the 2.5-hour one. There is a difference in the medical opinion between Miss Berhe's doctor and Medical Services as regards her capacity to work between 12 and 22 November 2013, and that difference might be attributable to the different sets of
25 contractual duties against which their assessments were made.

The basis for determining incapacity

41. Statutory Sick Pay is due when an employee is incapacitated and cannot carry out the duties for which she is contracted to do. From 11 November 2016, Miss Berhe
30 was contracted to do only the 2.5-hour shift. Whether SSP is due or not in this case is a matter of medical assessment against the set of duties for the 2.5-hour shift.

42. Miss Berhe's case has been referred to Medical Services, whose independence can be relied upon to assess the capacity of the employee in carrying out the contractual duties. Furthermore, HMRC have taken Miss Berhe's two long letters (of
35 24 April and 20 June 2014) seriously by consulting Medical Services again on each occasion. The medical advice in April 2014 states that Miss Berhe 'has no history of any mental health problem, is described only as having "stress and panic attack" by her GP and no follow was arranged'. The medical advice further states that Miss Berhe 'may well have been upset by the changes at her work, but this is in itself not
40 an illness and would not have precluded her from carrying out the simple duties detailed in SSP43 [the job description as sent by ACS]'.

43. Medical Services considered Miss Berhe's case on three occasions as regards her fitness to work from 12 November to 22 November 2013 and had arrived at the same conclusion that Miss Berhe was capable of carrying out the cleaning duties required for her 2.5-hour shift for which she was contracted to do.

5 44. Miss Berhe's principal contention is that she was suffering from stress-related illness induced by work. The advice by Medical Services was that her stress-related conditions did not render her unfit to work, and their opinion is the critical factor in determining Miss Berhe's eligibility for SSP. The Tribunal simply has no other way for determining Miss Berhe's entitlement other than to rely on the assessment of
10 Medical Services. Based on Medical Services' assessment, Miss Berhe was not incapacitated from 12 to 22 November 2013, and therefore not entitled to SSP.

First day of incapacity

15 45. Miss Berhe also contends that her first day of sickness was 1 November (not 2 November as established by HMRC) because she was injured during her first shift and could not work her second shift. For the purposes of SSP, Miss Berhe was considered as having one employment with ACS, albeit comprising two shifts. Since there was only one employment, and Miss Berhe had worked part of 1 November 2013 by finishing the first shift, 1 November 2013 does not count as a qualifying day.

20 46. The Tribunal notes the difference between Miss Berhe and ACS in the reckoning of the start date of Miss Berhe's employment. Whether Miss Berhe was a TUPE in her employment, however, would appear to be of no relevance for determining her SSP entitlement. The qualifying conditions pertain to the number of days contracted to work in the given period of sickness, and in Miss Berhe's case, it was Monday to Friday. There is no dispute between Miss Berhe and ACS in this
25 regard, and their difference concerning the start date of Miss Berhe's employment does not affect the SSP calculation.

Calculation of average weekly earnings

30 47. From the four payslips covering a total of 16 weeks as detailed at §13, the Tribunal is satisfied that HMRC have correctly taken into account the relevant earnings in the relevant period for the purpose of calculating Miss Berhe's entitlement.

48. Those weeks when Miss Berhe was working both her regular and the 'new' 8-hour shift have been included to arrive at the Average Weekly Earnings. 1 November 2013 was a Friday, and the first three qualifying days (ie: 4, 5 and 6 November) were waiting days, and SSP was due for two days (7 and 8 November) at £17.34 per day.

35 *Other considerations*

49. ACS supplied Miss Berhe's payslip for the pay period 7 April 2014 to 4 May 2014 as proof of the sick pay of £34.68 having been made. It would seem that Miss Berhe has continued to work the 2.5-hour shift for ACS after the period of sickness under dispute.

50. With Miss Berhe being absent at the hearing, the Tribunal has considered her extensive written submissions in some detail to ensure that her grounds of appeal are correctly understood. The general tenor of her submissions is that she was incapacitated from work from 12 to 22 November 2013 due to stress. She referred to a host of causes for her stress – her shoulder injury was due to health and safety complaints not being addressed by management; the disagreement over whether she was a TUPE or on probation, that she was summarily dismissed in relation to the 8-hour shift, and the discriminatory treatment she experienced before, during and after the grievance procedure.
51. These issues, however, do not fall within the jurisdiction of this Tribunal, and had Miss Berhe so wished, she could have taken these issues to the employment tribunal. The jurisdiction this Tribunal has is strictly in relation to her sick pay entitlement. In its final analysis, whether Miss Berhe is due SSP for the period from 12 to 22 November 2013 is a matter of medical assessment.
52. We note the meticulous efforts with which HMRC have dealt with the dispute. At every stage of Miss Berhe’s submissions, her case has been considered with due attention and professionalism. Medical Services had carried out a thorough assessment of her capacity on 24 March 2014, and were consulted on two further occasions by HMRC in the light of new submissions from Miss Berhe. The procedure followed, and the conclusion and calculation arrived at by HMRC are in accordance with the proper application of the legislation.

Decision

53. For the reasons stated above, the appeal is dismissed.
54. 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.

**DR HEIDI POON
TRIBUNAL JUDGE**

RELEASE DATE: 14 SEPTEMBER 2016