



TC05401

Appeal number: TC/2015/00548

Statutory Maternity Pay – Jurisdiction - Appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TARYN DENHAM

Appellant

- and -

(1)

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

**First
Respondent**

(2) HT PERSONNEL LIMITED

**Second
Respondent**

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at Fox Court on 7 September 2016

Mr Marc Denham representative for the Appellant

Linda Ramsay, Officer of HM Revenue and Customs, for the First Respondent

DECISION

Introduction

- 5 1. This is an appeal by the Appellant, Mrs Taryn Denham, against a decision made by the First Respondent, HMRC, on 23 May 2014 as varied on 13 June and 30 December 2014. The decision of 30 December 2014 was to the effect that HT Personnel Limited was liable to pay Statutory Maternity Pay to Mrs Denham amounting to £7,122.54 and this had been paid in full. The exact terms of the decision are set out below.
- 10 2. The appeal relates to: a) the extent of Mrs Denham's entitlement to Statutory Maternity Pay ("SMP") under section 8 of the Social Security (Transfer of Functions, etc.) Act 1999; and b) the amount actually paid to her.
- 15 *Non-attendance of Second Respondent*
3. The Second Respondent, the Appellant's former employer, HT Personnel Limited ("HTP") was joined as a Second Respondent by direction of Judge Aleksander following a hearing on 6 October 2015. HTP was subsequently wound up on 7 April 2016.
- 20 4. HTP did not attend and was not represented at the hearing. The joint liquidator for HTP, Paul Weber of Leigh Adams Chartered Accountants and Licensed Insolvency Practitioners, wrote on 12 July 2016 to HMRC to indicate that he would not be attending the hearing. I was satisfied that HTP had been notified of the hearing and that it was in the interests of justice to proceed with the hearing.
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The law

- 30 5. By virtue of section 164 of the Social Security Contributions & Benefits Act 1992 there are five qualifying conditions that have to be satisfied before a woman becomes entitled to SMP. The conditions are that:
- 35 (i) she has been continuously employed for a period of at least 26 weeks ending with the week immediately preceding the 14th week before the expected week of confinement (known as the qualifying week) – see section 164(2)(a);
- (ii) she has stopped working – see section 164(2)(a);
- (iii) her normal weekly earnings for the period immediately prior to the qualifying week are not less than the lower earnings limit in the tax year containing the qualifying week – see section 164(2)(b);
- 40 (iv) she has become pregnant and has reached, or been confined before reaching, the commencement of the 11th week before the expected week of confinement – see section 164(2)(c); and
- (v) she must have given her employer at least 28 days' notice of the date from which she wants to be paid SMP – see section 164(4).

6. In addition, Regulation 22 of the Statutory Maternity Pay (General Regulations) 1986 requires that a woman must have provided her employer with medical evidence of the date on which her baby is expected to be born. This must have been provided no later than the end of the third week of what would be the maternity pay period, or if there is good cause for the delay, by the 13th week of the maternity pay period.
7. Section 165(6) of the Act provides that SMP shall not be paid to a woman for any week after the week of confinement that she works for an employer who is not liable to pay her SMP.
8. Calculation of the amount of SMP required to be paid by an employer (the maternity pay period and rate of SMP) is governed by sections 165 and 166 of the 1992 Act and the 1986 Regulations.

The facts

9. The Tribunal received a bundle of documents from Officer Ramsay which was agreed by the Appellant. Mrs Denham also gave oral evidence in support of her appeal.
10. The tribunal finds the following facts:

Background

11. Mrs Denham was employed by HTP from 6 June 2012. She last worked for HTP on 6 September 2013, her baby was born on 25 September 2013 and her employment ended on 10 October 2013 by reason of redundancy.
12. Various disputes arose between Mrs Denham and HTP relating to outstanding pay, SMP, payment in lieu of notice and other matters. In December 2013, Mrs Denham filed a claim against HTP in the County Court for unpaid wages, unpaid SMP and for termination of contract without notice. The amount claimed was £7,200.49 plus the court fee of £200.
13. On 10 March 2014, the Dartford County Court issued an order that HTP pay £4,692.96 being the amount that HTP admitted that it owed Mrs Denham. On 26 June 2014, the County Court made a further order that HTP pay £2,717.53. HTP paid these sums on 31 March and 7 July 2014 respectively and hence considered they had paid the full amount claimed by Mrs Denham in respect of SMP.
14. Mrs Denham sought to enforce her entitlement to SMP due for the period from the beginning of December 2013 until 8 June 2014 as she believed this was

not covered by the county court orders which related to amounts owing subsequent to the date of the original claim form.

- 5 15. On 3 April 2014 HMRC wrote to Mrs Denham confirming that in their opinion Mrs Denham was due SMP from HTP for 39 weeks ending on 8 June 2014 in the sum of £7,122.54.
- 10 16. A formal decision was issued by HMRC on 23 May 2014 (the original decision), that Mrs Denham was entitled to SMP for the period from 9 September 2013 to 18 May 2014 in the sum of £6,708.
- 15 17. On 13 June 2014 HMRC wrote to both Mrs Denham and HTP and varied the decision (the first varied decision) on the basis that HTP had paid SMP up until the end of November 2013. The decision however now covered the period from 9 September 2013 until 8 June 2014. The amount of SMP due was decided to be £7,122.54. As HMRC considered that £3,416.82 had already been paid by HTP the balance still due was said to be £3,705.72.
- 20 18. HTP challenged this decision notice of 13 June 2014 on 10 September 2014. It submitted to HMRC that Mrs Denham's entitlement to SMP had been paid in full. HTP relied on the information on HMRC's real time information ("RTI") system which showed that all payments had been made.
- 25 19. RTI was introduced and designed to make Pay as You Earn (PAYE) submissions more efficient, by submitting information to HMRC in real time. All employers are required by law to submit a Full Payment Submission (FPS) every time employees are paid as part of the payroll arrangements. If an employee is not paid in a particular tax month, no FPS will be submitted and instead an Employer Payment Summary (EPS) is completed. HMRC will
30 penalise any employer who does not submit FPS or EPS on time.
- 35 20. On 30 November 2013 the amount entered onto the RTI system by HTP showed £3,416.82 of SMP having been paid to date in 2013-14 to Mrs Denham. On 31 March 2014, the amount entered onto the RTI system by HTP showed £5,550.58 of SMP having been paid to date in 2013-14 to Mrs Denham. On 30 June 2014 the amount entered onto the RTI system by HTP showed £1,571.96 of SMP having been paid to date in 2014-15. Thus the RTI system showed that SMP totalling £7,122.54 had been paid.
- 40 21. As the information on the RTI system showed that all payments had been made a second varied decision notice was made by HMRC on 30 December 2014 confirming that Mrs Denham was entitled to SMP totalling £7,122.54, but that this had all been paid.

22. HMRC's decision now under appeal (the second varied decision) issued on 30 December 2014, stated:

5 "Mrs Taryn Denham is entitled to Statutory Maternity Pay (SMP) at the rate of £432.70 per week for the period from 9 September 2013 to 20 October 2013, at the rate of £136.78 per week for the period from 21 October 2013 to 6 April 2014 and at the rate of £136.18 per week for the period from 7 April 2014 to 8 June 2014 and that HT Personnel Limited is liable to pay SMP to Mrs Denham amounting to £7,122.54. The amount of SMP paid by HT Personnel Limited is £7,122.54."

15 23. HTP withdrew its appeal on 17 December 2014 having been contacted by HMRC to advise that the varied notice of decision would be issued to the effect that SMP liability had been met in full.

24. On 9 January 2015 Mrs Denham wrote to HMRC and stated that she disagreed with the varied notice of decision of 30 December 2014.

20 25. On 21 January 2015 she wrote to HM Courts & Tribunals Service ("HMCTS") to appeal HMRC's second varied decision to the Tribunal. She submitted that she had only been paid SMP up until the date of her County Court claim of 6 December 2013 and that the monies thereafter were still owed to her and had not been paid.

25 26. On 14 April 2015 HMCTS wrote to Mrs Denham acknowledging her appeal but asking her to withdraw it on the basis it was contended that the Tribunal did not have the jurisdiction to hear it. Thereafter Mrs Denham emailed HMCTS to advise that she wished to continue with her appeal.

30 27. On 6 October 2015 a directions hearing was held before Judge Aleksander at which he ordered that:

- 35 a) The Appellant's appeal should not be struck out;
b) HTP should be added to the appeal as a Second Respondent and joined to all correspondence;
c) HMRC should give consideration to investigating the RTI.

40 28. In paragraphs 12-18 of the Judge's reasons for his decision, released on 14 October 2015, the Judge considered the issue of the Tribunal's jurisdiction and concluded there was an arguable issue as to whether the Tribunal had authority to determine the amount of SMP paid to an employee and that this should be determined in a substantive hearing.

45 29. In order to investigate the RTI, on 15 October 2015 HMRC wrote to Martin Prescott of HTP providing a breakdown of information HMRC held on RTI.

The letter noted inconsistencies in the information on the RTI which HTP had entered with other information provided by Mrs Denham such as:

- 5 a) Full payment submission (FPS) submitted for Mrs Denham showed SMP payments were made throughout the 2013-14 and 2014-15 tax years. In contrast Mrs Denham's bank statements confirmed the last salary payment she received was on 3 July 2013; and
- 10 b) An EPS was submitted on 5 February 2014 and on 3 March 2014 indicating SMP had been paid before any payments were actually made to Mrs Denham.

30. The letter requested HTP to respond to the following queries and provide the following information:

- 15 a) A breakdown of what the payments received by Mrs Denham on 31 March 2014 and 7 July 2014 represented;
- b) An explanation of any discrepancies between the RTI records and actual payments made to Mrs Denham; and
- 20 c) Confirmation that all RTI records were submitted correctly.

20 31. On 10 December 2015 HTP, acting through its director Mr Martin Prescott, emailed HMRC confirming that all RTI records were correctly submitted in respect of Mrs Denham. However the email did not provide any documentary evidence to support this, did not explain the inconsistencies raised nor answer the other questions raised in HMRC's letter of 15 October 2015.

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Jurisdiction

30 32. HMRC submitted that the Tribunal had jurisdiction to hear the appeal as to the amount of SMP Mrs Denham was entitled for the reasons set out in its written submissions of 18 September 2015 prepared for the directions hearing.

33. Mr and Mrs Denham supported this submission.

35 34. No submissions were received from HTP.

35 35. Section 8(1)(f) of the Social Security Contributions (Transfer of Functions etc.) Act 1999 ("SSCA") provides that it shall be for an officer of HMRC

40 ...to decide any issue arising as to, or in connection with, entitlement to statutory sick pay or statutory maternity pay.....

36. Section 11(2) of the SSCA, as amended by section 270 of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, together

with Regulation 3(3) of the Social Security Contributions (Decisions and Appeals) Regulations 1999 give both the employer and the employee a right to appeal to this Tribunal against any decision of HMRC made under section 8(1)(f) of the SSA.

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37. HMRC previously submitted that section 8(1)(f) relates solely to the decision as to whether an employee has an entitlement to SMP, and if so the amount to which she is entitled. Judge Aleksander recorded that HMRC previously submitted the provisions do not extend to any determination as to whether the SMP has in fact been paid.

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38. However at the hearing, HMRC submitted that the Tribunal had jurisdiction to decide the matter in full, namely a) the amount of SMP Mrs Denham was entitled to; and b) the amount she had in fact been paid and thus the amount which was outstanding.

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39. The issue is whether the words “any issue arising as to, or in connection with entitlement” are wide enough to confer jurisdiction on the Tribunal to determine the extent of the actual payment of SMP in addition to the amount of the entitlement.

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40. I agree with the preliminary reasoning of Judge Aleksander that the Tribunal has the jurisdiction to determine both the amount of SMP an employee is entitled to and the amount actually paid.

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41. I respectfully agree with the Judge’s reasoning in support:

(1) First, the use of the terms “any issue”, “arising”, and “connection” considerably broaden the scope of decisions on entitlement. If Parliament had intended that HMRC were solely to decide “entitlement”, they would not have need to include these terms. Indeed, as employers are entitled to claim 92% of SMP back from HMRC (more in the cases of small employers) it would be surprising if HMRC did not have powers to determine how much SMP had in fact been paid by an employer.

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(2) Second, that HMRC’s decision notices made in this case all state what amount of SMP has in fact been paid – and that the decision notice of 13 June 2014 was subsequently varied on 30 December 2014 only to show that the SMP had all been paid (there was no change in the amount of SMP to which Mrs Denham was said to be entitled). This suggests that in practice HMRC consider that their decision making power extends to the amount of SMP actually paid.

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42. Furthermore, Regulation 10 of the Social Security Contributions (Decisions and Appeals) Regulations 1999, as amended by paragraph 65 of Schedule 2 to

the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, provides that if

5 ...it appears to the Tribunal, that the decision should be varied in a particular manner, the decision shall be varied in that manner, but otherwise shall stand good.

43. Given that the decision of 30 December 2014 encompassed both the entitlement and the amount of SMP actually paid to Mrs Denham I consider it is within the Tribunal's jurisdiction to vary this aspect if appropriate.

Substantive Issue - entitlement and payment of SMP to Mrs Denham

Submissions

15 44. HMRC submitted that the decision of 30 December 2014 should be varied both in respect of the amount of SMP to which Mrs Denham is entitled and the amount already paid.

Entitlement

20 45. HMRC submitted that as a result of Mrs Denham starting working for a different employer on 1 May 2014, HTP was only liable to SMP for the period from 9 September 2013 to 27 April 2014. This revised date was earlier than the previous calculation of 8 June 2014 and therefore the amount of SMP due to Mrs Denham should be reduced and varied to:

25 £432.70 per week for the period from 9 September 2013 to 20 October 2013, £135.78 per week for the period 21 October 2013 to 6 April 2014 and £138.18 per week for the period 7 April 2014 to 27 April 2014 and that HTP is liable to pay SMP to Mrs Denham a sum amounting to £6,293.46.

30 46. This total entitlement to SMP is made up of 6 weeks from 9 September 2013 to 20 October 2013 at a rate of £432.70 totalling £2,596.20 plus 24 weeks from 21 October 2013 to 6 April 2014 at a rate of £136.78 totalling £3,282.72 plus 3 weeks from 7 to 27 April 2014 at a rate of £138.18 totalling £414.54.

Payment

40 47. HMRC submitted that a breakdown of payments provided by Mrs Denham shows that the payments made to Mrs Denham as a result of the County Court orders (paid in March and July 2014) only included SMP up to 21 December 2013.

48. HMRC submitted that HTP has only paid Mrs Denham £3,827.22 (a gross sum being £3,458.52 net of income tax and national insurance contributions)

in respect of SMP. This was made up of an entitlement of six weeks from 9 September 2013 to 19 October 2013 at a rate of £432.70 totalling £2,596.20 plus nine weeks from 20 October 2013 to 21 December 2013 at a rate of £136.78 totalling £1,231.02.

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49. HMRC submitted the amount of SMP paid by HTP of £3,827.22 leaves an outstanding balance of £2,466.24. The outstanding SMP balance is calculated for the period 22 December 2013 to 27 April 2014 as follows: 15 weeks from 22 December 2013 to 6 April 2014 at a rate of £136.78 totalling £2,051.70 plus three weeks from 7 to 27 April 2014 at a rate of £138.18 totalling £414.54.
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50. HMRC submitted that the County Court Claim was in respect of unpaid wages, termination of contract and unpaid SMP up to the date of the claim in December 2013.
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51. The two payments of £4,692.96 and £2,717.53 amounting to £7,410.49 received by Mrs Denham on 31 March 2014 and 7 July 2014 include payments in relation to unpaid wages, monies in respect of termination of contract and costs but only SMP until 21 December 2013. The SMP due after 21 December 2013 is still outstanding. No further payments in respect of SMP were received by Mrs Denham since 7 July 2014.
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52. HMRC submitted that HTP have submitted incorrect RTI records in respect of SMP paid. HTP have provided no further evidence that SMP has been paid after 21 December 2013. HTP have not provided any documentary evidence to confirm their RTI records were correct despite the request made by HMRC on 15 October 2015.
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53. HMRC submitted that the RTI records provided by HTP were not a true account of the payments made to Mrs Denham and were not provided in line with the RTI process.
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54. HMRC relied upon the absence of any documentary or other evidence to support the RTI provided, the absence of detailed reply to their queries of 15 October 2015 and the bank statements provided by Mrs Denham showing payments actually received from HTP.
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55. HMRC therefore submitted that the appeal should be allowed and the decision of 30 December 2014 should be varied to the effect that:
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Mrs Denham is entitled to Statutory Maternity Pay (SMP) at the rate of £432.70 per week for the period from 9 September 2013 to 20 October 2013, at the rate of £135,.78 per week for the period 21 October 2013 to 6 April

2014 and at the rate of £138.18 per week for the period 7 April 2014 to 27 April 2014 and that HTP is liable to pay SMP to Mrs Denham a sum amounting to £6,293.46. The amount of SMP paid by HTP is £3,827.22 leaving an outstanding balance of £2,466.24.

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56. Mr and Mrs Denham supported HMRC's submissions.

57. HTP, having been joined as the Second Respondent and being notified of the hearing, did not attend nor make any further submissions further to Mr Weber's indication that he would not attend.

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58. HTP had previously accepted that Mrs Denham qualifies for SMP and that the company was liable to pay the SMP to Mrs Denham. However, HTP has previously disputed that there is any outstanding SMP due to Mrs Denham, as it has previously submitted that HTP has met the SMP liability in full.

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Discussion and Decision

59. I am satisfied that the appeal against the decision of 30 December 2014 should be allowed both in respect of the SMP that Mrs Denham is entitled to be paid and the amount she has in fact been paid. I am satisfied that Mrs Denham has discharged the burden of proof upon her in respect of her entitlement to SMP and the amount she has been paid.

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60. In respect of Mrs Denham's entitlement to SMP there was no dispute between her and HMRC that the sum should be reduced to that submitted by HMRC, namely £6,293.46. I note that HTP did not challenge HMRC's decision of 30 December 2014 that the amount of SMP was to be the higher sum of £7,122.54.

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61. In respect of SMP actually paid, I accept the evidence Mrs Denham gave at the hearing, which was agreed by HMRC. This was that the payments from HTP detailed in her bank statements and provided to HMRC and those received as a result of the County Court orders were the sum total of all payments received from HTP.

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62. I find that on the balance of probabilities Mrs Denham received no payments for SMP after 7 July 2014 and payments received up to and including this date were only in respect of SMP to December 2013. Mrs Denham received her last salary payment on 3 July 2013. HTP's RTI entries appear to show payments from August 2013 to April 2014 when Mrs Denham's bank statements show no salary payment received during that time (although she did receive the payment on 30 March 2014 in satisfaction of the first County

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Court order). I find the evidence provided by Mrs Denham to HMRC as to the sums of money she has been paid by HTP to be reliable and credible.

5 63. I note the absence of any material to support the RTI figures provided by HTP, which together with the sums received in respect of the County Court order have been said to fully account for the SMP due. I also note HTP's failure to provide any of the information sought by HMRC on 15 October 2015 which might support the RTI figures. I find that HTP's RTI entries as recorded
10 which suggest SMP payments were made to Mrs Denham in respect of period after December 2013 – from January to April 2014 – are more likely than not to be incorrect.

15 64. In my view Mrs Denham has satisfied the burden of proving on the balance of probabilities she has not in fact been paid the full sum of SMP she is entitled to. I am satisfied that the calculations provided by HMRC are correct.

65. I therefore allow the appeal and vary the decision of HMRC dated 30 December 2014 as follows:

20 Mrs Taryn Denham is entitled to Statutory Maternity Pay (SMP) at the rate of £432.70 per week for the period from 9 September 2013 to 20 October 2013, at the rate of £135.78 per week for the period 21 October 2013 to 6 April 2014 and at the rate of £138.18 per week for the period 7 April 2014 to 27
25 April 2014 and that HTP is liable to pay SMP to Mrs Denham a sum amounting to £6,293.46. The amount of SMP paid by HTP is £3,827.22 leaving an outstanding balance of £2,466.24.

30 66. This decision was amended and re-released to correct clerical mistakes and typographical errors and omissions pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

35 67. 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
40 notice.

**TRIBUNAL JUDGE
RUPERT JONES**

45 **RELEASE DATE: 22 September 2016**