



TC06396

Appeal number: TC/2016/04020

STATUTORY MATERNITY PAY – Social Security Contributions and Benefits Act 1992 – Statutory Maternity Pay (General) Regulations 1986 – whether notice given of expected receipt of SMP – whether continuous employment sufficient to qualify for SMP

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAUL BROOK SOLICITORS

Appellant

-and-

**(1) THE COMMISSIONERS FOR HER
MAJESTY’S REVENUE AND CUSTOMS**

Respondents

(2) Ms REBECCA SCOTHERN

**TRIBUNAL: Judge Peter Kempster
Mr Simon Bird**

Sitting in public at Centre City Tower, Birmingham on 20 December 2017

Mr Paul Brook for the Appellant

Ms Linda Ramsey (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant appeals against a decision notice issued by the Respondents (“HMRC”) dated 5 May 2016 (“the Disputed Notice”), which was upheld on formal
5 internal review dated 19 July 2016, stating that the Appellant was liable to pay Statutory Maternity Pay (“SMP”) to Ms Rebecca Scothern (who has been included in these proceedings as a second respondent) for the period 10 January 2016 to 30 April 2016, totalling £2,633.78.

Law

10 2. Section 164 Social Security Contributions and Benefits Act 1992 (“the Act”) provides (so far as relevant):

15 “(1) Where a woman who is or has been an employee satisfies the conditions set out in this section, she shall be entitled, in accordance with the following provisions of this Part of this Act, to payments to be known as “statutory maternity pay”.

(2) The conditions mentioned in subsection (1) above are–

20 (a) that she has been in employed earner’s employment with an employer for a continuous period of at least 26 weeks ending with the week immediately preceding the 14th week before the expected week of confinement but has ceased to work for him,

25 (b) that her 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 than the lower earnings limit in force under section 5(1)(a) above immediately before the commencement of the 14th week before the expected week of confinement; and

(c) that she has become pregnant and has reached, or been confined before reaching, the commencement of the 11th week before the expected week of confinement.

30 (3) The liability to make payments of statutory maternity pay to a woman is a liability of any person of whom she has been an employee as mentioned in subsection (2)(a) above.

(4) A woman shall be entitled to payments of statutory maternity pay only if–

35 (a) she gives the person who will be liable to pay it notice of the date from which she expects his liability to pay her statutory maternity pay to begin;

and

(b) the notice is given at least 28 days before the date or, if that is not reasonably practicable, as soon as is reasonably practicable.

(5) The notice shall be in writing if the person who is liable to pay the woman statutory maternity pay so requests.

(6) Any agreement shall be void to the extent that it purports–

(a) to exclude, limit or otherwise modify any provision of this Part of this Act; ...”

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3. Regulation 17 Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960) (“the Regulations”) provides (so far as relevant):

“Meaning of “employee”

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(1) Subject to paragraph (1A), in a case where, and in so far as, a woman is treated as an employed earner by virtue of the Social security (Categorisation of Earners) Regulations 1978(a) she shall be treated as an employee for the purposes of Part V of the 1986 Act and in a case where, and in so far as, such a woman is treated otherwise than as an employed earner by virtue of those regulations, she shall not be treated as an employee for the purposes of Part V. ...

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(2) Any woman who is in employed earner’s employment within the meaning of the 1975 Act under a contract of apprenticeship shall be treated as an employee for the purposes of Part V. ...”

4. Regulation 22 of the Regulations provides:

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“Evidence of expected week of confinement or of confinement

(1) A woman shall in accordance with the following provisions of this regulation, provide the person who is liable to pay her statutory maternity pay with evidence as to–

(a) the week in which the expected date of confinement occurs, and

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(b) where her entitlement to statutory maternity pay depends upon the fact of her confinement, the week in which she was confined.

(2) For the purpose of paragraph (1)(b) a certificate of birth shall be sufficient evidence that the woman was confined in the week in which the birth occurred.

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(3) The evidence shall be submitted to the person who will be liable to make payments of statutory maternity pay not later than the end of the third week of the maternity pay period so however that where the woman has good cause the evidence may be submitted later than that date but not later than the end of the 13th week of the maternity pay period.

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(4) For the purposes of paragraph (3) evidence contained in an envelope which is properly addressed and sent by prepaid post shall be deemed to have been submitted on the day on which it was posted.”

Witness evidence

5. We took oral evidence from (1) Ms Karen Burley, the Appellant's office manager, who adopted and confirmed a formal witness statement dated 10 November 2016; and (2) Ms Scothern.

5 6. Ms Burley stated:

(1) The Appellant is a small firm of solicitors in general practice.

(2) Ms Scothern is a niece of Ms Burley.

10 (3) Ms Scothern was sent to the Appellant for work experience by The Apprentice Team in Chesterfield on 14 July 2015. The arrangement was that after a short unpaid trial period, she would have a placement for twelve months. She received an allowance set by The Apprentice Team.

(4) The placement ended on 13 August 2015 and Ms Scothern was then employed by the Appellant until 31 December 2015. During this period Ms Scothern was paid the National Minimum Wage.

15 (5) At no stage did Ms Scothern notify Ms Burley that she wished to be paid SMP. Ms Burley was responsible for office management including staff wages and thus was the person with whom staff would discuss such matters. Ms Scothern did not provide a Form MAT B1, nor discuss maternity leave. Ms Scothern was aware that her employment would cease well before her
20 confinement.

(6) As Ms Scothern's office manager Ms Burley had work discussions with her; also, she was her aunt and so had general discussions.

(7) The Form SMP1 stamped by the firm confirming SMP would not be paid was completed in January 2016.

25 (8) In Ms Burley's opinion, if individuals on work experience placements were eligible for SMP then the number of places available may diminish considerably.

7. Ms Scothern stated:

30 (1) She had never received a contract from the Appellant. She had completed some paperwork with The Apprentice Team in 2014.

(2) From August 2014 she was doing a Level 3 NVQ. She received £100 per fortnight.

(3) In August 2015 the Appellant offered her a job to continue what she had been doing, with the same hours but at National Minimum Wage. It was not

stated how long this was for; there was no mention of it only being until December.

5 (4) She became aware of her pregnancy at about week 8 of term. At week 12 (after a scan) she told Mr Brook and Ms Burley. Maternity arrangements were not discussed until later; her midwife gave her a Form MAT B1 which she handed to Mr Brook and Ms Burley; they said it was not necessary because the firm was not paying SMP, and some paperwork was completed (the Form SMP1). She had several conversations with Mr Brook about SMP but was told that she was not entitled. When she left in December 2015 Mr Brook
10 asked her to phone him in three months.

Appellant's case

8. Mr Brook submitted as follows.

9. If there was an obligation to pay SMP in this case then the Appellant would be able to reclaim it in full from HM Government, but as a firm of solicitors it was
15 important to ascertain that there was such a legal obligation.

10. The employment only started in August 2015 and thus the qualifying period in s 164 was not satisfied. The earlier placement did not constitute qualifying employment for SMP purposes.

11. Further, the requirement to give notice and evidence under s 164 and reg 22
20 had not been satisfied.

12. The Appellant occasionally offered work experience placements to school leavers and other young people. Ms Scothern started a placement in August 2014, organised by The Apprentice Team – this was a body that was paid by HM Government to find work experience for school leavers and unemployed people. The
25 arrangement was fairly informal and there was little paperwork. Ms Scothern is the niece of Ms Burley. Ms Scothern was superfluous to the business requirements of the firm, and her role was just to learn from office experience; she performed menial tasks such as making tea, answering phones, filing, and running errands. The Apprentice Team paid an allowance of £35 per week; the Appellant considered that
30 was insufficient to meet travel and other costs and so voluntarily topped-up the payments by £15 per week. It was correct that the firm's accountant had recorded Ms Scothern as an employee on the PAYE record; however, that was a mistake and the record had now been corrected with HMRC. The date for start of employment on the Form SP50B was also an error.

35 13. In August 2015 the twelve month placement came to an end and the Appellant decided that, as she had performed satisfactorily, Ms Scothern would be offered a job. The Appellant was aware that Ms Scothern was keen to have a baby, and she was employed from August 2015 to Christmas 2015, when she left, and her baby was born in March 2016.

14. It was not correct that Ms Scothern had discussed her pregnancy with Mr Brook, nor that she had attempted to give to him her Form MAT B1.

15. The Appellant would be disinclined to take more young people on placements if they had to be treated as employees.

5 **Respondents' case**

16. Ms Ramsey submitted as follows for the Respondents.

17. The relevant dates were set out in HMRC's review decision dated 19 July 2016. Ms Scothern's expected confinement was 29 March 2016. Thus the 14th week prior to the expected week of confinement (s 164(2)) was that starting on 13
10 December 2015, and the 26 week period leading up to that (also s 164(2)) began on 27 June 2015.

18. HMRC's records showed that Ms Scothern was on the PAYE system from April 2015 at the latest. Also, the Form SP50B (Application to resolve a dispute about SMP entitlement) completed on 11 February 2016 by the Appellant stated (on
15 page 2) that Ms Scothern's employment started on 14 August 2014 and ended on 31 December 2015.

Consideration and Conclusions

19. We consider that we need to determine two matters in order to reach a conclusion on this appeal.

20 *Giving notice to employer*

20. The first matter is the requirement in s 164(4) of the Act for the woman to give notice to the employer:

“(4) A woman shall be entitled to payments of statutory maternity pay only if–

25 (a) she gives the person who will be liable to pay it notice of the date from which she expects his liability to pay her statutory maternity pay to begin;

and

30 (b) the notice is given at least 28 days before the date or, if that is not reasonably practicable, as soon as is reasonably practicable.”

21. That requirement is given further detail by reg 22 of the Regulations – quoted at [4] above.

22. There is a dispute in the evidence as to what Ms Scothern said to Mr Brook and Ms Burley, in particular whether she presented a Form MAT B1 to the Appellant.
35 There is no requirement in the legislation for that particular Form (often called the

maternity certificate, and provided by the midwife or obstetrician) to be presented; it will normally be how a woman gives notice that she expects to receive SMP but any notice is sufficient, and it need not necessarily be in writing (s 164(5)).

23. The maternity pay period (see reg 2 of the Regulations) started on 8 January 2016 – per the Form SMP1 completed by the Appellant on 26 January 2016. Thus the requirement under s 164(4) is for the woman to notify her employer of her expectation to receive SMP, such notice to be given at least 28 days before 8 January 2016 – namely, 11 December 2015 - (“or, if that is not reasonably practicable, as soon as is reasonably practicable”); and the requirement under reg 22 is for the woman to notify her employer of her expected date of confinement not later than the end of three weeks after 8 January 2016 – namely, 29 January 2016 - (or up to 10 weeks later if there is good cause). In this case the requirement under reg 22 was met because the Form SMP1 was completed by the Appellant on 26 January 2016, and (in Part C) states the week in which the baby is due. That leaves the only question as being whether Ms Scothern notified the Appellant of her expectation to receive SMP not later than 11 December 2015.

24. As stated above, we do not consider that presentation of the Form MAT B1 is necessary for there to be proper notice; nor does the notice need to be in writing (unless the employer specifically requests that: s 164(5)). We consider that (i) in a small firm such as the Appellant there would likely be a lack of formality in dealing with HR matters (for example, Ms Scothern was never provided with a written contract, even after she was kept on at the end of the placement); (ii) As a busy solicitor Mr Brook may not have had time to discuss HR matters in detail with junior staff members such as Ms Scothern, and would likely have left such matters to the office manager, Ms Burley; (iii) As Ms Burley was Ms Scothern’s aunt, Ms Burley’s conversations with Ms Scothern would likely have included both work and family issues, rather than being focused on particular HR matters; and (iv) by 11 December 2015 Ms Scothern had been working at the firm for around 17 months and was at that date almost six months pregnant.

25. Having carefully considered the above points, the documentation in the hearing bundle and the witness evidence, we conclude that it is more likely than not that Ms Scothern did mention to Ms Burley and/or Mr Brook before 11 December 2015 that she was expecting to receive SMP. Accordingly, the condition in s 164(4) is satisfied.

Start of qualifying employment

26. The second matter for determination is when Ms Scothern started employment that qualifies her for entitlement to SMP. That is set by s 164(2)(a) – it is common ground that the conditions in s 164(2)(b) & (c) are satisfied. If the qualifying employment started before 27 June 2015 then the qualifying period is satisfied, but not if – as contended by the Appellant – it started only in August 2015. In a nutshell, it turns on whether the placement (or at least, the latter part of it) qualifies.

27. We note the following features of the placement:

(1) Ms Scothern was not a volunteer worker – she was remunerated (albeit at a modest level).

(2) At least part of the remuneration came directly from the Appellant (the £15 per week top-up).

5 (3) Ms Scothern was not in a formal apprenticeship, and although she was undertaking a Level 3 NVQ the work was not a specifically required part of the course.

10 (4) The placement was not work-shadowing – it was not confined only to observing and listening; Ms Scothern was actually performing office work duties (albeit at a relatively low level of expertise).

(5) She worked regular hours for twelve months (not including the initial trial period), under the direction of the Appellant.

15 (6) She was registered on the PAYE system by the Appellant during the placement, and the Form SP50B completed by the Appellant treats the employment as starting at the start of the placement – we have noted that the Appellant submits these were both errors.

28. Taking together all the above factors, and having carefully considered the documentation in the hearing bundle and the witness evidence, we conclude that the placement did constitute an employment for SMP purposes, and thus Ms Scothern
20 was in qualifying employment for the purposes of s 164(2)(a) from the start of the placement. Accordingly, the condition in s 164(2)(a) is satisfied.

Conclusion

29. Given our conclusions on both matters ([25] and [28] above), we must determine this appeal against the Appellant.

25 **Decision**

30. The appeal is DISMISSED.

31. 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
30 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.

35 **PETER KEMPSTER**
TRIBUNAL JUDGE

RELEASE DATE: 19 MARCH 2018