



TC07411

Appeal number: TC/2017/09463

STATUTORY MATERNITY PAY – entitlement to SMP – termination of employment when going on maternity leave – conciliation by ACAS – whether COT3 agreement can compromise claim to SMP – held that SMP is payable – s203 Employment Rights Act 1996 - Section 164, Social Security Contributions and Benefits Act 1992

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NVCS LIMITED

Appellants

- and -

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

**First
Respondents**

- and -

KATE DARE

**Second
Respondent**

**TRIBUNAL: JUDGE ALEKSANDER
IAN ABRAMS**

Sitting in public at Taylor House, London EC1 on 19 June 2019

The Appellant did not appear and was not represented

E Edley, an officer of HMRC, for the First Respondents

The Second Respondent in person

DECISION

1. The issue in this appeal is whether the COT3 settlement agreement, signed on 4 October 2016, under the auspices of ACAS, included the statutory maternity pay ("SMP") due to Mrs Dare. The amount of SMP in issue is £7846.20.
2. At the hearing, Ms Edley represented HMRC and Mrs Dare appeared in person. The Appellants, NVCS, did not appear and were not represented. However, their solicitors, Schofield Sweeney, wrote to the Tribunal on 28 May 2019 noting that the appeal was listed for hearing on 19 June 2019, and enclosing written submissions which they asked be taken into account by the Tribunal. In view of this letter, we were satisfied that the Appellants had been notified of the hearing and that it was in the interests of justice to proceed with the hearing in the Appellants' absence.
3. We heard oral evidence from Mrs Dare, and in addition a bundle of documents was produced in evidence.

Background Facts

4. On the basis of the evidence before us, we found the background facts to be as follows:
5. Mrs Dare had been employed by NVCS as a sales representative from 1 February 2016 to 30 September 2016. On 6 July 2016, Mrs Dare notified NVCS that she was pregnant.
6. A dispute arose in respect of Mrs Dare's performance. Mrs Dare argued that the performance issues identified by NVCS were a sham and that they had been put forward on the grounds of her pregnancy and impending maternity leave. NVCS deny these allegations.
7. Mrs Dare was absent from work due to work-related stress. She was paid full sick pay (including her entitlement to statutory sick pay ("SSP")) from 1 August 2016 to 11 September 2016. From 12 September 2016 to 30 September 2016 she was paid SSP only.
8. On 25 August 2016, having received legal advice, Mrs Dare wrote to NVCS offering two options. The first was that she returns to work as soon as her health permitted. The other option was a "clean break" upon payment of compensation of £25,000. The letter provided that:

My employment is terminated by mutual agreement on a date that is convenient for both parties as a result of which I would sign an agreement waiving all claims and the company would make a payment to me ("the Settlement Sum") in order that I can draw a line under this matter and move on with trying to secure new employment elsewhere on an identical salary.

9. The letter sets out and breaks down how the payment of £25,000 is calculated. This breakdown shows that Mrs Dare's entitlement to SMP was included in the £25,000:

I calculate that the Settlement Sum would need to be at least £25,000 ... and that is premised upon the following:

[...]

As to my Statutory Maternity Pay I would have had 6 weeks at 90% totalling £2907 and then 33 weeks at £139.58 totalling £4606.14

[...]

10. Mrs Dare contacted ACAS to go through a pre-claim conciliation process, and notifying her intention to commence proceedings against NVCS in the Employment Tribunal.

11. There was a process of negotiation between NVCS and Mrs Dare, mediated by ACAS. On 29 September 2016, NVCS's solicitor told ACAS that if Mrs Dare wanted to return to work, her probationary period would be extended to continue after her return from maternity leave. Alternatively, NVCS were prepared to pay Mrs Dare the amount she would have otherwise been paid for her maternity leave, £8000, and bring her employment to a close at the end of her sick leave.

12. On 30 September 2016 Mrs Dare made a counter-offer via ACAS, that she be paid £8000 plus loss of earnings from September to December (when she intended to start her maternity leave), or the 3 months' pay which she would have earned on her return after maternity leave. NVCS's solicitor's response was that the £8000 took into account the maternity pay, but he would take his clients' instructions. Subsequently, the solicitor telephoned ACAS stating that NVCS would make a payment of £10,000, with Mrs Dare's employment terminating at the end of December. This offer was accepted in principle by Mrs Dare. Over the subsequent few days there was correspondence and telephone calls between ACAS and the parties to finalise the terms of the COT3 agreement (which formalised the terms of the settlement of the dispute), and the terms of a reference that NVCS agreed to provide for Mrs Dare.

13. The COT3 agreement was signed on 4 October 2016 by Mrs Dare and on 7 October 2016 by NVCS's solicitors on behalf of NVCS.

14. The COT3 agreement provided as follows:

1 The Employee's employment with the Employer terminated on 30 September 2016 ("the Termination Date") by mutual agreement.

2. The Employee has been paid all salary, including statutory sick pay, for the period up to the Termination Date.

3. Without admission of liability, the Employer will pay to the Employee the sum of £10,000 (ten thousand pounds) ("the Termination Payment") in full and final settlement of all claims that the Employee may have against the Employer arising out of her employment, and its termination thereof. For the avoidance of doubt, this shall include any claim for unfair dismissal, sex and/or pregnancy related discrimination, personal injury arising out of her current period of sickness absence and its alleged cause.

4. The Termination Payment will be paid to the Employee within 14 days of the Employer, or its representatives, receiving a copy of the COT3 signed by the Employee.

5. The Employee shall return all property belonging to the Employer, including printer, laptop, tablet, mobile telephone, fuel card, and her company car, registration number AO64 ZKO, by no later than 5

October 2016, and she shall immediately contact Chris Skipper to make arrangements for the return of the Employer's property.

6. The Employer shall, upon request by a prospective employer, provide a reference in the form annexed to this COT3 agreement and any verbal requests for a reference shall be consistent with the wording of the reference.

7.. Both parties shall keep the terms of this settlement and the circumstances of the termination of the Employee's employment confidential and shall only be disclosed to representatives or as required by law.

15. NVCS paid the £10,000 to Mrs Dare on 17 October 2016. No deductions were made on account of any income tax or national insurance contributions.

16. At around that same date, Mrs Dare contacted NVCS regarding her SMP entitlement, as she claimed that she was entitled to this in addition to the £10,000.

17. Included in the bundle were ACAS's notes of telephone conversations and emails with Mrs Dare and with NVCS. These show that ACAS advised Mrs Dare that NVCS's original offer included her entitlement to SMP. However, the notes also record that Mrs Dare told ACAS that she considered that she was at no time advised by ACAS that she had waived her claim to SMP.

18. ACAS notified both NVCS and Mrs Dare that due to their obligation of impartiality, they could not advise who was right or wrong.

19. On 7 November 2017, Mrs Dare notified HMRC that she is entitled to SMP, but that payments of SMP had not been made by NVCS. On 30 November 2016, HMRC wrote to NVCS determining that Mrs Dare was entitled to SMP and requiring NVCS to make payments of SMP to her. NVCS appealed against this decision.

20. Having sought the views of both Mrs Dare and NVCS, and after correspondence between the parties, HMRC wrote to NVCS and to Mrs Dare on 3 February 2017 stating that she satisfied the relevant conditions and was entitled to SMP. HMRC calculated that her entitlement to SMP for the whole of her maternity leave (16 October 2016 to 15 July 2017) was £7825.20. However, their decision on SMP had to be limited to the period to 28 January 2017 – being the end of the maternity pay week preceding the date of the letter. HMRC's decision was that she was entitled to £4475.28 SMP for this period. HMRC, having considered the evidence put to them by Mrs Dare and by NVCS also decided that £7825.20 SMP had been included in the settlement amount, and had been paid to Mrs Dare on 17 October 2016.

21. However, HMRC noted that NVCS had not withheld tax and NICs from the payment, and had advised NVCS to account for the NICs due retrospectively and issue a revised pay statement. A formal letter recording this decision was enclosed with the letter.

22. HMRC's real time information (RTI) pay records show no payments of earnings were made in the month ended 31 October 2016. In other words, none of the £10,000 compensation payment was filed on the RTI system. But following HMRC's decision letter of 3 February 2017, taxable pay of £4475.28 was recorded as having been paid on 28 February 2017.

23. Mrs Dare notified HMRC that she wished to appeal against this decision on 7 February 2017, and requested a review on 9 February 2017. On 20 April 2017, HMRC wrote to Mrs Dare with the conclusions of the review, which upheld the original decision of 3 February 2017. Mrs Dare now appeals against the review decision.

Submissions

24. NVCS submit that no express reference needs to be made to SMP in the COT3 agreement, as the agreement expressly settled all claims that Mrs Dare might have against NVCS.

25. They also submit that Mrs Dare's entitlement to SMP was taken into account in the compensation payment of £10,000. They say that this is clear in the light of the negotiations between the parties: Mrs Dare's original settlement proposal of £25,000 expressly took SMP into account, the subsequent offer by NVCS of £8000 was expressly stated to be on account of her SMP, and by implication, the increase of that amount to £10,000 (as accepted by Mrs Dare) must also have included SMP.

26. In support of their submissions, they refer to the telephone call between Mrs Dare and ACAS on 24 October 2016. ACAS's note of this call is included in the bundle, and the content of the note is not disputed. The note says:

I [ACAS officer] advised I can't stop her but I have notes which state the conversations between the parties through me, clearly stating SMP and that she has been paid over and above. She [Mrs Dare] said she was at no time advised that she waives her right to claim SMP or maternity benefit. I argued with the fact that she had been paid SMP.

27. NVCS submit that their failure to record the payment of SMP on HMRC's RTI system at the time the payment was made was a mistake, which was corrected as soon as it had been brought to their attention.

28. Mrs Dare submits that the COP3 settlement agreement did not include SMP. She points out that the agreement makes express reference to statutory sick pay ("SSP"), but not SMP. When she signed the COT3 agreement, she believed that she could claim SMP in addition to the £10,000 compensation amount.

Discussion

29. Section 164, Social Security Contributions and Benefits Act 1992 ("SSCBA") provides that any agreement purporting to exclude or limit an employee's entitlement to statutory maternity pay is void. Thus, an agreement (including a compromise or settlement agreement), which purports to be in full and final settlement of all claims, cannot exclude entitlement to SMP, and is void to the extent that it purports to do so.

30. Section 203, Employment Rights Act 1996 ("ERA") provides that any agreement is void insofar as it purports to exclude or limit the operation of any provision of that act, or to preclude a person from bringing proceedings under that act before an employment tribunal. There is an important exception for settlements concluded with the assistance of an ACAS conciliation officer – as occurred here.

31. But it is important to note that (a) the right to SMP is not a right granted by the ERA, and (b) Mrs Dare is not pursuing a remedy before the employment tribunal.

32. NVCS submit that no express reference needs to be made to SMP in the COT3 agreement, as the agreement expressly settled all claims that Mrs Dare might have against NVCS. But the effect of s164 SSCBA is that a term of any agreement that purports to settle "all claims" cannot compromise a claim to SMP. And that remains true even if the agreement is concluded under the auspices of ACAS, because the exceptions to s203 ERA only apply to rights conferred by the ERA, and do not apply to rights conferred by the SSCBA.

33. So, it is not possible to enter into an agreement in "full and final settlement" of a claim to SMP (even under the auspices of ACAS) unless the employer has actually paid the employee her entitlement to SMP.

34. We therefore disagree with NVCS's submission that "full and final" settlement language in the COT3 agreement effectively waives any entitlement Mrs Dare may have to payment of SMP.

35. The question we therefore need to consider is whether the compensation paid to Mrs Dare under the COT3 agreement included her entitlement to SMP.

36. NVCS say that it does, and in support of this contention draw our attention to the negotiations between the parties leading up to the COT3 agreement. Mrs Dare's evidence and submissions are that it does not.

37. There are a number of factors which we have considered.

38. First is that the COT3 agreement expressly acknowledges that Mrs Dare has received her entitlement to SSP. Yet the agreement does not itself make any reference to the compensation amount including Mrs Dare's entitlement to SMP.

39. The second is the operation of the very long standing "parol evidence" rule, Lord Morris (in *Bank of Australasia v Palmer* [1897] A.C. 540 at 545 – not cited to us) said

... parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract.

40. The parol evidence rule is subject to various exceptions, particularly if it can be proved that the written contract (in this case the COT3 agreement) was not intended to express the entire agreement between the parties. But in a case such as this, where the agreement is intended to settle nascent litigation and has been concluded under the auspices of ACAS, there must be a strong presumption that the parties intended that the written agreement was intended to be the complete agreement governing the settlement of the potential claims.

41. It was very clear at the time that her claims included her entitlement to SMP as well as her claims in respect of pregnancy and sex discrimination. The agreement expressly addresses the discrimination claims, but not her entitlement to SMP.

Conclusions

42. The issue under appeal is Mrs Dare's entitlement to SMP for the period from 16 October 2016 to 28 January 2017. The period from 28 January 2017 to 15 July 2017 (the end of her maternity leave) is not under appeal.

43. Neither Mrs Dare's entitlement to SMP nor the amount of SMP is in dispute. For the period under appeal her entitlement to SMP was determined by HMRC to be £4475.28. We agree with HMRC's calculation and so find. For the record, we also agree with HMRC's calculation of Mrs Dare's SMP for the whole of her maternity leave, which is £7825.20

44. We find that the payment of SMP was not included in the £10,000 compensation paid to Mrs Dare under the COT3 agreement.

45. We reach this finding because there is no express reference to SMP in the agreement. This is to be contrasted to Mrs Dare's entitlement to SSP and compensation for discrimination, which are expressly mentioned.

46. We do not find the evidence of the antecedent negotiations helpful in reaching any finding as to what was, or was not, intended to be covered by the £10,000 compensation payment. Whilst we acknowledge that the previous offers made by NVCS expressly included Mrs Dare's entitlement to SMP, all of these were rejected by her. The reason she accepted their final offer was because she believed that she would be entitled to be paid SMP in addition to the £10,000 compensation payment.

47. In any event, we find that the evidence of the content of the antecedent negotiations cannot be admitted to imply a term into the COT3 agreement to the effect that the £10,000 compensation included Mrs Dare's entitlement to SMP.

48. We therefore find that NVCS has not paid Mrs Dare her entitlement to SMP.

49. NVCS's appeal is therefore dismissed, and Mrs Dare's cross-appeal is therefore allowed.

50. 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.

**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

RELEASE DATE: 17 OCTOBER 2019