



Neutral Citation: [2023] UKFTT 00875 (TC)

Case Number: TC08952

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/12296

NATIONAL INSURANCE CONTRIBUTIONS – 15 months of arrears of sick pay paid in one lump sum – whether a single payment or multiple payments paid simultaneously – “mistimed payments” - disapplication of Regulation 7(1) by Regulation 7(3) – HMRC decision correct, but not for the reasons submitted by them - Regulations 7 and 58, Social Security (Contribution) Regulations 2002

Heard on: 19 September 2023
Judgment date: 04 October 2023

Before

**TRIBUNAL JUDGE ALEKSANDER
JANE SHILLAKER**

Between

KIRIN KALIA

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents

Representation:

The Appellant in person

For the Respondents: Kieran Gargan, litigator, of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This appeal relates to the timing of national insurance contributions paid to Ms Kalia in respect of sick pay.
2. There has been considerable and lengthy correspondence flowing between Ms Kalia and HMRC – much of which has served to over-complicate and obscure, rather than elucidate, the issues in this appeal. The issues that arise are best understood in the context of the factual background.
3. Ms Kalia was an employee of Crowe LLP (“Crowe”). Under the terms of her contract of employment, she was entitled to be paid sick pay for up to 8 weeks in any 12 month period. In addition, she participated in Crowe’s Group Income Protection plan (“the Plan”). Under the terms of the Plan, participants (such as Ms Kalia) are (in very general terms) entitled to be paid an amount corresponding to (approximately) 75% of their salary whilst they are not working due to sickness. The payment is paid by Crowe to the participant (subject to the usual deductions such as PAYE and NICs). Crowe insure their risk with an insurer (in this case Friends Life – but as Friends Life was acquired by Aviva, in this decision we refer to the insurer as Aviva). The insurance covers (approx.) 75% of the participant’s basic salary (and certain specified benefits), plus Crowe’s liability for pension contributions and employers’ NICs.
4. Payments made by Aviva to Crowe under the terms of the insurance policy are subject to various conditions, including a deferral period (payments under the insurance policy are not made unless and until the participant has been on sick leave for a specified period – in the case of Crowe’s policy with Aviva, 26 weeks). In addition, there are exclusions for various reasons. The terms of the Plan were that Crowe were obliged to pay participants under the GIP if, but only if, the insurer paid Crowe. So, if Aviva declined coverage under the terms of the insurance policy, Crowe were not obliged to make any payments under the Plan to the participant.
5. Ms Kalia became ill, and stopped working on 19 October 2017. She was paid her contractual sick pay at her full rate of pay until the end of December 2017, and thereafter was paid statutory sick pay until April 2018. At that point, payments under the Plan should have started, but Aviva asserted that Ms Kalia’s illness was excluded from cover under the terms of the insurance policy, and refused to make payments to Crowe. In consequence, Crowe were under no obligation to, and did not, make payments under the Plan to Ms Kalia.
6. Ms Kalia challenged Aviva’s refusal to make payments with the Financial Ombudsman. On 16 April 2020, the Financial Ombudsman ruled that Ms Kalia had met Aviva’s definition of incapacity since October 2018, and (taking into account the deferral period) Crowe became entitled to payments under the insurance policy from April 2019. In addition, he directed Aviva to pay interest at an annual simple rate of 8% from the date each payment became due until the date of settlement. Aviva paid Crowe the sick pay due to Ms Kalia back-dated to April 2019 in May 2020. Crowe paid Ms Kalia her entitlement to back-dated sick pay in June 2020. This represented 15 months of arrears. For the purposes of HMRC’s real time information system, Crowe returned the payment as a single payment of earnings paid in June 2020, and accounted for PAYE and NICs on that basis. In addition, interest was paid to compensate Ms Kalia for the delay in payment.
7. The issue under appeal is whether Crowe were correct to treat the payment Crowe to Ms Kalia as a single payment of earnings, or whether it should have been treated as 15 late payments of monthly sick pay which were paid simultaneously.
8. According to Ms Kalia, this treatment for NICs purposes has a bearing on her entitlement to employment and support allowance. We make no findings as regards Ms Kalia’s entitlement to state benefits.

9. It is not in dispute that payments of sick pay made by Crowe to Ms Kalia are earnings and liable to deduction of PAYE and NICs.

10. The issue in this appeal is how those payments are allocated to earnings periods for NICs purposes.

THE APPEAL

11. On 19 July 2022 HMRC issued a decision notice which set out Ms Kalia's liability to Class 1 NICs as follows:

My decision is:

You were liable to pay Class 1 National Insurance Contributions for the period 6 April 2019 to 5 April 2021 amounting to

6.4.2019 - 5.4.2020 £ 575.02

6.4.2020 - 5.4.2021 £4676.67

The amount you have paid is as follows

6.4.2019 - 5.4.2020 £ 575.02

6.4.2020 - 5.4.2021 £4676.67

12. On 31 July 2022 Ms Kalia wrote to HMRC appealing against this decision and seeking a review.

13. Ms Kalia notified the Tribunal of her appeal on 12 August 2022.

14. HMRC wrote to Ms Kalia with their "view of the appeal" on 1 September 2022, and offered a statutory review (not being aware at that time that Ms Kalia had already notified her appeal to the Tribunal). As the appeal had already been notified to the Tribunal, a statutory review was not undertaken, and the appeal to the Tribunal proceeded.

DISCUSSION

15. The basic rule under s6, Social Security Contributions and Benefits Act 1992 is that a liability to Class 1 NICs arises when earnings are paid. However, this basic rule is modified by Regulation 7, Social Security (Contribution) Regulations 2002, which provides as follows:

7 Treatment of earnings paid otherwise than at regular intervals

(1) Subject to regulation 3(5) and paragraphs (2) and (3), for the purposes of assessing earnings-related contributions—

(a) if on any occasion a payment of earnings which would normally fall to be made at regular interval is made otherwise than at the regular interval, it shall be treated as if it were a payment made at that regular interval;

(b) if payments of earnings are made at irregular intervals which secure that one and only one payment is made in each of a succession of periods consisting of the same number of days, weeks or calendar months, those payments shall be treated as if they were payments made at the regular interval of one of those periods of days, weeks or, as the case may be, calendar months;

(c) if payments of earnings, other than those specified in sub-paragraph (b), are made in respect of regular intervals, but otherwise than at regular intervals, each such payment shall be treated as made at the regular interval in respect of which it is due.

(2) Where under paragraph (1) a payment of earnings is treated as made at a regular interval, it shall for the purposes of assessment under these regulations of earnings-related contributions also be treated as paid—

(a) in a case falling within paragraph (1)(a), on the date on which it would normally have fallen to be made;

(b) in any other case, on the last day of the regular interval at which it is treated as paid.

(3) Paragraphs (1) and (2) shall not apply to a payment of earnings made in one year where by virtue of those paragraphs that payment would be treated as made in another year.

(4) Notwithstanding regulation 15, a payment to which paragraph (3) applies (“the relevant payment”) shall not be aggregated with any other earnings unless—

(a) other earnings to which paragraphs (1) to (2) do not apply by virtue only of paragraph (3) are paid in the earnings period in which the relevant payment falls; and

(b) those other earnings would have been aggregated with the relevant payment had paragraph (3) not applied.

(5) A relevant payment shall be aggregated only with the other earnings specified in paragraph (4).

16. HMRC public notice CWG2 and HMRC’s manuals at NIM08700 describe one of the situations covered by Regulation 7(1)(a) as being “mistimed payments” – being payments made by an employer otherwise than on the usual payday. Examples of this given in HMRC’s guidance are where payments are brought forward due to a public holiday, or payments are delayed because of a computer breakdown or the employee’s absence.

17. Ms Kalia submits that Regulation 7(1)(a) applies. This is because she was entitled to be paid sick pay each month under the terms of the Plan. She submits that the payment made by Crowe in June 2020 represented 15 delayed monthly payments of sick pay.

18. On the other hand, HMRC submit that the payment made by Crowe represents arrears of pay, which should be treated as a single payment made in June 2020.

19. No case law authorities were cited to us, and we were unable to find any authorities on the issues arising in this appeal when we undertook a straightforward search using BAILII and LexisNexis. We have therefore had to consider the points in issue from first principles.

20. We start from the position that the payment made to Ms Kalia in June 2020 (insofar as it represented arrears of sick pay) was not compensation or damages paid by Crowe for breach of her contract of employment. The terms of Ms Kalia’s contract with Crowe were that they were only obliged to make payments under the Plan if and when Aviva made corresponding payments to Crowe. We find that shortly after Aviva paid Crowe the arrears of sick pay, Crowe paid Ms Kalia under the terms of her employment contract. We are reinforced in our view by an email sent by Aviva to Ms Kalia on 6 May 2020 where they said:

The Ombudsman is effectively saying the claim benefit should’ve been paid contractually and so the claim payments are absolutely not compensation, they are benefits due to your employer under the contract.

21. We distinguish the arrears from the payment of an amount corresponding to interest – which in our view does represent compensation for Aviva failing to recognise Ms Kalia’s entitlement under the Plan with effect from April 2019.

22. We also consider that the payments are not “arrears” in the sense of an award of an increase in pay which is backdated to an earlier date. An example of this would be an agreement between an employer and a trade union in (say) September 2021 of a pay increase of 3% backdated to April 2021 (being the start of the financial year). The increased pay is paid from November 2021, and in December 2021 a payment of “arrears” is made representing the

difference between the aggregate amounts of salary actually paid from April to October, and the aggregate amounts of salary after taking account of the 3% increase. In such a case, the legal entitlement to be paid the “arrears” only arose once the pay increase was agreed, and the payment of the arrears in such a case is a single payment, rather than an aggregate of seven payments of salary that was owed but had not been paid.

23. On balance, we find that the payment made to Ms Kalia (save to the extent that it represents interest) represented 15 simultaneous payments of sick pay for the periods from April 2019 to June 2020 respectively. We find that these payments were (in the language of HMRC’s guidance) “mistimed”, and that Regulation 7, Social Security (Contribution) Regulations 2002 is engaged.

24. We find that the instalments of sick pay paid in June 2020 represent earnings which would normally fall to be made at regular monthly intervals. Under the terms of Regulation 7(2), each individual payment should (subject to paragraph (3)) be allocated for the purposes of NICs to the earnings periods in which the payments would normally fall – in other words to the earnings periods for the months of April 2019 to June 2020 respectively. However, as regards the payments for the months April 2019 to March 2020, paragraph (3) is engaged, as those payments relate to the tax year (2019/20) preceding the tax year (2020/21) in which the payments were actually made. Those payments are excluded from the application of Regulation 7(1), and are treated as paid in the earnings period in which they were actually paid (namely June 2020).

CONCLUSION

25. Although we have found that Regulation 7 is engaged, the effect of the exclusion in paragraph (3) means that NICs have been correctly allocated between the 2019/20 and 200/21 tax years. The decision notice issued by HMRC on 19 July 2022 is therefore correct (although not for the reasons submitted by HMRC). For this reason, the appeal must be dismissed.

26. However, we note that for the purposes of claiming state benefits, Ms Kalia may (under Regulation 58) apply to reallocate to the 2019/20 tax year the NICs payments excluded from treatment under Regulation 7(1).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

27. 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: 04 October 2023