



Neutral Citation: [2022] UKFTT 00358 (TC)

Case Number: TC08611

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video hearing]

Appeal reference: TC/2018/08283

Statutory Sick Pay – disputed GP report - reference to Medical Services - HMRC Decision under s.8 Social Security Contributions (Transfer of Functions etc) Act 1999 – appeal dismissed

Heard on: 26 September 2022
Judgment date: 03 October 2022

Before

**TRIBUNAL JUDGE ALASTAIR J RANKIN MBE
MR IAN SHEARER**

Between

WHITE FEATHER COMMERCIAL CLEANING LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

and

YASMIN TYRRELL

Respondents

Representation:

For the Appellant: No appearance

For the First Respondents: Ms Jane Chris-Tagoe, litigator of HM Revenue and Customs’ Solicitor’s Office

For the Second Respondent: Ms Yasmin Tyrrell

DECISION

INTRODUCTION

The form of the hearing was by video using the Tribunal video hearing system. The documents to which we were referred are an electronic Documents and Authorities Bundle containing 291 pages, a pdf bundle containing 100 pages and the Second Respondent's Document Bundle containing 32 pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

As there was no appearance by anyone on behalf of the Appellant, the Tribunal requested the Video Hearing Officer to telephone to the two directors of the Appellant company. One telephone was not answered, the other telephone went to an answer machine on which the Officer left a message. The Officer also sent emails to both directors. No response was received from either director during the hearing.

The Tribunal had sent the standard Notice of Hearing by email to Alison Doyle with the Notice attached addressed to Steven Doyle (Steven Doyle and Alison Doyle being the directors of the Appellant). In addition, Ms Chris-Tagoe had emailed Steven Doyle on 20 September 2022 to remind him of the date and time of the hearing. She had tried to telephone Mr Doyle but there was no opportunity to leave a message.

The Tribunal was satisfied that the Appellant had received notice of the hearing and in accordance with paragraph 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 decided that it was in the interests of justice to proceed with the hearing.

BACKGROUND

Ms Tyrrell worked as a cleaner for the Appellant from April 2017. On 16 November 2017 she contacted the First-named Respondents (HMRC) because she had been incapable of work since 30 October 2017 and had not received Statutory Sick Pay (SSP).

On 20 November 2017 HMRC sent a letter to both the Appellant and Ms Tyrrell with an enquiry form for completion. By letter dated 27 November 2017 Ms Tyrrell provided HMRC with a completed enquiry form, payslips, bank statement and fit notes covering period 30 October 2017 to 29 November 2017.

On 11 January 2018 HMRC wrote to the Appellant stating that Ms Tyrrell was owed £357.40 in SSP. On 19 January 2018 HMRC received a letter from Ms Tyrrell which included fit notes for period 28 November 2017 to 29 January 2018 and advising she was waiting for a scan.

On 14 February 2018 HMRC wrote to both parties requesting a full job description. By letter dated 19 February 2018 Ms Tyrrell informed HMRC that the Appellant had paid her £339.53 in SSP but this was less than the amount due and they did not continue to pay SSP.

On 22 February 2018 HMRC received two letters from Ms Tyrrell enclosing payslip showing some SSP paid. There were also copies of a letter from her General Practitioner (GP) to the Appellant and e-mails sent to the GP by the Appellant, a letter from Ms Tyrrell's physiotherapist, a letter from Ms Tyrrell's daughter's school, a letter from her MP and fit notes for the period from 29 January 2018 to 8 March 2018.

On 6 March 2018 HMRC received from Ms Tyrrell a fit note covering period 6 March 2018 to 12 March 2018 and on 13 March 2018 HMRC referred papers to Medical Services including

Ms Tyrrell's consent form, medical evidence and report from her GP and the Appellant's reason why they believed incapacity was not genuine.

On 26 March 2018, HMRC received an email from Ms Tyrrell with fit notes covering the period from 12 March 2018 to 8 April 2018 and on 9 April 2018 a further fit note was received from her covering the period from 9 April 2018 to 22 April 2018.

On 23 April 2018, HMRC received an e-mail from the Appellant with fit note covering period 23 April 2018 to 22 June 2018.

On 1 June 2018 HMRC issued a Section 8 decision with covering letters to the Appellant and Ms Tyrrell. HMRC decided that Ms Tyrrell was entitled to £2,517.46 in respect of SSP for the period 30 October 2017 to 16 May 2018. The Appellant had paid Ms Tyrrell £339.53 on 30 January 2018 with the result that the Appellant owed a further £2,177.93.

By letter dated 22 June 2018 the Appellant wrote to HMRC disagreeing with the SSP decision. HMRC treated this letter as an appeal. In the letter it was said that conflicting medical opinions had been given, and that Ms Tyrrell's sickness was premeditated and she had withheld information. The Appellant also claimed the Appellant's doctor had said she could do the majority of her duties. On 31 July 2018, HMRC sent a letter to Ms Tyrrell notifying her of the appeal.

On 13 August 2018 HMRC sent to the Appellant a letter giving a view of the matter, which dismissed the appeal and offered a review

The Appellant accepted a review on 14 September 2018.

On 23 November 2018 HMRC sent a Review conclusion letter to the Appellant which upheld the decision.

The Appellant appealed to this Tribunal by Notice of appeal on 22 December 2018.

POINT AT ISSUE

This Tribunal has to decide whether the Appellant is liable to pay the outstanding SSP to Ms Tyrrell and whether Ms Tyrrell is entitled to SSP.

The burden of proof is the ordinary civil standard of the balance of probabilities and the onus is on the Appellant to show that HMRC's decision is incorrect.

LEGISLATION

Section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 (the 1999 Act) gives the authority for officers of HMRC to make decisions on certain national insurance matters. Section 11 of the Act gives the right of appeal against such decisions. Section 13 of the Act provides that HMRC, with the agreement of the Lord Chancellor and the Lord Advocate, can make regulations to make provision to take such appeals to the Tax Appeal Commissioners. Following the Tribunal reforms, legislation was introduced to transfer the power of the Commissioners to The Tribunal.

Section 268 to 275 of The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 amended the 1999 Act mainly by substituting 'Tax Commissioners' with 'tribunal'. (First-Tier and Upper-Tier as appropriate).

The Social Security Contributions (Decisions and Appeals) Regulations 1999 (the 1999 Regulations) set out the powers conferred on the Commissioners of the Inland Revenue to deal with decisions and appeals made under the 1999 Act.

Schedule 2 paragraphs 59 to 67 of The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 amended regulation 7 of the 1999 Regulations by insertion of sections 49A to 49I of The Taxes Management Act 1970.

This provides the jurisdiction for this Tribunal to decide on decisions made under section 8 of the 1999 Act. This appeal falls into that category.

In accordance with Section 151 of the Social Security Contributions and Benefits Act 1992 (the 1992 Act), employers are liable to pay SSP to employees who satisfy all the conditions. To be entitled to SSP an employee must:

- be unfit for work due to incapacity or illness
- must inform their employer they are sick
- provide evidence of incapacity to work
- be employed by an employer who is liable to pay National Insurance (NI) contributions on their earnings
- must have average weekly earnings of at least the lower earnings limit (LEL) for NI purposes.

A day of incapacity for work means a day on which the employee is, or is deemed to be, incapable by reason of some specific disease or bodily or mental disablement of doing work which he can reasonably be expected to do under his contract.

Section 152 of the Act states:

- '(1) The first condition is that the day in question forms part of a period of incapacity for work
- (2) In this Part of this Act "period of incapacity for work" means any period of four or more consecutive days, each of which is a day of incapacity for work in relation to the contract of service in question'.

The first qualifying condition is in dispute as to whether the employee's incapacity was genuine. All the remaining qualifying conditions have been met.

Section 9(2) and (3) of the 1999 Act states

- (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 shall have the assistance of one or more experts.
- (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.

APPELLANT'S CONTENTIONS

The Appellant's grounds of appeal may be summarised as:

There is conflicting medical opinion between the fit for work notes and the report obtained with Ms Tyrrell's consent from her General Practitioner (GP).

Ms Tyrrell's claim for SSP was pre-meditated and she concealed a pre-existing condition.

The Appellant believes it is more than coincidental that the claim for SSP was received immediately after Ms Tyrrell's first six months of employment. The Appellant believes Ms Tyrrell understood that she had to work for six months before she could claim SSP.

The report from the GP indicates that the only area of concern for Ms Tyrrell's work was with mopping.

The Appellant claims they tried to arrange meetings with Ms Tyrrell to discuss changes to her working practices to make a return to work possible, but she would not attend.

Alison Doyle claimed that she saw Ms Tyrrell running across the road and a workmate had observed her dancing at a petrol station.

Ms Tyrrell conceived a baby during a period she claimed she was unfit for work. The baby was born on 1 October 2018. Ms Tyrrell specifically requested her GP not to mention the fact that she was pregnant.

Other employees have been signed off sick for back issues by the same GP surgery with no obvious disability present.

HMRC'S CONTENTIONS

HMRC submitted that Ms Tyrrell had provided HMRC with unfit to work certificates, from five different doctors and that these had been signed. Her GP had said that she had symptoms of sciatica.

Ms Tyrrell had been examined by several GPs over an extended period. As there was a dispute between the Appellant and Ms Tyrrell as to whether or not the sickness was genuine, arrangements had been made in accordance with Section 9 of the 1999 Act. Ms Tyrrell was examined by an expert doctor at the Medical Services in a meeting, which lasted over an hour. This latter examination included an extensive physical examination and exploration of her ability to move, bend, stretch and so on.

HMRC contended that there is unanimous agreement from all health professionals who have seen Ms Tyrrell that she has suffered from sciatica to the extent that she was not fit to carry out the duties of her work as a cleaner. HMRC are not qualified to dispute these expert findings.

HMRC stated that in the Appellant's appeal it is mentioned that there is a conflict regarding the medical opinions between the fit for work notes and the report they obtained (with Ms Tyrrell's consent) from her GP. HMRC submitted that a series of different doctors who had all examined her over a period of six months, giving the same findings, that Ms Tyrrell was not fit for work. HMRC did not object to the findings from medically trained doctors.

HMRC further submitted that the Appellant had stated in their Notice of appeal that the claim to SSP was premeditated, and that Ms Tyrrell had concealed a pre-existing condition. HMRC has not found any evidence to come to such a conclusion and therefore submitted that this was not relevant to the issue at hand.

HMRC further stated that the Appellant has made other arguments in the appeal, which HMRC contend are supposition. There is no evidence to support these claims.

Ms Chris-Tagoe stated that the facts and evidence show that Ms Tyrrell was unfit to work, according to the signed unfit to work certificates. The medical reports were from trained medical professionals.

MS TYRRELL'S CONTENTIONS

Ms Tyrrell had submitted 32 pages of documentation much of which referred to the treatment which she has been receiving. She included a photograph taken from her house of a car sitting half on the pavement and half on the road on a double yellow line. She believed this car was being driven by Alison Doyle. She asserted that while Mrs Doyle normally collected other employees from a neighbouring street where those employees lived, during the period of Ms Tyrrell's SSP claims Mrs Doyle collected these employees from outside Ms Tyrrell's house so that she could keep an eye out for Ms Tyrrell. In other words, Ms Tyrrell claimed that Mrs Doyle was stalking her.

DECISION

The medical evidence clearly shows that Ms Tyrrell was unfit for work during the period claimed. The Appellant has produced no evidence to substantiate its claim that Ms Tyrrell knew that she had to be employed for six months before she could claim SSP or that it was a coincidence that her claim was submitted as soon as she had been employed for six months.

The Appellant has produced no evidence to support its claim that other employees have been signed off sick by Ms Tyrrell's surgery with no obvious disability being present.

The only first-hand evidence before the Tribunal was from Alison Doyle when she claimed in correspondence that she had nearly knocked Ms Tyrrell down while she was running across the road. All the other claims by the Appellant were hearsay and without any independent evidence to support them, cannot be considered by this Tribunal.

Ms Tyrrell gave birth to a baby on 1 October 2018. There is no evidence that she experienced any adverse symptoms during her pregnancy which might affect her entitlement to SSP. Accordingly her pregnancy has no bearing on her entitlement to SSP.

The appeal is therefore dismissed. The Appellant remains liable to pay Ms Tyrrell the balance of the SSP to which she is entitled - £2,177.93.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

**ALASTAIR J RANKIN MBE
TRIBUNAL JUDGE**

Release date: 03rd OCTOBER 2022