Appeal number FTC/67/2010
[2011] UKUT 297 (TCC)

STATUTORY SICK PAY – Employer's liability – Qualifying conditions – Period of entitlement – Whether period of entitlement during which no earnings were paid to employee deprives employee of right to statutory sick pay – Whether employee's normal weekly earnings less than lower earnings limit then in force – Definition of "normal weekly earnings" – Social Security Contributions and Benefits Act 1992 s153 and Sch 11 para 2(c) – Appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

LINDA SEATON **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: SIR STEPHEN OLIVER QC
EDWARD SADLER

Sitting in public in London on 23 March 2011

C R Bagley, Stroud Citizens Advice Bureau, for the Appellant

Aparna Nathan, counsel, instructed by the Solicitor for HMRC, for the Respondents

DECISION

Background

1. Linda Seaton appeals against the Decision ("the Decision") of the First-tier Tribunal (John Brooks and Simon Bird) ("the Tribunal") released on 14 June 2010. The Tribunal decided that Linda Seaton was not entitled to Statutory Sick Pay ("SSP") for the period 30 May 2006 to 3 December 2006.

2. The issue for determination is whether the circumstance specified in paragraph 2(c) of Schedule 11 to Social Security Contributions and Benefits Act 1992 ("SSCBA") existed such that Linda Seaton's entitlement to SSP did not arise. "Exclusion C", as we call it, will be present if at the relevant date Linda Seaton's normal weekly earnings were less than the lower earnings limit then in force. Throughout the relevant period Linda Seaton's employer had, in breach of her service contract, failed to make any payment to Linda Seaton by way of earnings. The Tribunal had upheld the contention of HMRC to the effect that Linda Seaton's average weekly earnings had not exceeded the lower earnings limit for the relevant period; in consequence the Tribunal decided that she was not entitled to receive SSP for the period from 30 May 2006 to 3 December 2006.

Summary of the facts

3. Linda Seaton was employed as a deputy manager/care assistant at Sharpness Residential Nursing Home since 1996. Her normal working days were Monday to Thursday and her pay day was the last Friday of each month when she was paid by way of a BACS payment into her bank account.

4. Linda Seaton's last working day had been Thursday 18 May 2006. She notified her employer (a Mrs B) on Monday 22 May that she was unable to attend to work for reasons of ill-health. She claimed SSP for the period from 22 May until 1 December 2006.

5. Linda Seaton had received payslips for March, April and May 2006 but she did not receive any payment of her wages for those months. Following a successful claim in the Employment Tribunal against her employer for "unlawful deduction of wages", Linda Seaton was awarded net wages for those months, which she received on 30 August 2006.

6. At the time that Linda Seaton had become unable to work, her weekly earnings had been £264. The lower earnings limit in the period from April 2006 until April 2007 had been £84 per week.

The statutory framework relevant to the present dispute

7. SSP is governed by Part XI of the SSCBA. An employee's entitlement to SSP arises from section 151(1) of SSCBA which, so far as relevant, provides:

> "(1) Where an employee has a day of incapacity for work in relation to his contract of service with an employer, that employer shall, if the conditions set out in sections 152-154 below are satisfied, be liable to make him, in accordance with the following provisions of this Part of this Act, a payment (to be known as "statutory sick pay") in respect of that day."

A "day of incapacity for work in relation to a contract of service" occurs where the employee concerned is "incapable by reason of some specific disease or bodily or mental disablement of doing work which he can reasonably be expected to do under that contract." (See section 151(4)).

8. The three conditions start with section 152. This requires that the day "to which the entitlement to SSP relates" forms part of a period of incapacity. Section 154 requires that that day be a qualifying day (i.e. a day when the employee would otherwise be required to work). Nothing turns on those two conditions. The present issue revolves round the interpretation and the application of the second of the three conditions, which is found in section 153.

9. Section 153, so far as is relevant, reads as follows:

> "(1) The second condition is that the day in question falls within a period which is, as between the employee and his employer, a period of entitlement.
>
> (2) For the purposes of this part of this Act a period of entitlement, as between an employee and his employer, is a period beginning with the commencement of a period of incapacity for work and ending with whichever of the following first occurs –
>
> …"

There then follows a number of events covering, for example, the termination of the period of incapacity for work and the end of the period of entitlement. Nothing turns on the occurrence of those events in relation to this appeal. Section 153 continues by providing:

> "(3) Schedule 11 to this Act has effect for the purpose of specifying circumstances in which a period of entitlement does not arise in relation to a particular period of incapacity for work."

10. Schedule 11 to the SSCBA sets out the circumstances in which a period of entitlement does not arise for purposes of section 153. So far as relevant Schedule 11 provides:

> "(1) A period of entitlement does not arise in relation to a particular period of incapacity for work in any of the circumstances set out in paragraph 2 below or in such other circumstances as may be prescribed …
> (2) The circumstances are that –
>
> > (a)-(b) …
> > (c) at the relevant date the employee's normal weekly earnings are less than the lower earnings limit then in force under section 5(1)(a) above;
> > (d)-(h) …
>
> (3) In this Schedule "relevant date" means the date on which the period of entitlement would begin in accordance with section 153 above if this Schedule did not prevent it arising."

It is not in dispute that the relevant date in the case of Linda Seaton is 22 May 2006.

11. Section 163 of SSCBA interprets certain words and expressions found in Part XI. So far as relevant it provides:

> "(2) For the purposes of this Part of this Act an employee's normal weekly earnings shall, subject to subsection (4) below, be taken to be the average weekly earnings which in the relevant period have been paid to him or paid for his benefit under his contract of service with the employer in question.
>
> (3) For the purposes of subsection (2) above, the expression "earnings" and "relevant period" shall have the meaning given to them by regulations.
>
> (4) In such cases as may be prescribed an employee's normal weekly earnings shall be calculated in accordance with regulations."

The Regulations are the Statutory Sick Pay (General) Regulations 1982. These define the term "earnings" at Regulation 17 as follows:

> "(2) For the purposes of section 163(2) of the Contributions and Benefits Act, the expression "earnings" refers to gross earnings and includes any remuneration or profit derived from a person's employment … ."

This provision identifies one purpose of the special definition of normal weekly earnings in section 163(2). But for the requirement that the weekly earnings shall "in the relevant period have been paid", benefits in kind (which are profit derived from an employment) would have to be valued and brought into the reckoning required by Schedule 11 para 2(c).

12. Regulation 19 of the Regulations defines "the relevant period" for the purposes of section 163(2) as follows (so far as is relevant):

> "(3) Subject to paragraph (4), the relevant period … is the period between –
>
> > (a) the last normal pay day to fall before the critical date; and
> > (b) the last normal pay day to fall at least eight weeks earlier from the normal pay day mentioned in subparagraph (a)
>
> Including the normal pay day mentioned in subparagraph (a) but excluding that first mentioned in subparagraph (b) …".

The Tribunal took the "relevant period" in this case to have been the period between 24 March 2006 and 19 May 2006. This is not challenged.

13. Linda Seaton's eligibility for SSP hinges on whether it can be said that her normal weekly earnings were above the lower earnings limit. In determining this, as noted, section 163(2) of SSCBA provides that normal weekly earnings are taken to be the average weekly earnings which in the relevant period have been paid to the employee under the contract of service with his or her employer.

At the Hearing

14. The parties focussed their arguments on whether the Tribunal's interpretation was correct.

15. The approach taken by the Tribunal had been to explore the possibility of adopting a construction of section 163(2) that avoided injustice or absurdity. The Tribunal expressed the view that a literal interpretation of that provision resulted in Linda Seaton being deprived of her SSP because of the unlawful action of her employer. The alternative construction suggested for Linda Seaton had been to regard the weekly earnings "paid to" Linda Seaton as including the contractual entitlement which, following the employment tribunal's ruling, had eventually been paid to her. Section 163(2), it had been argued for Linda Seaton, did not require that the earnings paid should have been actually paid during the relevant period; it was sufficient that they were paid in respect of that period. The Tribunal had been unable to adopt that construction. The words of section 163(2) were against it. The words required, as had been contended for by HMRC, that payment of the weekly earnings be made "in" and not "in respect of" or "for" the relevant period. It followed that she had not satisfied the statutory conditions and was not therefore entitled to receive SSP.

16. Our provisional view was that the positions taken by both parties were wrong. The construction sought for Linda Seaton was unsustainable on any basis of statutory construction: in that we agreed with the Tribunal. HMRC were wrong because they had failed to establish that Linda Seaton's non-existent "normal weekly earnings" (using section 163(2) to interpret that expression in Schedule 11 paragraph 2(c) as meaning earnings paid in the relevant period) were less than the lower weekly limit then in force. They failed because, in our provisional view, the expression "earnings … which in the relevant period have been paid to him … under his contract" could not be construed as applying to Linda Seaton's situation where there had been a total failure on the employer's part to pay any amount by way of earnings to the employee: no earnings whatsoever had been paid, and therefore it could not be said that "the employee's normal weekly earnings [as defined in section 163(2)] are less that the lower earnings limit".

17. We were concerned that our provisional view had not been addressed by the parties and we invited them to comment in writing.

18. For Linda Seaton, no comments were made on the construction provisionally adopted by us in the note inviting comments; the submissions were directed at the practicalities and difficulties that such construction was said by HMRC to lead to. We will review these later.

19. For HMRC it was argued against our provisional construction that the definition of normal weekly earnings in section 163(2) was clear and precise and could not be ignored when applying Schedule 11 paragraph 2(c). Developing their argument they said that the day of incapacity in question has (by section 153(1)) to fall within a period of entitlement and (by section 153(3)) that there will have been no period of entitlement if Schedule 11 so specifies. Schedule 11 paragraph 2(c) does so specify on the strength of the words of interpretation in section 163(2). It would, to quote the written submission of HMRC , "be absurd if the section 163 definitions apply for the purposes of one part of section 153 (i.e. section 153(1)) but not for another part (section 153(3)) which imports in Schedule 11".

20. Regarding the proper application of section 163(2), HMRC say that the definition of normal weekly earnings requires that, for earnings to qualify as such, they must not only be sums to which the employee is contractually entitled; they must also have been paid to him for his benefit.

Conclusions

21. We agree with HMRC's construction of the definition of normal weekly earnings as found in section 163(2). We agree that the literal construction of the words "which in the relevant period have been paid" envisages an actual payment being made during the relevant period. The disagreement between us is as to the application of that construction to the system of SSPs. HMRC seek this result. Where, on the proper construction of normal week earnings no earnings have been paid to the employee in the relevant period, it will follow that the second condition (in

section 153) will not be satisfied. This is because, at the relevant date (i.e. when the period of entitlement would otherwise begin) the employee's normal weekly earnings, being £0, will have been less than the lower weekly limit then in force. Thus, the employee (here Linda Seaton) fails to qualify herself for SSP. The result, we think, is the reverse. Because, on the agreed construction of the expression "normal weekly earnings", no earnings to which Linda Seaton was entitled under her contract of service with the proprietor of Sharpness Residential Nursing Home will in the relevant period have been paid to her, there will be no amount to be "taken to be the average weekly earnings" for purposes of the calculation (in Schedule 11 paragraph 2(c)) in determining whether "normal weekly earnings" are less than the lower weekly limit then in force. That calculation cannot be made and it cannot be said that "at the relevant date the employee's normal weekly earnings are less than the lower earnings limit then in force"; – consequently Exclusion C does not operate, and Linda Seaton is not thereby denied her entitlement to SSP. The application of the special definition of normal weekly earnings to the present circumstances produces nothing relevant to the Schedule 11 paragraph 2(c) calculation. We now explain the reasoning behind our conclusion.

22. The employer claiming exclusion from what would otherwise be a section 151 liability for SSP has to demonstrate that the "second condition" (in section 153) is applicable on the grounds that there was no "period of entitlement" in relation to the day to which the alleged entitlement to SSP relates. To do so, the employer must show that one or more of the specified circumstances in Schedule 11 are present with the result that (to use the words of section 153(3)) "a period of entitlement does not arise in relation to [the] particular period of incapacity for work".

23. The critical question therefore is whether HMRC (which have assumed liability for SSP in relation to Linda Seaton's claimed entitlement) is absolved from the liability for SSP as regards Linda Seaton on grounds that one or more of the specified circumstances in Schedule 11 are present. For this purpose we take the period of entitlement as having commenced on the first day of Linda Seaton's period of incapacity for work: see section 153(2). Our understanding is that this was 22 May 2006; but nothing turns on the exact date.

24. Turning to the statutory provisions and their effect, we note that Schedule 11 paragraph 2 specifies seven excluding circumstances. As just observed, if any one of them exists, the period of entitlement does not arise as regards Linda Seaton. Only paragraph 2(c), Exclusion C, is in point in the present dispute. Exclusion C exists where the circumstances are such that "at the relevant date the employee's normal weekly earnings are less than the lower earnings limit then in force …". "The relevant date" is the date when Linda Seaton's period of entitlement would begin (in accordance with section 153(2)) if Schedule 11 did not prevent it from arising. We have taken the relevant date to have been 22 May. "The lower earnings limit then in force" was £84 per week.

25. The determination of Linda Seaton's "normal weekly earnings" (for the purposes of showing that they are less than the lower weekly limit of £84 per week)

brings the words of section 163(2) into play. These take her normal weekly earnings to be the average weekly earnings which "in the relevant period have been paid to [her] or for [her] benefit under the contract of service with the employer in question". It is not in dispute that, by reason of Regulation 19, the "relevant period" in the present case was the period between 23 March and 19 May 2006.

26. The problem HMRC have to address, if they are to bring themselves within Exclusion C, is the agreed fact that "in the relevant period" the proprietor of the Nursing Home ignored the obligation to pay any weekly earnings to Linda Seaton under the contract between the proprietor and Linda Seaton. Adopting a literal construction, being the approach consistently advocated by HMRC, the prescribed circumstances of Exclusion C cannot have occurred. Thus, because no actual payment of contracted weekly earnings will have been made during the relevant period, the special definition in section 163(2) will have no effect to treat as paid earnings that were never paid.

27. The result must be what Parliament contemplated. The intention is shown by the words "normal weekly earnings" in Schedule 11 paragraph 2(c) which, on their ordinary meaning must mean her actual entitlement under her contract of service. There is no need to seek to adopt a purposive construction of the special definition in section 163(2) that produces a different result by, for example, deeming something less than the lower earnings limit to have been paid when in fact nothing was paid. Indeed HMRC have not sought to do so.

The Decision appealed against

28. In paragraph 23 of the Decision the Tribunal stated:

> "The literal construction of section 163(2), favoured by HMRC, clearly envisages an actual payment being made during the "relevant period".

As indicated above, we entirely agree with this.

29. The Tribunal went on in paragraph 24 to say:

> "However, we consider that, having regard to the circumstances of this appeal, such an interpretation would lead to an injustice given that Mrs Seaton's situation has arisen as a result of the unlawful action of her employer. As such it is necessary for us to consider whether the language of section 163(2) admits to an alternative construction which avoids the injustice or absurdity which we may then adopt in preference to the literal interpretation … ."

That, as we have already indicated, is an unnecessary exercise. In our view the Tribunal erred in focussing, as it says it did in paragraph 21, on the words "… which in the relevant period have been paid to him …" without analysing their effect on the wider question of whether the circumstances of Exclusion C were present. The

Tribunal failed to recognise that where the employer has simply ignored his contractual obligation to pay earnings to his employee, there has been no payment and no amount can be deemed to have been paid in the relevant period or at all. The phrase "which in the relevant period have been paid to him", when used to relate to "weekly earnings" is, as the Tribunal recognised in paragraph 21, expressly concerned with earnings that have been paid. If the obligation to pay the earnings has been completely ignored by the employee, nothing will have been paid in the relevant period. Consequently the actual circumstances will have been wholly outwith those prescribed in Exclusion C, i.e. at paragraph 2(c) of Schedule 11.

30. For those reasons we think that the Tribunal erred in law. We therefore allow the appeal.

HMRC's practical objections

31. HMRC submit that the decision we have just reached, which was foreshadowed in the note of our provisional view, could have a wide ranging adverse impact on the operation of SSP. There are, they say, approximately 2.1m employers at present all of whom are required to operate the SSP scheme. Consequently, it is said, the policy on the part of the State is to ensure that the payment of SSP is kept simple and easy to apply. Consequently, they say, part of this approach has been to leave out of account questions of contractual entitlement to pay and focus simply on what has actually been paid in the relevant period. Thus all the employer has to do, in order to determine whether an employee qualifies for SSP, is to see what amount has actually been paid to the employee in the relevant period. The employer should not have to determine the amount on the basis of the contractual entitlement of the employee. To do so, it is said, could raise complex issues based on the employee's attendance, overtime, bonuses, dividends, commission, long service awards, holiday pay etc. We do not see that as an objection. HMRC appear to be making a point about contractual entitlements. Whereas we are simply saying that if nothing is actually paid (irrespective of entitlement), Exclusion C does not came into play. Thus (all other conditions being satisfied) the employee has the right to SSP. Besides, as Linda Seaton's advisers point out, employers already have to calculate all the elements that comprise earnings for each and every pay period; and in the case of a claim for SSP employers also have to calculate all these elements for the relevant period to determine if an employee's earnings are above the lower earnings limit.

32. Then HMRC observe that our reasoning is based on the situation where the obligation to pay earnings has been completely ignored by the employer such that nothing has been paid in the relevant period. HMRC asked whether our decision is applicable only to the facts of the case or whether it applies to other circumstances. It cannot, we think, be appropriate for us to give a definitive ruling on this. Everything will depend on the facts.

33. Finally HMRC suggest that we have been motivated by the fact that Linda Seaton has been disadvantaged through the fault of her employer; consequently, HMRC suggest, our provisional view, which (they say) creates many practical

difficulties, should not be adopted. We do not see what those difficulties are. We can only say this. HMRC's contentions are unsound in law and have been rejected. The appeal succeeds. In principle, we think that Linda Seaton is entitled to her costs, but if HMRC wish to put forward any reasons why the costs should not follow the event, they have thirty days in which to do so.

SIR STEPHEN OLIVER QC

EDWARD SADLER
JUDGES OF THE UPPER TRIBUNAL

RELEASE DATE: 21 July 2011