



TC02748

Appeal number: TC/2011/05226

Statutory sick pay – whether payable by employer – dispute as to whether employment had been terminated before sickness began – No – SSP payable by employer – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STEVEN MCGREGOR

Appellant

- and -

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

Respondents

MEGAPRINTER.CO.UK LTD

**Second
Respondent**

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 19 November 2012 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 05 July 2011 and HMRC's Statement of Case submitted on 05 October 2011, the Appellant replying on 17 November 2011 and the Second Respondent submitting no Reply

DECISION

Introduction

- 5 1. This is an appeal by Mr. Steven McGregor ('the Appellant') against a decision issued on 23 March 2011, under section 8 of the Social Security Contributions (Transfer of Functions) Act. 1999 that the Appellant was not entitled to Statutory Sick Pay ('SSP') from his former employer Megaprinter.co.uk Ltd, ('the Second Respondent') for a period of incapacity that commenced on 20 September 2010.
- 10 2. The Second Respondent says that the Appellant is not entitled to SSP as his employment ended with effect from 20 September 2010.

The Background

- 15 3. The Appellant started employment with the Second Respondent on 7 June 2010. He worked in a telemarketing role, from 9 am until 6 pm Monday to Friday. He was paid in cash every Wednesday. There were some weeks when he did not receive a pay slip. During the week commencing 21 June 2010 the Appellant's title changed to 'commercial director' to give him the authority to instigate improvements to the company but his salary and the hours remained the same. The Appellant says that he was paid in full up to 30 July 2010 and that the amount of his take-home pay each week varied between £208 and £282. From 2 August 2010 until 27 August 2010, he received a fixed amount of £210 each week, and was given no payslip.
- 20 4. From 31 August until 17 September 2010 the Appellant says he agreed to work from home for part of the time and for the remainder, from the Second Respondent's offices in Milford Haven. For this period he received no wages at all. He became aware that other employees who were paid on a monthly basis had also not been paid and eventually Mr. Thomas Sinclair the company secretary admitted that the Second Respondent company had 'run out of money'.
- 25 5. On the week starting Monday, 20th of September the Appellant says he was feeling ill and suffering severe chest pains. He could not work and went 'on sick'. On Thursday 30 September, he collapsed and was rushed to hospital where he remained until 4 October 2010. He says he spoke to Mr. Sinclair on Wednesday, 6 October and informed him of the situation. He says that Mr. Sinclair told him not to worry and to try and get back to work as soon as possible. He says that he spoke again with Mr. Sinclair on 14 October, who said he would call to see the Appellant the following day. In the event, Mr. Sinclair did not keep the appointment and instead they met on 19 October when the Appellant says they discussed a number of things, including Mr. Sinclair hopes that the Appellant would be able to return to work as soon as possible. The Appellant says that they spoke for a couple of hours about a range of strategies to try and improve the company's situation and that Mr. Sinclair assured the Appellant he would 'sort out' arrears of pay and sick pay. The Appellant says Mr. Sinclair left with a file containing the Appellant's personal banking documentation and that this was the last time he saw him in person or spoke to him.
- 30 35 40 6. On 21 October 2010 Mr. Sinclair faxed a document to Haverfordwest County Court relating to Court proceedings, which the Appellant was due to attend. The letter says :

5 ‘I have the unfortunate duty of informing the court that Mr. Steve McGregor my neighbour and work colleague, last week had a suspected heart attack and was admitted to hospital.... He is now back and making a steady recovery but would not realistically be able to attend court today. Mr. McGregor therefore asked me to inform the court of the situation and request that the matter be adjourned for at least two or three weeks so that he can attend. I enclose a copy of his sick note which currently reads ‘chest pain, under investigation’

- 10 7. The Appellant points out that the letter to the court refers to him as a ‘work colleague’. The sicknote had been obtained from his GP and given to Mr. Sinclair. The Appellant says that the letter is clear evidence that he was still employed by the Second Respondent, albeit sick and off work.
- 15 8. Two weeks later the Appellant was admitted to hospital again suffering the same symptoms and remained in hospital for a further 18 days. During this time the Appellant says that his wife made numerous calls to the Second Respondent, in an effort to speak to Mr. Sinclair about outstanding pay and accumulating sick pay, but was never able to speak to him. Instead, she spoke to a Mr. Andrew Kuruc who assured the Appellant's wife that the situation regarding the outstanding sick pay was being dealt with. The Appellant says that one Sunday evening when presumably not expecting anyone to call regarding business matters, Mr. Sinclair answered the phone in person and was embarrassed to find that he was speaking to the Appellant's wife. He reassured her that the outstanding pay was being dealt with.
- 20 9. By November 2010, the Appellant says that he needed to know where he stood with regard to sick pay, and was advised to contact the HMRC Customer Operations at the National Insurance Contributions Office, Statutory Payments Disputes Team (the SSP team) based at Longbenton Newcastle upon Tyne.
- 25 10. On the 22 November 2010 the SSP team wrote to the Second Respondent with form SS P50 for completion and return, advising that the Appellant appeared to satisfy the qualifying conditions for entitlement to SSP. They calculated the amount due to the Appellant at £886.48, representing one day at £15.83 and 11 weeks at £79.15. The Second Respondent was asked to arrange payment of this, to the Appellant, as soon as possible, and advised that the company may be able to recover all or part of the SSP paid. The Second Respondent was also informed that employers cannot terminate an employee's contract of employment to avoid paying SSP and that if the contract of an employee is ended for that purpose, then the employer remains liable to pay SSP to the employee until an event occurs, which would have caused the period of entitlement to SSP to come to an end, for example, if the incapacity had ended.
- 30 11. On 7 December 2010 the SSP team informed the Appellant that he met all the qualifying conditions and that the Second Respondent was liable to pay the outstanding SSP of £886.48. He was asked to inform the SSP team if he had not received payment from the Second Respondent by 4 January 2011.
- 35 12. On 10 December 2010. Mr. Sinclair wrote to the SSP team saying that the company had returned form SSP50 the previous week and that he was enclosing it ‘again’. Mr. Sinclair said that the Appellant had been informed in person of the termination of his employment on Monday, 20 September 2010 by letter and e-mail, copies of which had been provided.
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Mr. Sinclair said that the Appellant's employment had been terminated due to unsatisfactory sales performance. He enclosed a copy of the company's 'termination letter' and a copy of the e-mail to Mr. McGregor.

13. The termination letter is dated 20 September 2010 and states:

5 'Further to and as explained in our meeting. I'm writing to confirm that your casual hours of employment have ended due to unsatisfactory sales performance.

 Please note, as promised, I'm still willing to assist you with your personal legal matters.

 If you have any queries please do visit to contact me'

10 14. The e-mail correspondence Mr. Sinclair refers to, includes an e-mail from Mr. McGregor to Mr. Sinclair, dated 29 October 2010, which says:

 Tom,

 'I've just spoken to Trevor and he confirmed that the staff have been paid today

 Tricia is waiting to go shopping so can you please tell me what time you will bring you my wages and statutory sick pay over?'

15 Mr. Sinclair replied by e-mail dated 2 November 2010 referring to 'a previous meeting in September' and Mr. McGregor's unsatisfactory sales performance. Mr. Sinclair goes on to say:

20 'that being the case you are aware that your casual hours with Sinclair Megaprinter Plc have long since come to an end and you have already confirmed to me that any future work you do for the company will be on a commission only self-employed basis therefore, we do not owe you any wages or SSP given the circumstances. According to accounts your wages been paid up-to-date.'

The e-mail is addressed to the Appellant at the e-mail address given in his e-mail of 29 October 2010.

25 15. There is some doubt as to whether the Appellant received either the letter of termination of employment dated 20 September 2010 or the e-mail of 2 November 2010 as the Appellant makes no reference to either of these in his correspondence with the SSP team..

30 16. On 10 January 2011 the SSP team wrote to the Appellant to say that they had received information from the Second Respondent to the effect that the Appellant's employment was terminated on 20 September 2010 and that their revised opinion was that the Appellant was not entitled to SSP from the Second Respondent.

17. The Appellant replies that the Second Respondent was attempting to evade its responsibilities. He reiterated that he had received neither a notification of termination of his employment, nor his P45, as would have been expected in such circumstances.

35 18. On 28 February 2011 the Second Respondent was informed by the SSP team that the Appellant disputed that his contract of employment had been terminated on 20 September 2010, and that he had not received form P45. They requested a copy of forms P 11 and P14, that would have been submitted to the local tax office by the Second Respondent on termination of the Appellant's employment. The Second Respondent does not appear to
40 have responded to this letter.

- 5 19. The SSP team undertook a review of their decision on 23 March 2011. They said that they had been unable to obtain ‘substantial evidence from either party to confirm whether Mr. MacGregor was still employed when his sickness began and that they had therefore accepted that the employment ‘did end on 20 September 2010’. They added that the question as to whether a contract of employment ended is one which is decided under employment law and that when an employer and employee cannot reach agreement, the Department of Trade and Industry, or the Advisory Conciliation and Arbitration Service (ACAS) would usually adjudicate in any such dispute. They added that HMRC cannot decide such matters and that based on the evidence available, the Second Respondent was not liable to pay SSP to the Appellant from 20 September 2010, as he was not employed when his sickness began.
- 10 20. The Appellant contacted ACAS but was informed that because his employment had ended more than three months previously he was out of time and no longer able to pursue his claim against the Second Respondent through an employment tribunal.
- 15 21. The Appellant says that if Mr. Sinclair had terminated his employment he would have applied for incapacity benefit. There would have been no reason for him not to do so, as he would clearly have been entitled to the benefit
22. On 8 June 2011 the SSP's team advised the Appellant of his right to an appeal to this Tribunal. They summarised their findings and reasons for their decision.
- 20 23. The Appellant responded on 24 June, reiterating the history of the matter and that he was contacting his MP.
24. On 18 July 2011, HMRC wrote to the Appellant saying that, having notified him of the time limit within which an appeal had to be submitted to the Tribunal, his appeal had been treated as settled under regulation 11 of the Social Security Contributions (Decisions and Appeals) Regulations 1999.
- 25 25. On 5 July 2011 the Appellant appealed to the Tribunal.
26. HMRC filed their Statement of Case on 5 October 2011
27. On 17 November 2011 the Appellant wrote to the Tribunal with a summarising letter. He reiterated much of what he had said previously but added that he intended to submit copy BT phone invoices demonstrating the number of times his wife had endeavored to contact Mr. Sinclair (between September – December 2011). He was also concerned that he had been badly advised by the SSP team and that he should have been advised to claim incapacity benefit from the outset. The Appellant maintains that the Second Respondent has ‘concocted the story’ about his employment being terminated. He said it was wrong that the SSP team (HMRC) had arrived at a decision without pursuing important outstanding issues with the Second Respondent.
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Conclusion

- 40 28. There is evidence that the Appellant’s employment continued after 20 September 2010. Mr. Sinclair, in the faxed letter to Haverfordwest County Court of 21 October 2010 clearly refers to the Appellant as a ‘work colleague’. The Second Respondent has also not provided any evidence that the Appellant was given his P45 on 20 September 2010 when his employment was supposedly terminated. The Second Respondent did not reply to HMRC’s letter of 28 February 2011 and has not supplied copy forms P 11 or P14

which would have had to be submitted to the local Tax Office on termination of the Appellant's employment.

- 5 29. The Tribunal finds the Appellant's chronological account of what happened, to be credible. It is inherently improbable that he would have continued to press for payment of outstanding Statutory Sick Pay and not claim incapacity benefit if he knew his employment had been terminated. The Second Respondent has not provided any supporting evidence of the meeting which Mr. Sinclair says took place with the Appellant on 20 September 2010, or that the letter dated 20 September 2010 was indeed given or sent to the Appellant on that day. The Second Respondent was joined in the proceedings by direction of the Tribunal on 19 December 2011 and notified of that fact. It has however, not replied to HMRC's Statement of Case and has not offered any response to the Appellant's Reply of 17 November 2011.
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- 15 30. In accordance with Section 151 of the Social Security Contributions and Benefits Act 1992 (The Act) employers are liable to pay Statutory Sick Pay to employees who satisfy all the requisite conditions. An Employment Tribunal would normally decide matters of dispute relating to termination of a contract of employment. However, this Tribunal exercises jurisdiction in matters relating to Statutory Sick Pay and whether it is payable by an employer. It is not in dispute that the Appellant was employed by the Second Respondent until at least 20 September 2010. The presumption therefore has to be that the Appellant's contract of employment continued until the employer is able to establish otherwise. There is clear evidence that the Appellant had a contract of employment with the Second Respondent which continued beyond commencement of the Appellants incapacity. Conversely, there is no substantiated evidence that the Appellant's contract of employment was terminated on 20 September 2010. There is no reason why the Appellant would not have received the Second Respondent's e-mail of 2nd November 2011 but this was 42 days after the purported date of termination of employment.
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- 30 31. The Tribunal's decision is that the Appellant became entitled to Statutory Sick Pay on 20 September 2010 and that SSP is payable by the Second Respondent for the period of Appellant's incapacity and as referred to in paragraph 10 of this decision.
- 35 32. 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.
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MICHAEL S CONNELL
TRIBUNAL JUDGE
RELEASE DATE: 18 April 2013