



TC05020

Appeal number: TC/2015/03224

Statutory Maternity Pay – payment in lieu of notice – whether to be set against liability of employer to pay SMP – held, payment in lieu of notice contractual – required by para 3 Sch 13 SSCBA 1992 to be set against employer’s liability – appeal dismissed and HMRC determination of SMP due confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREA LADIVEROVA

Appellant

- and -

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

Respondents

- and –

CHOKDEE LIMITED

**Second
Respondent**

**TRIBUNAL: JUDGE JOHN CLARK
MICHAEL SHARP FCA**

Sitting in public at Southampton on 23 February 2016

The Appellant in person

**Sandie Connell, Presenting Officer, HM Revenue and Customs, for the
Respondents**

DECISION

1. The Appellant, Miss Ladiverova, appeals against a decision of the Respondents (“HMRC”) in respect of the amount of Statutory Maternity Pay (“SMP”) payable by the Second Respondent (“Chokdee”).

The background facts

2. The evidence consisted of a bundle of documents. In addition Miss Ladiverova made various statements in the course of presenting her case; where appropriate, we have treated any relevant statements made by her as evidence.

3. From the evidence we find the following background facts.

4. Miss Ladiverova had worked for seven years at a restaurant named Strada, owned by a company named Tragus Group Ltd (“Tragus”); she had become the assistant manager. On 22 October 2014, Tragus sold Strada to Chokdee; the restaurant was then renamed “Giggling Squid”. On the same date, Miss Ladiverova and other employees who had transferred to Chokdee were made redundant.

5. Miss Ladiverova was due to give birth on 5 November 2014. Her child was born early, on 16 October 2014. On 19 October 2014 she contacted Tragus Ltd, and was told that because the employees were being transferred under “TUPE” [the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006], the liability to pay SMP to her would fall on Chokdee.

6. At the time when she filled in the SP14 questionnaire on 3 November 2014, Miss Ladiverova had been informed of Chokdee’s view that Tragus Ltd was responsible for paying SMP to her, but because Strada was insolvent, the liability would fall on HMRC.

7. On 19 December 2014 HMRC wrote to Miss Ladiverova. They explained that similar forms had been issued to Tragus and to Chokdee, but no response had been received from either company. It appeared to HMRC that TUPE applied, so that the continuity of employment was not broken and the ‘new’ employer took on responsibility for her entitlement to SMP if the qualifying conditions were met. As the transfer to Chokdee had been completed before she had been made redundant, it would still remain the liable employer.

8. HMRC calculated the total SMP as £7,091.22, and stated that as no SMP had been paid, the balance to date was outstanding.

9. On the same date HMRC wrote to Chokdee setting out the conclusion that Chokdee was liable to pay the SMP to Miss Ladiverova and informing it of the amount outstanding.

10. On 7 January 2015 Sherrards Solicitors wrote to HMRC on behalf of Chokdee. They stated that their client had not received a form SMP50. On the basis of the information available to them, they did not believe that Chokdee was liable for the SMP; they would set out their reasons in a further letter, in accordance with the
5 deadline for a duplicate copy of form SMP50. They referred to the administration of Miss Ladiverova's previous employer.

11. On 15 January 2015 Sherrards wrote again to HMRC setting out the background history. In their view, TUPE would not apply, although on this occasion Chokdee agreed to accept the transfer of employment of the employees of the Strada restaurant
10 in Salisbury as part of the overall transaction. Sherrards indicated that their previous understanding that Tragus had gone into administration had been erroneous.

12. They continued:

15 "We now understand that Miss Ladiverova's employer was not insolvent before she transferred. Although we do not accept that TUPE applied in these circumstances, and that such liability transferred, Chokdee Limited **are** however prepared to pay the Statutory Maternity Pay to Miss Ladiverova in order to resolve this matter.

The only outstanding issue is the amount to be paid."

They set out their calculation of the SMP due to Miss Ladiverova.

20 13. On 13 February 2015 HMRC wrote to Sherrards, stating that the question of whether Miss Ladiverova transferred under TUPE ultimately fell to ACAS and an Employment Tribunal to decide under employment law. However, as Chokdee had accepted the liabilities to pay holiday pay, redundancy pay and a payment in lieu of notice ("PILON") to Miss Ladiverova, HMRC considered that liability to pay SMP
25 also transferred from Tragus to Chokdee.

14. The total SMP as calculated by HMRC was £7,110.82. Chokdee had made a payment of £3,068.80 to Miss Ladiverova, and the payslip which she had provided showed that this had been paid as a PILON. HMRC continued:

30 "Not all payments made on termination of employment are classed as earnings for National Insurance Contributions (NICs) purposes but if a payment is given under the terms of a contract it is treated as earnings and it can be set off against liability to pay statutory payments.

35 Miss Ladiverova has provided a copy of her contract with Tragus Group Ltd dated 6 August 2010 that states the company reserves the right to pay basic salary in lieu of notice and this is what appears to have been paid to her.

40 I note from the copy payslip that Miss Ladiverova has paid the appropriate PAYE tax and NICs on the holiday pay and PILON and in view of this and the terms of her contract, I consider the PILON was earnings and can be treated as SMP. This means that a total of £3490.67 has been paid in SMP."

15. HMRC attached a formal Notice of their decision in respect of the rates of SMP payable and the amount which Chokdee was liable to pay to Miss Ladiverova, as well as the amount of SMP paid.
16. Also on 13 February 2015, HMRC wrote to Miss Ladiverova in broadly similar terms setting out their decision
17. On 18 February 2015 Miss Ladiverova wrote to HMRC appealing against the decision that her PILON should be used as part of her SMP. She referred to information which she had found as a result of her online research on a website for working mothers; this stated that SMP could not be offset against a PILON.
18. On 24 February 2015 HMRC replied, stating that they did not feel that any additional information had been provided to them which would enable them to change their decision. Any payment made under the terms and conditions of a contract of employment was earnings for the purposes of NICs because this was remuneration which an employee received in return for providing services to the employer. SMP was also earnings for the purposes of NICs because s 4(1)(a) of the Social Security Contributions and Benefits Act 1992 (“SSCBA 1992”) directed that SMP was to be treated as remuneration derived from an employment. HMRC considered the circumstances, including other information which Miss Ladiverova had provided, but did not consider that there was anything to justify changing their decision. They offered an independent review of the decision.
19. Miss Ladiverova submitted a form dated 27 February 2015 requesting a review; she set out her grounds for her view that the PILON should not be deducted from the SMP.
20. On 15 April 2015 HMRC wrote to her to explain that they had returned the case to the decision maker, who had issued a decision which varied from the original one dated 13 February 2015. The letter set out the results of HMRC’s review of the varied decision; the view of the officer who had carried out the review was that the decision as varied on 14 April 2015 should be upheld.
21. HMRC confirmed that in calculating the SMP, HMRC had not included the redundancy payment made to Miss Ladiverova and shown on her payslip dated 5 December 2014. The letter continued:
- “There is no provision in Schedule 3 of the Social Security (Contributions) Regulations that says a Payment in Lieu of Notice (PILON) can be disregarded.
- Section 3(2)(a) of Schedule 13 of the Social Security Contributions and Benefits Act 1992 provides that any contractual remuneration paid to a woman by an employer of hers in respect of a week in the maternity pay period shall go towards discharging any liability of that employer to pay SMP to her in respect of that week.
- Tragus Limited paid you one weeks [*sic*] SMP at £421.87 and Chokdee have paid you seven weeks pay in lieu of notice. Previously HMRC

had calculated that a total of £3490.67 had been paid. This was based on £421.87 plus the £3068.80 PILON. The calculation should not have included the full payment of your PILON only the number of weeks you had received a PILON for.

5 HMRC have now revised their decision stating that the amount of SMP paid is £2807.64. This is based on:

6 weeks at £421.88 £2531.28

2 weeks at £131.18 £276.36

...”

10 22. On 14 April 2015 HMRC issued a varied decision to Chokdee, setting out the rates of SMP and stating that Chokdee was liable to pay SMP to Miss Ladiverova amounting to £5,156.70; the amount of SMP paid was £2,807.64.

23. On 14 May 2015 Miss Ladiverova gave Notice of Appeal to HM Courts & Tribunals Service.

15 *Miss Ladiverova’s arguments*

24. In her grounds for appeal, Miss Ladiverova submitted that according to UK case law a PILON provided for the employment contract was not remuneration for the duties which the employee would have performed during the notice period if notice had been given. It was not payment of wages in the ordinary sense since it was not a
20 payment for work to be done under the contract of employment. It was payment by the employer to cover the damages for the breach of contract without giving proper notice. This was compensation for losing the job, paid as a lump sum

25. SMP could not be offset against a PILON unless provided in the contract; her contract did not mention it. The PILON which she had received was not
25 remuneration; it was damages for losing her job.

26. At the hearing she referred to the circumstances of her working at the Strada restaurant, working up from the bottom to become assistant manager. She thought that she had been transferred under the TUPE legislation, but was not clear whether this had actually happened; she was slightly confused.

30 27. She had submitted her Maternity Certificate, and had subsequently been told that Chokdee had not received her staff file. The copy in the bundle was a second version, not the original.

28. She referred to section 88 of the Employment Rights Act 1996. She had not received a period of notice; her contract had been terminated.

35 29. She emphasised that she had been aware of the benefits regime following the birth of her first son.

30. In advance of the hearing, she had provided a document which she described as a “witness statement”. This set out the background, and explained the research which

she had carried out, as well as the results of that research. Although we do not record the details of that document here, we have taken it into account in arriving at our decision.

Arguments for HMRC

5 31. Mrs Connell stated that the TUPE transfer had taken place on 22 October 2014; Chokdee had thought that Tragus was insolvent. There was an outstanding amount still due to come through to Miss Ladiverova in order for the TUPE to be complete. The outstanding amount was £683.04, which was not set against any SMP. (This figure was higher than the £138 that had been due.) Miss Ladiverova intervened to
10 say that there had been no confirmation that Tragus paid; Mrs Connell explained that she had obtained the information from the RTI (Real Time Information) database. Miss Ladiverova stated that her last payslip had not included this amount.

15 32. She explained that £421.88 was shown in HMRC's records as having been paid by Tragus. There should be a matching payslip. Mrs Connell agreed to arrange for the RTI information to be obtained.

20 33. After a brief adjournment to enable her to obtain the RTI information, she stated that the RTI information and the copy payslip did not appear to match. The amount shown on the payslip was the same as normal. It appeared that Tragus had paid the amount; this had been by simply putting through a full month's pay. HMRC considered that Tragus had paid one week of SMP.

34. Chokdee had initially thought that Tragus had been insolvent and was in administration or in the course of liquidation, in which case the liability to pay SMP would have fallen on HMRC. HMRC had pointed out to Chokdee that Tragus was not insolvent, and had expressed the view that TUPE did apply.

25 35. The issue of a form P45 by Chokdee to Miss Ladiverova indicated a TUPE transfer. Mrs Connell questioned why Chokdee would be paying if it did not have to.

36. Mrs Connell submitted that Miss Ladiverova's employment contract provided for a PILON. Miss Ladiverova intervened to comment that she had not been given seven weeks' notice.

30 *Discussion and conclusions*

37. We made clear to Miss Ladiverova that the jurisdiction of the Tribunal is limited, so that we could not deal with various other matters which she had mentioned in putting her case.

35 38. After hearing from the parties, we arrived at our decision and announced it in the following terms:

“Having considered the evidence, we find that the payment in lieu of notice was made under the contract with Tragus Ltd and constitutes

earnings for social security purposes. It therefore has to be set off against liability to pay SMP.

As a result, Chokdee Ltd is liable to pay SMP to Miss Ladiverova amounting to £5,156.70. The amount of SMP paid is £2,807.64.

5 We therefore have to dismiss the appeal.

We will be providing a full written decision so that if necessary this can be passed on to Chokdee Ltd and its advisers.”

39. As we indicated at the hearing, we have produced this decision by way of information for all the parties.

10 40. Miss Ladiverova raised various matters in presenting her case which we had to explain were outside the jurisdiction of the Tribunal. These matters, including the loss of holiday pay and “keep in touch days”, would have to be pursued in other ways.

41. We first consider the terms of her contract with Tragus, which govern the terms which Chokdee has accepted the liability to pay the SMP. Under the heading
15 “Termination of Employment”, it sets out the notice to be given by either party. It continues:

“The Company reserves the right to pay basic salary in lieu of notice. This can be in the form of a lump sum, or in instalments, on those days when the salary would normally have been paid had the employment
20 continued through the notice period.”

42. The effect of this wording is that Tragus, and therefore Chokdee, has the choice under the contract to make a PILON; it is not necessary to go outside the terms of the contract in order to do so.

43. In tax cases concerning the treatment of such payments and the availability of
25 what became the £30,000 exemption, there is a clear distinction between a payment made pursuant to the contract and a payment made by way of compensation for breach of the terms of the contract. Put more simply, the distinction is between a payment made under the contract and one made outside the terms of the contract, effectively by way of damages for not following the terms of the contract. The tax
30 cases show that a “damages” payment qualifies for the £30,000 exemption, while a payment under the terms of the contract is not exempt.

44. Thus for tax purposes the PILON does form part of Miss Ladiverova’s income. However (as she acknowledged) that is not the question raised by her appeal. Instead, we have to consider whether, under the terms of the legislation relating to SMPs, a
35 PILON is to be treated as part of her SMP.

45. It is necessary to set out the relevant legislation. Schedule 13 to the Social Security Contributions and Benefits Act 1992 (“SSCBA 1992”) covers “Relationship of Statutory Maternity Pay with Benefits and Other Payments etc”. Paragraph 3 Sch 13 SSCBA 1992 provides:

“3 (1) Subject to sub-paragraphs (2) and (3) below, any entitlement to statutory maternity pay shall not affect any right of a woman in relation to remuneration under any contract of service (“contractual remuneration”).

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(2) Subject to sub-paragraph (3) below—

(a) any contractual remuneration paid to a woman by an employer of hers in respect of a week in the maternity pay period shall go towards discharging any liability of that employer to pay statutory maternity pay to her in respect of that week; and

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(b) any statutory maternity pay paid by an employer to a woman who is an employee of his in respect of a week in the maternity pay period shall go towards discharging any liability of that employer to pay contractual remuneration to her in respect of that week.

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(2A) In sub-paragraph (2) “week” means a period of seven days beginning with the day of the week on which the maternity pay period begins.

(3) Regulations may make provision as to payments which are, and those which are not, to be treated as contractual remuneration for the purposes of sub-paragraphs (1) and (2) above.”

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46. We have found no regulations made under para 3(3) Sch 13 SSCBA 1992, and therefore the question whether any payments do or do not constitute contractual remuneration for these purposes has to be answered by applying general principles.

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47. As we have already explained, the PILON paid to Miss Ladiverova was paid under the terms of her contract, rather than being paid as compensation for breach of the terms of her contract. It was therefore “contractual remuneration” as specified in para 3(2)(a) Sch 13 SSCBA 1992. The contractual remuneration reduces the employer’s liability to pay SMP. Miss Ladiverova had seven years’ service, and under the terms of her employment contract with Tragus she was therefore entitled to a number of weeks’ additional notice. She did not seek to dispute the amount of the

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48. The result is that, contrary to her submissions in pursuing her appeal, the PILON has to be set off against the SMP due to her. At the hearing, on the basis of our view that this was the case, she accepted HMRC’s revised calculation of the SMP due as set out in their varied decision dated 14 April 2015.

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49. We therefore confirm HMRC’s decision, given in the following terms:

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“Miss Andrea Ladiverova is entitled to Statutory Maternity Pay (SMP) at the rate of £421.88 per week for the period from 17 October 2014 to 27 November 2014 and at the rate of £138.18 per week for the period from 28 November 2014 to 9 April 2015 and that Chokdee Ltd is liable to pay SMP to Miss Ladiverova amounting to £5,156.70. The amount of SMP paid is £2,807.64.”

50. As we have determined that the PILON paid to Miss Ladiverova was contractual, it is not necessary for us to consider whether a non-contractual PILON

would or would not fall to be deducted from SMP. At the hearing Mrs Connell produced to us a copy of regulation 9 of The Social Security Benefit (Computation of Earnings) Regulations 1996 (SI 1996/2745), sub-paragraph (1)(c) of which includes in the definition of “earnings”, in the case of employment as an employed earner,

5 “(c) any payment in lieu of notice”.

51. Without a detailed explanation of the relationship between this provision and the legislation and subordinate legislation relating to SMPs, we are not satisfied that this sub-paragraph answers the question in respect of a non-contractual PILON. We therefore leave that question to be considered in the context of some other appeal
10 concerning circumstances different from those relevant to Miss Ladiverova’s case.

52. For the above reasons, we dismiss her appeal, but confirm HMRC’s determination of the amounts of SMP payable to her and the amount due to be paid to her by Chokdee.

Right to apply for permission to appeal

15 53. 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
20 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

25 **JOHN CLARK**
TRIBUNAL JUDGE

RELEASE DATE: 6 APRIL 2016