



TC05466

Appeal number: TC/2015/07224

*STATUTORY MATERNITY PAY – entitlement to statutory maternity pay -
employment terminated by redundancy – claim for unfair dismissal and
pregnancy discrimination settled – whether SMP included in Settlement
Agreement payment – amount of SMP - whether bonus part of “normal
weekly earnings*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CAMPUS LIVING VILLAGES UK LTD

Appellant

- and -

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

Respondents

-and-

JOANNE A SEXTON

**Second
Respondent**

**TRIBUNAL: JUDGE MARILYN MCKEEVER
MR DEREK ROBERSTON**

**Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester on 30
September 2016**

Mr N Kennedy and Mr D Farthing, directors of the Appellant for the Appellant

**Mrs L Crawford, presenting officer, instructed by the General Counsel and
Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. *Introduction*

5 2. This is an appeal by Campus Living Villages Ltd against a decision by HMRC issued on 24 August 2015 that their former employee, Ms Joanne Sexton was entitled to Statutory Maternity Pay (SMP) of £41,627.36 up to 21 August 2015 (the last week before the date of the decision letter) and a total amount of SMP up to 25 September 2015 of £42,325.26.

10 3. The Appellant appeals on three grounds:

- A bonus paid to Ms Sexton under the company's discretionary incentive scheme should not have been included in the computation of the SMP
- SMP was taken into account in the payment made under a Settlement Agreement entered into between the Appellant and Ms Sexton following
- 15 termination of her employment so she had no further entitlement; and
- The Settlement Agreement was made under the auspices of a conciliation officer of the Advisory, Conciliation and Arbitration Service (ACAS), a government body and the Appellant submitted that she would not have advised and assisted it with the wording if it was not enforceable.

20

4. *The Law*

5. Entitlement to SMP is governed by Part XII of the Social Security Contributions and Benefits Act 1992 ("The 1992 Act").

6. Section 164 of the 1992 Act provides, so far as relevant:

25 ***"164 Statutory maternity pay—entitlement and liability to pay***

(1) Where a woman who is or has been an employee satisfies the conditions set out in this section, she shall be entitled, in accordance with the following provisions of this Part of this Act, to payments to be known as "statutory maternity pay".

(2) The conditions mentioned in subsection (1) above are—

- 30 *(a) that she has been in employed earner's employment with an employer for a continuous period of at least 26 weeks ending with the week immediately preceding the 14th week before the expected week of confinement but has ceased to work for him. . . ;*

[(aa) that at the end of the week immediately preceding that 14th week she was entitled to be in that employment;]

(b) that her normal weekly earnings for the period of 8 weeks ending with the week immediately preceding the 14th week before the expected week of confinement are not
5 less than the lower earnings limit in force under section 5(1)(a) above immediately before the commencement of the 14th week before the expected week of confinement;
and

(c) that she has become pregnant and has reached, or been confined before reaching, the commencement of the 11th week before the expected week of
10 confinement.

(3) The liability to make payments of statutory maternity pay to a woman is a liability of any person of whom she has been an employee as mentioned in subsection (2)(a) above....

(6) Any agreement shall be void to the extent that it purports—

15 (a) to exclude, limit or otherwise modify any provision of this Part of this Act...”

7. It is common ground that Ms Sexton satisfied the conditions and was entitled to SMP,

8. The amount of SMP to be paid is set out in section 166 of the 1992 Act:

“166 Rate of statutory maternity pay]

20 [(1) Statutory maternity pay shall be payable to a woman—

(a) at the earnings-related rate, in respect of the first 6 weeks in respect of which it is payable; and

(b) at whichever is the lower of the earnings-related rate and such weekly rate as may be prescribed, in respect of the remaining portion of the maternity pay period.

25 [(1A) In subsection (1) “week” means any period of seven days.]

(2) *The earnings-related rate is a weekly rate equivalent to 90 per cent of a woman's normal weekly earnings for the period of 8 weeks immediately preceding the 14th week before the expected week of confinement.*

5 (3) *The weekly rate prescribed under subsection (1)(b) above must not be less than the weekly rate of statutory sick pay for the time being specified in section 157(1) above or, if two or more such rates are for the time being so specified, the higher or highest of those rates.]...*

9. Section 171(4)-(7) of the 1992 Act refers to definitions of terms relevant to the computation:

10 “(4) *For the purposes of this Part of this Act a woman's normal weekly earnings shall, subject to subsection (6) below, be taken to be the average weekly earnings which in the relevant period have been paid to her or paid for her benefit under the contract of service with the employer in question.*

15 (5) *For the purposes of subsection (4) above “earnings” and “relevant period” shall have the meanings given to them by regulations.*

(6) *In such cases as may be prescribed a woman's normal weekly earnings shall be calculated in accordance with regulations.*

[(7) Regulations under any of subsections (2) to (6) above must be made with the concurrence of the Commissioners of Inland Revenue.]”

20 10. The “Regulations” referred to are The Statutory Maternity Pay (General) Regulations 1968 SI 1960 (“the Regulations”).

11. Regulations 20 and 21 of the Regulations contain the critical definitions of “earnings” and “normal weekly earnings”. They provide so far as relevant:

“20 Meaning of “earnings”

25 (1) ...

*[(2) For the purposes of section 171(4) of the Contributions and Benefits Act, the expression “earnings” refers to gross earnings and includes **any remuneration or profit derived from a woman's employment** ... (our emphasis)*

21 Normal weekly earnings

(1) *For the purposes of [Part XII of the Contributions and Benefits Act], a woman's normal weekly earnings shall be calculated in accordance with the following provisions of this regulation.*

5 (2) *In this regulation—*

“the appropriate date” means the first day of the 14th week before the expected week of confinement, or the first day in the week in which the woman is confined, whichever is the earlier, . . . ;

*“normal pay day” means a day on which the terms of a woman's contract of service
10 require her to be paid, or the practice in her employment is for her to be paid, if any payment is due to her; and*

“day of payment” means a day on which the woman was paid.

(3) *Subject to paragraph (4), the relevant period for the purposes of [section 171(4) of the Contributions and Benefits Act] is the period between—*

15 (a) *the last normal pay day to fall before the appropriate date; and*

(b) *the last normal pay day to fall at least 8 weeks earlier than the normal pay day mentioned in sub-paragraph (a),*

including the normal pay day mentioned in sub-paragraph (a) but excluding that first mentioned in sub-paragraph (b).

20 ...

(5) *In a case where a woman has normal pay days at intervals of or approximating to one or more calendar months (including intervals of or approximating to a year) her normal weekly earnings shall be calculated by dividing her earnings in the relevant period by the number of calendar months in that period (or, if it is not a
25 whole number, the nearest whole number), multiplying the result by 12 and dividing by 52.”*

12. *The Facts*

13. The facts are not in dispute.

14. Ms Sexton was Head of Finance at the Appellant. She commenced her employment on 1 July 2010. She became pregnant and the baby was due (her
5 “expected date of confinement” for the purposes of the 1992 Act) on 28 January 2015. Ms Sexton’s employment with the Appellant ended on 26 December 2014 and her baby was born on 5 February 2015.

15. The stated reason for the termination of Ms Sexton’s employment was redundancy.

10 16. Ms Sexton commenced a claim against the Appellant for unfair dismissal and pregnancy discrimination. The claim was compromised, without admission of liability, and the settlement was contained in a “COT3 Form” following conciliation by ACAS. Settlement was reached on 16 February 2015 and the COT3 was signed by Ms Sexton on 25 February 2015 and by the Appellant on the following day.

15 17. Clause 1 of the COT3 provided:

“Without admission of liability, the [Appellant] agrees to pay and [Ms Sexton] agrees to accept the sum of £60,000 (the “Settlement Payment”)...as compensation in full and final settlement of...all and any claims she has or may have relating to her contract of employment...and its termination. Included in this Settlement Payment is a
20 sum of £20,000 as compensation for injury to feelings....The parties believe that a further £30,000 of the Settlement Payment will be tax free. The [Appellant] shall deduct income tax only from the remainder of the Settlement Payment (£10,000) at the appropriate rate. The parties believe that the Settlement Payment is not subject to National Insurance.”.

25 18. Clause 5 provided:

“For the avoidance of doubt, the settlement in this agreement includes, but is not limited to any claim under [statutes concerned with equality legislation]...” The 1992 Act was not specifically mentioned, but the Appellant pointed out that the settlement was specifically “not limited to” the legislation set out and Clause 1 expressly stated
30 the settlement applied to “all and any claims”.

19. In the course of the negotiations on the settlement agreement, Ms Sexton had submitted a calculation of her claim totalling £98,394.46 and including a sum of £41,143.45 in respect of “maternity pay entitlement” although this seemed to be calculated on the basis of the salary to which she would have been entitled over the
35 period of maternity leave, rather than a SMP calculation. Ms Sexton’s computation was based on her annual salary. This claim was compromised and the sum of £60,000 was ultimately paid, broken down as set out in the COT3.

20. On 15 October 2014, during her period of employment, Ms Sexton had been paid the sum of £44,077 under the Appellant’s bonus scheme. The scheme provided for the

possible payment of an annual bonus in respect of the work carried out in the previous year. The scheme was discretionary, so there was no entitlement to payment. Ms Sexton's contract of employment had not been included in our hearing bundles but HMRC had no objection to a copy being produced at the hearing.

5 21. Clause 7.4 of the contract dated 25 May 2010 provided:

10 *“The Company operates a discretionary performance related Short Term Incentive (“STI”) scheme to which (sic) you are eligible. The Company is under no obligation to make any STI payments to any employee , however in the event that any STI payments are made, these will be determined and advised along with your annual salary review.”*

22. So Ms Sexton's contract of employment provided for her participation in the STI scheme, even though she had no fixed entitlement to a payment under it.

23. The discretionary bonus payment of £44,077 in fact made in October 2014 was in respect of performance in the year to 30 June 2014.

15 24. *The Appellant's submissions*

25. The Appellant submits that the amount of the SMP has been wrongly calculated in that the discretionary bonus paid in October 2015 should not have been taken into account in calculating the “earnings related rate” of SMP payable for the first six weeks. It argues that this was an annual payment relating to the previous year and so cannot be part of Ms Sexton's “normal weekly earnings”.

26. Secondly, Ms Sexton's right to SMP was taken into account in arriving at the Settlement Payment made under the Settlement Agreement so she has already received a payment in respect of SMP and has no further entitlement. She gave up “all and any claims” arising from her employment under the COT3 and this included any further claim to SMP.

27. Finally, as ACAS had assisted with the settlement and wording of the COT3, culpability lay with them.

28. *The Respondent's submissions*

30 29. HMRC submit that they applied the law correctly in calculating “average weekly earnings” and that the bonus payment was properly taken into account.

35 30. It is not possible to contract out of the obligation to pay SMP and an employer will only have met the obligation, in connection with a settlement agreement, if the agreement specifically includes SMP in the amount paid. In addition, National Insurance Contributions must be paid in respect of the SMP. Neither requirement was satisfied in this case

31. ACAS is separate from HMRC and ACAS's advice cannot affect Ms Sexton's entitlement in law to SMP.

32. *Onus of proof*

33. The burden is on the Appellant to show that it has met its full obligation to pay SMP.

34. *Discussion*

5 35. *The amount of SMP*

36. The first six weeks of maternity pay is, under section 166 of the 1992 Act to be paid at the “earnings related rate”. This is defined by sub-section (2) as “ *a weekly rate equivalent to 90% of a woman’s normal weekly earnings for the period of 8 weeks immediately preceding the 14th week before the expected week of confinement*”.

10 Ms Sexton’s expected week of confinement began on 28 January 2015, so 15 October 2014 fell within this period.

Section 171(4) of the 1992 Act provides that “...*a woman's normal weekly earnings shall, subject to subsection (6) below, be taken to be the average weekly earnings which in the relevant period have been paid to her or paid for her benefit under the*
15 *contract of service with the employer in question.*”

37. The expressions “earnings”, “relevant period” and “normal weekly earnings” are defined in the Regulations and are set out above.

38. The “relevant period” includes 15 October 2014.

20 39. “Earnings” includes **any** remuneration or profit derived from a woman’s employment with some immaterial exceptions. Irregular or one-off payments including bonuses therefore count as “earnings” as long as they are derived from the woman’s employment. Ms Sexton’s contract of employment provided for her participation in the Company’s STI scheme and we find that the bonus paid in October 2014 was accordingly derived from Ms Sexton’s employment.

25 40. Regulation 21(5) sets out how a woman’s “normal weekly earnings” are to be calculated. It states: “ *In a case where a woman has normal pay days at intervals of or approximating to one or more calendar months (including intervals of or approximating to a year) her normal weekly earnings shall be calculated by dividing her earnings in the relevant period by the number of calendar months in that period*
30 *(or, if it is not a whole number, the nearest whole number), multiplying the result by 12 and dividing by 52.*”

35 41. Ms Sexton was paid monthly, so sub-section (5) applied. The computation is purely arithmetical. One takes the earnings in the relevant period (which in this case includes the bonus) and then calculates the weekly equivalent of that amount. There is no requirement that the pay during the relevant period must be “normal” in the sense of the usual amount and Regulation 20(2) makes clear that all payments, whether usual or not are included in earnings for the purpose of the calculation.

42. We therefore find that the discretionary bonus paid in October 2014 was correctly included in the calculation of the SMP and that the amount of SMP determined by HMRC was correct.

43. *Whether obligation to pay SMP satisfied*

5 44. If a woman satisfies the conditions for receiving SMP, section 164 of the 1992 Act gives her an absolute right to the payment of it. She cannot contract out of that right and section 164(6) provides that any agreement which purports to exclude the right to SMP is void to that extent.

10 45. The Settlement Payment may have included an element in respect of maternity rights (although as noted above, Ms Sexton's calculation related to salary during maternity leave rather than SMP) but it is clear from the breakdown of the payment that it did not include Ms Sexton's entitlement to SMP. Nor were any National Insurance Contributions made, which are required to be made on payments of SMP by virtue of sections 3 to 6 of the 1992 Act. Indeed the Settlement Agreement expressly
15 stated the parties believed NICs were not payable.

46. Although the Settlement Agreement purported to be in full and final settlement of all Ms Sexton's claims in relation to her former employment, such a provision cannot exclude her entitlement to SMP and is void to the extent it purports to do so under section 164(6) of the 1992 Act.

20 47. Accordingly we find that the Appellant has not satisfied its obligation to pay Ms Sexton her entitlement to SMP.

48. *Involvement of ACAS*

25 49. Whilst it is unfortunate that the conciliation officer did not advise the Parties correctly in relation to the impact of the COT3 on SMP, ACAS is independent of HMRC and its acts or omissions cannot affect HMRC's correct application of the law.

50. *Decision*

30 51. For the reasons set out above we find that HMRC correctly calculated the amount of SMP due to Ms Sexton, that the Appellant has not satisfied its obligation to pay the full amount of the SMP and that this is not affected by the fact that ACAS advised on the settlement agreement.

52. We also note that the Appellant will be entitled to reclaim most of the amount of SMP paid from the government.

53. We dismiss the appeal.

35 54. 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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**MARILYN MCKEEVER
TRIBUNAL JUDGE**

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RELEASE DATE: 1 NOVEMBER 2016