[2019] UKFTT 0674 (TC)

TC07449

Appeal number: **TC/2018/06945**

STATUTORY MATERNITY PAY – Social Security Contributions and Benefits Act 1992 – continuous employment - whether continuous employment sufficient to qualify for SMP

FIRST-TIER TRIBUNAL
TAX CHAMBER

OLGA SWIECA **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **1st Respondent**

UNIQUE EMPLOYMENT SERVICES LIMITED **2nd Respondent**

TRIBUNAL: JUDGE PARMINDER SAINI
MS ELIZABETH BRIDGE

Sitting in public at Taylor House on 30 September 2019

For the Appellant: **Mr Pawel Swieca, Appellant's Partner**
For the 1st Respondent: **Ms G Truelove, Presenting Officer**
For the 2nd Respondent: **Mr T Hussain, Litigation Consultant, Croner**

DECISION

Introduction

1. Mrs. Olga Swieca (the Appellant), appeals against HMRC's (the 1st Respondent) decision of 28 February 2018 agreeing with Unique Employment Services ("UES") (the 2nd Respondent) that the Appellant was not entitled to Statutory Maternity Pay as she was not in continuous employment for the period required by section 164(2)(a) of the Social Security Contributions and Benefits Act 1992 ("SSCBA 92") and because she had not been employed by UES.

2. The following facts are agreed for the purposes of this appeal.

3. The Appellant signed a contract of services with UES on 13 January 2017. The Appellant's first assignment through UES was on 3 May 2017. The Appellant provided UES with a MATB1 form on 10 August 2017. UES provided the Appellant with a letter dated 13 September 2017 informing her that she was not entitled to Statutory Maternity Pay (SMP). The Appellant disagreed with UES' decision but UES believed their position was correct. The Appellant appealed to HMRC on 20 September 2017.

4. The Appellant's baby's due date was 18 November 2017 however the child was born on 21 November 2017.

5. On 28 February 2018, HMRC issued a decision agreeing with UES that the Appellant had not been employed by them and therefore not been in continuous employment for the period required by section 164(2)(a) of SSCBA 92.

6. A Review Conclusion Letter was issued on 10 October 2018 upholding HMRC's decision.

7. HMRC's pleaded position is that the Appellant satisfies the earnings rule and the Appellant gave at least 28 days' notice of the date from which SMP was due to start which occurred on 10 August 2017 and as such she has satisfied the notification qualifying condition. As such, HMRC concluded that the Appellant needed to be employed from 11 February 2017 to 5 August 2017 (the week immediately preceding the 14th week before the expected week of confinement).

8. HMRC however concluded that the condition of continuous employment was not satisfied because UES did not offer the Appellant any work between 13 January 2017 until her first assignment on 3 May 2017.

The Issue(s)

9. At the outset of the hearing, the parties agreed that the key issue before this Tribunal is whether the Appellant is entitled to Statutory Maternity Pay by being able to demonstrate that she had been in continuous employment for the period

required by section 164(2)(a) of the Social Security Contributions and Benefits Act 1992 ("SSCBA 92"). A secondary potential issue that the parties decided not to ventilate is whether the Appellant could show that she had been employed by UES.

10. The parties agreed that the Tribunal would dispense with the continuous employment issue first, followed by the second issue based on the materials before it, if relevant.

Law

11. Section 164 Social Security Contributions and Benefits Act 1992 ("SSCBA 92") provides (so far as relevant):

> "(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–
>
> (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,
>
> (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 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 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.
>
> (4) A woman shall be entitled to payments of statutory maternity pay only if–
>
> (a) she gives the person who will be liable to pay it notice of the date from which she expects his liability to pay her statutory maternity pay to begin;
>
> and

(b) the notice is given at least 28 days before the date or, if that is not reasonably practicable, as soon as is reasonably practicable.

(5) The notice shall be in writing if the person who is liable to pay the woman statutory maternity pay so requests.

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

(a) to exclude, limit or otherwise modify any provision of this Part of this Act; …"

Burden of Proof

12. The burden of proof rests with UES, supported by HMRC as necessary, to show that the Appellant does not qualify for SMP.

13. The onus then shifts to the Appellant to show that the decision that she does not qualify for SMP was incorrect.

14. The standard of proof is the ordinary civil standard on the balance of probabilities.

Hearing

15. Aside from the Document Bundle and Authorities Bundle provided by HMRC, we were also provided in advance with the Appellant's Authorities (excerpted and numbering 38 pages), her P46 document, her UES Comprehension Test and we were also provided with an excerpt from Statutory Payments Manual (SPM250800) from the Appellant and Written Submissions on behalf of UES, which all parties had the opportunity to consider before the hearing commenced.

16. We heard arguments from all three parties' representatives. We do not intend to set out those arguments in full, but merely summarise the key points made.

17. In summary, UES accepted that there is a contract between the Appellant and itself, but that if the Appellant had any expectation of payment, she should have raised it. UES pointed to the payslips from [AB/185] onwards which evidenced the employment and indicated that the Appellant did not work for UES in each of the 26 weeks into the Qualifying Week (i.e. 5 August 2017). The Appellant did not ask for payment for the arrears for the periods where she did not receive payment. The Statutory Payments Manual (SPM) given by the Appellant actually supports UES' position. UES also relied upon Clause 2.1 of the contract between the Appellant and UES which stated as follows: "*These terms constitute a contract for services between the Employment Business and the Temporary Worker and they govern all Assignments undertaken by the Temporary Worker. However, no contract shall exist between the Employment Business and the Temporary Worker between Assignments*".

18. HMRC argued that the Appellant had not shown she was in continuous employment between 13 January 2017 up to and including 2 May 2017. It is not

disputed that the Appellant was receiving remuneration from 3 May 2017 onwards. The operative dates (i.e. the 26 weeks) where the Appellant needed to be employed are 11 February 2017 to 20 August 2017.

19. It was also argued that there was not and could not be continuity as employment had not begun until 3 May 2017. The date of which the contract was signed did not represent a start of employment, and consequently the gap from 13 January 2017 to 3 May 2017 could not be construed as a break in the employment. There was no employment before 3 May 2017 that was interrupted by any gap and it must follow that there can only be continuity of employment from when employment begins.

20. Although relating to the secondary issue, HMRC also points to section 171(a) SSCBA 92 which defines an employee as "…a woman who is – gainfully employed" and section 3(1) of SSCBA 92 which states that earnings includes "any remuneration or profit derived from an employment"; and thus pointing to the Appellant having no gainful employment or remuneration or profit until 3 May.

21. The Appellant says that she satisfies the continuous employment requirement as she did not reject any offer of work between 13 January 2017 (or 11 February 2017) up to and until the first work she performed on 3 May 2017.

22. The Appellant argues that breaks in employment do not exclude an employee from SMP. The Appellant argued that the SPM supported the Appellant's case as it stated that "There may be complete weeks when an employee is not working for that agency. This does not necessarily mean that continuity of employment is broken."

23. The Appellant pointed to the fact that she had signed a contract on 13 January 2017 which combined with her P46 Form cumulatively indicated that her job with UES was to be her sole employment and that her job had in fact started.

24. The Appellant also relied upon §3.3 of the Continuous Employment Rule under the subheading "If you are employed by an agency" in the government website's Statutory Maternity Pay Technical Guidance which states as follows in relevant part:

> **If you are employed by an agency**
>
> If you are employed by an agency, in each of the 26 weeks into the qualifying week, you will satisfy the continuous employment rule. As long as you did some work during any week it counts as a full week.
>
> There may be complete weeks when you did no work for the agency. This does not necessarily mean that your continuity of employment is broken.
>
> Deciding the continuous employment question: If the agency was unable to offer you work in any particular week, continuity is not broken. If the agency did offer

work, but you were not available, the period of absence can count only if you were unable to work because of sickness, injury or pregnancy or parental, paternity or adoption leave.

Employment in the qualifying week: If you were not employed in the qualifying week (QW), you can still be treated as employed in that week if:

- the agency had no work for you in that week and

- you were not intending to start your maternity leave at that time, and remained available for work after the QW as soon as the agency had something for you and

- you did in fact have further employment with the agency before starting your maternity leave

If you had intended to go on working but stopped before the QW because of sickness, you can be regarded as working into the QW. You must actually resume work with the agency within 26 weeks of stopping before this can apply. If you have stopped looking for work through a particular agency before the start of the QW, you are not entitled to SMP from that agency. But you may be entitled to claim Maternity Allowance from Jobcentre Plus.

25. The Appellant also relied upon section 20(4)(c) of the Statutory Maternity Pay Act 1986 as demonstrating that she was entitled to a guarantee payment and was thus employed. The Appellant argued she was in "earners" employment but UES did not pay her the guarantee payment under section 22 Employment Protection Act 1975. We were told that this issue was to be decided by the Employment Tribunal, which would also consider allegations of discrimination and non-payment of remuneration. The Appellant and UES confirmed that there were several claims pending before the Employment Tribunal and that a 2-day Preliminary Hearing was listed for April 2020 with a Substantive Hearing also listed for September 2020.

26. When considering Clause 2.1 of the contract, the Appellant argued that the contract was a "sham" contract and the majority of UES' workers did not understand English or employment law and the contract had been drafted so as to avoid any payment to the workers by UES. She argued that there was no chance to negotiate the contract and that she had been obliged to sign it.

Findings and Conclusions

27. Section 164(2)(a) SSCBA 92 requires the Appellant to be 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 excepted week of confinement.

28. The 26-week period in question is 11 February 2017 to 5 August 2017.

29. It was agreed between the parties that the Appellant was employed between 3 May 2017 to 5 August 2017.

30. The primary issue is therefore whether the Appellant was employed between 11 February 2017 and 2 May 2017 inclusive (the relevant period).

31. We find that the 1st and 2nd Respondents (UES and HMRC) have succeeded in showing on balance that the Appellant was not continuously employed for the period 11 February 2017 to 2 May 2017 for the following reasons.

32. There are no payslips evidencing paid employment from UES to the Appellant for the relevant period provided in the documents. Indeed, we do not understand it to be the Appellant's case that she worked at all during that period.

33. The SPM and the Statutory Maternity Pay Technical Guidance are of relevance to gauging whether the Appellant could be considered to have been continuously employed despite not having worked. The SPM states as follows in relevant part:

> **Continuous employment: agency/short contract workers and casual employees**
>
> If an employee has worked for an agency in each of the 26 weeks into the QW/MW, they satisfy the continuous employment test. A week means Sunday to Saturday. As long as some work was done during any week, it counts as a full week.
>
> There may be complete weeks when an employee is not working for that agency. This does not necessarily mean that continuity of employment is broken.
>
> Employment is not broken if:
>
> - the agency was unable to offer the employee work in any particular week,
> - the agency did offer work, but the employee was not available because of
>   - sickness
>   - injury
>   - pregnancy
>   - paternity leave
>   - adoption leave
>   - parental leave
>   - paid holiday.
>
> If there was a complete week (Sunday to Saturday) in which the employee did no work, the agency might regard the employment as broken without considering why they were not doing any work for them. If the employee questions the decision,

they must explain any periods of absence. The agency should then reconsider the continuous employment question.

34. Taking the excerpts from the Technical Guidance and the SPM into account (which we do not consider to be substantively different), as may be seen, the first requirement is that an employee have worked for an agency, such as UES, for each of the 26 weeks. It is not in dispute that the Appellant has not worked for each of those 26 weeks, and as such continuity of employment is not established from the outset against the SPM.

35. However, the Appellant's reliance upon there being complete weeks when an employee is not working can only rationally save the Appellant's continuity of employment, if that employment has commenced in the first place and is then logically unbroken. As to the commencement, we shall return to that shortly.

36. As to the employment being unbroken, it may be that if the agency is unable to offer work in any particular week that employment will be unbroken. On its face, the SPM does support the Appellant's case in that work was not offered between 13 January 2017 or 11 February 2017 until she commenced work on 3 May 2017.

37. That takes us to the question of whether there was employment existing such that it could be broken. We have not found this an easy issue to gauge given that it concerns employment law and given that the guarantee payment evidencing *prima facie* employment is yet to be determined by the Employment Tribunal. Neither party sought an adjournment to await the outcome of this issue and we did not seek to make one of our own volition given that the appeal is not listed until next September and we are mindful that the Tribunal should not adjourn for such lengths of time of its own motion and without confirmation that this issue is live before the Employment Tribunal and will be decided by that appeal.

38. In relation to the employment issue on the evidence before us and the law as we see it, we find against the Appellant that she did not commence work until 3 May 2017.

39. On the face of it, even if the Appellant is a Temporary Worker as defined by Clause 2.1 of the contract between her and UES, that agency arrangement could still qualify as employment for the purposes of statutory maternity pay given the content of the SPM and Technical Guidance and given that the contract does not explicitly exclude UES from liability for Statutory Maternity Pay. We make no comment in relation to the manner in which the contract came to be signed nor the good faith of either UES or the Appellant as it is not a matter for us to decide.

40. However, the SPM and Technical Guidance appear to suggest that employment may not be broken by certain events, however, if the employment is to be gauged by reference to the work performed, then it will not have commenced until 3 May 2017. If it is to be gauged by the contract between the parties then Clause 2.1 appears to limit the scope for employment having commenced until a an assignment commences not least because the contract is one "for services" and it is stated that no contract exists "between assignments". Given that no assignment

began until 3 May 2017, the terms of the contract provide, that that must be when the contract came into operation and 'existence'. This is the moment in which the employment began and sits well with the definitions in section 171(a) SSCBA 92 which define an employee and section 3(1) of SSCBA 92 which state what earnings include and which point to the Appellant not being an employee and not receiving earnings until the work which commenced on 3 May 2017.

41. Thus, the Appellant's response that she did not reject an offer of work does not assist as, regardless of any implied unfairness in the contract (which is not relevant for our purposes in the Tax Chamber), the Appellant is bound by that contract and by the unfortunate fact that work was not performed by her for UES until 3 May 2017. Thus, the period before she commenced such work cannot rationally be described as a break or gap in employment where none had been performed previously and where the contract did not describe her as an employee.

42. Additionally, although we accept that the Appellant indicated via her P46 Form that UES was to be her sole employment and that her sole job had in fact started, this demonstrates the Appellant's state of mind, but does not demonstrate that employment commenced by operation of law or contract or circumstance such that it could be immediately broken by the non-provision of work for several months.

43. The Appellant has not established continuity of employment. In that light, we do not go on to consider the secondary wider question as to whether the Appellant was an employee given that the appeal fails at this first hurdle.

44. Finally, in relation to the Appellant's complaints that the contract was a "sham", that the majority of UES' workers do not understand English or employment law, that the contract has been drafted so as to avoid any payment to the workers by UES and that there was no chance to negotiate the contract and the Appellant was obliged to sign; these are not matters which we are convened to decide. If proven, they are of course extremely serious matters which we are sure will no doubt be ventilated before the Employment Tribunal and are a matter for that jurisdiction rather than our own. We would say that in any event, accepting on its face that the Appellant believed this to be her sole employment it will come as a sore blow to her that she is not entitled to Statutory Maternity Pay owing to matters beyond her control, however that is the outcome the law requires and this is the conclusion which we must reach according to the same.

45. Given our conclusions above, we must determine this appeal against the Appellant.

Decision

46. The appeal is DISMISSED.

47. 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.

PARMINDER SAINI
TRIBUNAL JUDGE

RELEASE DATE: 06 NOVEMBER 2019