



**TC03301**

**Appeal number: TC/2012/11050**

*STATUTORY SICK PAY – whether Appellant entitled to statutory sick pay - whether absences of Appellant from work comprised days of incapacity for work - Appellant's GP certified Appellant as unfit for work - HMRC instructed doctors to give medical opinion as to Appellant's fitness to work - failed to set out full extent of duties performed by Appellant - appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MRS RANO YASMEEN MIAN**

**Appellant**

**- and -**

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

**First  
Respondents**

**- and -**

**ECLAT UK LIMITED**

**Second Respondents**

**TRIBUNAL: JUDGE EDWARD SADLER  
JOHN WOODMAN CA**

**Sitting in public at Bedford Square on 17 December 2013**

**The Appellant was not represented and did not appear**

**Miss L Ramsay, of the Contributions and Employer Office of HM Revenue and Customs, for the First Respondents**

**The Second Respondents were not represented and did not appear**

## DECISION

### *Introduction*

1. This is an appeal by Mrs Rano Yasmeen Mian ("the Appellant") against a  
5 decision of The Commissioners for Her Majesty's Revenue & Customs ("HMRC")  
dated 30 May 2012. That decision was made under section 8 of the Social Security  
Contributions (Transfer of Functions, etc) Act 1999. The decision was that the  
Appellant was not entitled to Statutory Sick Pay ("SSP") for the period of the  
Appellant's absence from work for sickness beginning on 26 August 2011 and ending  
10 on 9 March 2012. In consequence the Appellant's employer, Eclat UK Limited ("the  
Employer"), was not liable to pay the Appellant SSP.

2. The grounds of the decision made by HMRC were that the doctor appointed by  
HMRC for the purpose of determining whether she was capable of performing the  
duties of her employment was of the opinion that she was capable of performing those  
15 duties. The Appellant requested a review of that decision, and (after taking a further  
medical opinion) HMRC upheld their decision in their letter to the Appellant dated 24  
October 2012. On 19 November 2012 (and therefore within the 30 day period for  
making an appeal) the Appellant appealed to this tribunal against that decision. The  
Appellant's appeal is made under section 11 of the Social Security Contributions  
20 (Transfer of Functions, etc) Act 1999.

3. When the hearing of the Appellant's appeal was called neither the Appellant nor  
the Employer (which was Second Respondent in the appeal proceedings) was present.  
The Appellant had notified the tribunal office that she would rely on the documents  
supplied to HMRC in the course of this matter. The Employer had not replied to any  
25 correspondence from the tribunal office. We were satisfied that both those parties had  
been notified of the hearing, and that it was in the interests of justice to proceed with  
the hearing in their absence under Rule 33 of The Tribunal Procedure (First-tier  
Tribunal (Tax Chamber) Rules 2009.

4. The issue we have to decide is whether, in the terms of the SSP legislation (set  
30 out below), the relevant period of absence of the Appellant from work comprised a  
period of incapacity for work, that is, a period when the Appellant was incapable by  
reason of some form of illness or disablement of doing the work which the Appellant  
could reasonably be expected to do under her contract of service.

5. It is our decision to allow the Appellant's appeal. From the evidence before us  
35 we find that the Appellant made a credible case that she could not, by reason of illness  
or disablement, carry out the duties required of her by her contract of service. HMRC  
sought to refute the Appellant's case by seeking their own medical opinion on the  
point. However, in instructing the doctors on whose opinion HMRC relied in  
reaching their decision, HMRC failed to explain certain of the duties of the Appellant  
40 which were, or were likely to be, material to the medical condition which the  
Appellant claimed rendered her incapable of working. HMRC's case that the  
Appellant was not entitled to SSP cannot therefore be relied on.

*The relevant legislation*

6. The legislation relating to SSP is primarily found in the Social Security Contributions and Benefits Act 1992 ("SSCB Act 1992"). The entitlement to SSP arises under section 151 SSCB Act 1992, the relevant parts of which provide:

5                   (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 to 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  
10                   of that day.

...

15                   (4)For the purposes of this Part of this Act a day of incapacity for work  
in relation to a contract of service means a day on which the employee  
concerned is, or is deemed in accordance with regulations to be,  
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.

7. The first of the qualifying conditions referred to in section 151(1) SSCB Act 1992 is set out in section 152 SSCB Act 1992 in the following terms:

20                   (1)The first condition is that the day in question forms part of a period  
of incapacity for work.

(2)In this Part of this Act "period of incapacity for work" means any  
period of four or more consecutive days, each of which is a day of  
incapacity for work in relation to the contract of service in question.

25   8. The Appellant's case relates to the question of whether her period of absence  
from work comprised a period of incapacity for work. The Appellant contends that  
this was so: HMRC contend that since, according to the medical opinion obtained by  
them, the Appellant was capable of performing the duties required under her contract  
of employment, her absence was not a period of incapacity for work, and this first  
30   condition of entitlement to SSP was therefore not satisfied.

9. The remaining conditions which must be satisfied before an entitlement to SSP  
arises are not in dispute between the parties and we need therefore make no reference  
to them. There are provisions which govern the amount of SSP payable by reference  
to the employee's normal weekly earnings, but again that is not a matter in dispute in  
35   the present case. Similarly there is no dispute about the statutory limitations on  
entitlement (broadly, SSP cannot be claimed for the first three qualifying days of  
incapacity for work, nor for a period exceeding 28 weeks).

10. Regulations deal with such matters as the notice which the employee must give  
to the employer of the employee's day of incapacity for work, the provision of  
40   information as to the incapacity and its duration, and the provision of medical  
information in the terms of a doctor's statement or certificate in a prescribed form.

11. Although in most cases it is the employer who pays SSP to his sick employee, it is an officer of HMRC who, as provided in section 8(1)(f) Social Security Contributions (Transfer of Functions, etc) Act 1999, must decide whether in a particular case an employee has an entitlement to SSP.

5 *The facts*

12. The Appellant was employed from 1 May 2009 by the Employer. She worked three days a week. Her job description was as a beauty therapist. The Employer informed HMRC that the duties of the Appellant's employment required her to carry out beauty treatments on the Employer's customers (including facial therapies, manicures and pedicures, massages (including full body massages) and hair removal) and ancillary duties including reception work, ordering supplies, maintaining notes of customers' treatment programmes and medical histories, and cashing up at the end of the day.

13. The Appellant's employment duties (again, as the Employer informed HMRC) required her to stand up for lengthy periods and to bend over customers to administer the beauty treatments and, for the massages, to bend over customers and exert pressure with hands and arms. The equipment she had to operate was either fixed or mounted on wheeled trolleys.

14. The Employer kept a large and free-standing advertising board which each day was placed on the pavement outside the premises where the Appellant worked. She was expected to lift that advertising board and carry it out to the pavement each morning at the start of business and to carry it back into the premises at the end of the working day before locking up the premises.

15. The Appellant's last day of work was on 24 August 2011. On 26 August 2011 she became sick, and the first working day when she was absent because of sickness was 29 August 2011. She reported her sickness to the Employer on 30 August 2011.

16. The Appellant consulted her general practice doctor on 26 August 2011. Her doctor issued over time a series of certificates advising that the Appellant was not fit for work. The certificates covered the period beginning 26 August 2011 until mid-March 2012 (she was "signed off" by her GP on 19 March 2012). The Appellant's condition in those certificates was described as "backache, migraine and panic attacks". A medical report from the Appellant's GP dated 6 December 2011 provides a diagnosis of "back pain/panic attack", states symptoms to be "back pain after lifting heavy board at work (accident at work)" and states that treatment received is "physiotherapy, exercises at home as advised by physiotherapist, and pain killers". The outlook for the Appellant's condition is said to be "unpredictable at the moment because she is still having back pain and getting more panic attacks".

17. The Employer paid the Appellant £530 on 31 October 2011 and £163.60 on 30 November 2011.

18. In response to HMRC's request as to the reason for non-payment of SSP, the Employer advised HMRC in December 2011 that the Appellant had been absent for sickness for a period longer than would be expected from HMRC guidelines issued to employers; that the Appellant had been offered a welfare meeting, but had not attended; and that the notes from the Appellant's GP were not helpful and that the doctor was probably unaware of the nature of the Appellant's duties at work.

19. HMRC sought an independent medical opinion from the consultancy Medical Services. The doctor providing the opinion examined the Appellant on 7 December 2011. On 11 January 2012 HMRC advised the Appellant and the Employer that "it is Medical Services' opinion that [the Appellant] is capable of work as a Beauty Therapist in the periods covered by the medical evidence supplied. As a result of the Medical Services opinion, it would appear that [the Appellant] is not entitled to SSP for the periods covered by medical evidence supplied ..." We did not have in evidence either the information or instructions given to Medical Services or a copy of their opinion.

20. The Appellant wrote to HMRC on 31 January 2012 with further certificates from her GP (until mid-February 2012 and describing her back pain and panic attack illnesses in detail). She said that she had attended hospital because of sharp pains in her head and neck and pain and numbness in her arm, and had been referred for an MRI scan. On 16 February 2012 the Appellant had a cervical spine MRI scan. The scan revealed some disc degeneration in the spine, but no evidence of nerve root entrapment. The Appellant also had a lumbar spine X-ray on 4 May 2012. The report from that X-ray specifies: "Minimal scoliosis of the lumbar spine convex to the right is noted in the lower lumbar region. No other abnormality is seen."

21. From 16 February 2012 the Appellant had therapy for anxiety and depression from the mental health services department of the North East London NHS Foundation Trust.

22. Throughout this period the Appellant had physiotherapy treatment for her back condition and during part of the period she had physiotherapy for pain in her neck.

23. On 19 March 2012 the Appellant was "signed off" by her GP, that is, certified as in fit condition to work, and she approached the Employer with a view to returning to work. The Employer decided that she should not return to work and subsequently the Appellant was dismissed from her employment without returning to work.

24. HMRC sought a further opinion from Medical Services. The doctor concerned was sent a copy of the results of the MRI scan which had by then taken place. He carried out an examination of the Appellant on 12 May 2012. Following the examination Medical Services expressed the opinion that the Appellant was capable of doing her work as a beauty therapist. We did not have in evidence either the information or instructions given to Medical Services or a copy of their opinion.

25. In consequence of the opinion received by HMRC from Medical Services, on 30 May 2012 HMRC made their decision in these terms: "[The Appellant] is not entitled

to Statutory Sick Pay (SSP) from 26 August 2011 and that [the Employer] is not liable to pay SSP for that period".

26. The Appellant appealed in writing to HMRC against that decision on 22 June 2012. On 11 July 2012 the Appellant wrote to HMRC setting out in detail the circumstances of her illnesses, and the tests and treatment she had undertaken. She referred to the lifting of the heavy advertising board which she carried in and out of the Employer's premises. In that connection she submitted an undated statement of a Mrs C Puaar of Wanstead, which states:

"This is to confirm that on Wednesday 24 August 2011 I was [the Appellant's] last client at Pure Medispa, South Woodford. I also confirm that she was working late by herself and there were no other therapists in the salon at this time of the day above.

I also confirm that I witnessed [the Appellant] moving the advertising board from outside the salon to inside with great difficulty. I could not assist due to my frozen shoulder but did question why she was moving such a heavy object by herself which she was greatly struggling with.

If you need any further clarification please do not hesitate to contact me."

27. On 18 July HMRC notified the Appellant that the information supplied by her had not caused the officer to change her mind, and that the decision of 30 May 2012 still stood. The Appellant was told that she could ask for an independent review of the decision or appeal to the tribunal.

28. On 8 August 2012 the Appellant requested an independent review of the decision.

29. On 19 September the officer of HMRC who was to carry out that review sent an internal memo to the officer who made the decision stating that certain of the medical reports provided by the Appellant were not held on the file previously sent to Medical Services. The reviewing officer asked the decision officer to send the reports to Medical Services. In that memo the reviewing officer also stated: "My other concern is the accuracy of the job description that the Employer has provided for the Medical examiner - he does not include the carrying of the advertising board when closing up at the end of the day."

30. There was no further medical examination of the Appellant.

31. On 24 October 2012 the reviewing officer wrote to the Appellant to inform her that the decision of 30 May 2012 that she was not entitled to SSP was upheld. The reviewing officer stated that the additional medical reports provided by the Appellant had been forwarded to Medical Services Scrutiny Panel who had been asked to review all the information on their file, and they had concluded that the Appellant could have had some limitation to doing her job but it was unlikely to have lasted more than a few days.

32. We had no evidence as to the instructions given to the Medical Services Scrutiny Panel or of exactly what information was given to them. Nor did we have in evidence the report which they provided to the reviewing officer.

5 33. On 19 October 2012 the Appellant appealed to this tribunal against the decision of HMRC.

*Discussion and conclusion*

10 34. As mentioned, the issue we have to decide is whether the relevant period of absence of the Appellant from her work was a period of incapacity for work within sections 151 and 152 SSCB Act 1992. For that to be the case each day within that period must be a day on which the Appellant was incapable by reason of some specific disease or bodily or mental disablement of doing work which she can reasonably be expected to do under her contract of service. If there was such a period of incapacity for work the Appellant is entitled to SSP for that period, subject to the rules relating to the maximum period of entitlement and the rules relating to the amount which may be claimed.

15 35. The Employer paid SSP to the Appellant for the first ten weeks of absence. Her claim is therefore for the remaining 18 weeks of the 28 week period which is the entitlement limit. That 28 week period began on 30 August 2011 and ended on 9 March 2012.

20 36. The first matter to be determined is the scope and nature of the work which the Appellant can reasonably be expected to do under her contract of service. The duties of the Appellant's employment, according to the Employer, are set out in paragraphs 12 and 13 above. This is the information which the Employer supplied to HMRC in the course of their enquiries, and from the internal memo disclosed in the evidence, it appears that this was the information as to the Appellant's work which HMRC supplied to Medical Services for the purposes of obtaining both the medical opinions HMRC sought as to the capability of the Appellant to carry out her work (see paragraph 29 above).

30 37. In our view the description by the Employer of the duties of the Appellant's employment, on which, in turn, HMRC and Medical Services relied, was inadequate. It extended to those duties which might normally be considered to be within the scope of a job described as a beauty therapist. But it is clear that the Appellant undertook other tasks, to do with the daily opening up for business of the beauty salon premises, and closing them down for business, which were physically far more demanding. In particular, the Appellant was required, without assistance, to carry or drag out to the pavement and then, at closing, back from the pavement and into the beauty salon, a heavy advertising board. The statement of the salon customer, Mrs Puaar, which we have no reason to doubt, makes it clear that this was the *de facto* responsibility of the Appellant; that no other employee was available to assist the Appellant; and that it was a very physically demanding task with which the Appellant struggled. Mrs Puaar observed these matters on the day which proved to be the last working day before the Appellant reported that she was unable to work.

38. We conclude that moving this heavy board was work which the Appellant could reasonably be expected to do under her contract of employment: it was, we infer, a necessary part of opening up and shutting the beauty salon at the beginning or end of each day which was part of the Appellant's job. The Appellant made this assertion in the course of the lengthy correspondence in this case, and the assertion was not challenged. In any event, it seems entirely credible that the Appellant was expected to do this.

39. Therefore, in answering the question whether the Appellant was incapable by reason of illness of performing her work duties it is necessary to ask that question by reference to that particular and physically-demanding task as well as by reference to those tasks more obviously within the scope of the work of a beauty therapist.

40. This HMRC failed to do. We did not have in evidence the instructions or brief which HMRC gave to Medical Services on the two occasions it sought a medical opinion on the question of whether the Appellant was incapable by reason of illness of doing work which she could reasonably be expected to do under her contract of service. However, it is clear from the HMRC internal memo that the reviewing officer was concerned that the matter had not been put to Medical Services, since they had relied on the (more limited) description of the work duties of the Appellant as supplied by the Employer.

41. The two medical opinions obtained by HMRC could not therefore have expressed a valid view on the question which had to be addressed in this case and by reference to the particular circumstances of this case. If the illness in relation to which a person claims SSP is back injury of some kind, it is highly material in assessing the capacity of that person to work to take account of work tasks which involve lifting and carrying a heavy item. Since those opinions formed the basis of HMRC's decision given on 30 May 2012 it follows that that decision is flawed because in the circumstances of the case it does not answer the question which section 151 SSCB Act 1992 requires must be answered.

42. We cannot say from the evidence which HMRC put before us whether the reviewing officer, in returning to Medical Services in October 2012, put this issue to them. In any event, there was no further medical examination of the Appellant by reference to the proper extent of the Appellant's duties. Having identified material failings in the original decision, the proper procedure which the reviewing officer should have followed was to set that decision aside and begin the decision process afresh by reference to all the material factors.

43. Having concluded for these reasons that we should disregard the decision reached by HMRC in this matter, we must, in exercising our appellate jurisdiction, decide whether, on the evidence before us, the Appellant has established on the balance of probabilities that during the relevant period she was incapable by reason of some specific illness or disablement of doing work which she could reasonably be expected to do under her contract of employment.



44. In our view the Appellant succeeds in her case. Her own GP certified her condition as unfit for work throughout this period. She made several hospital visits for her condition and underwent a series of tests which showed some medical conditions or abnormalities relating to the spine. She had physiotherapy treatment for both her back and her neck throughout the period. Her condition may not have incapacitated her for the purposes of providing beauty treatments (although certain of those treatments, and in particular massage treatments, were physically demanding), but we accept that they could have incapacitated her for heavy lifting, which, as we have found, formed part of the work she was expected to do under her contract of employment.

45. We therefore conclude that each day of absence from work by the Appellant during the period until 9 March 2012 was a day of incapacity for work in relation to her contract of service for the purposes of the SSP legislation. Accordingly the Appellant is entitled to SSP for that period.

46. We allow the Appellant's appeal.

*Right to apply for permission to appeal*

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.

**EDWARD SADLER  
TRIBUNAL JUDGE**

**RELEASE DATE: 5 February 2014**