



TC05776

Appeal number: TC/2016/01886

NATIONAL INSURANCE CONTRIBUTIONS – entitlement to Statutory Sick Pay – duration of incapacity – independent medical assessments – definition of incapacity – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FLEMINGTON CARE HOME LIMITED

Appellant

- and -

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

Respondents

ROSE LYNCH

**Second
Respondent**

**TRIBUNAL: JUDGE HEIDI POON
MR IAN SHEARER**

**Sitting in public at Tribunal Centre, Eagle Building, 215 Bothwell Street,
Glasgow on 16 January 2017**

No attendance or representation by the Appellant or Second Respondent

Ms Linda Gordon, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

- 5 1. The appellant, Flemington Care Home Ltd ('FCH'), appealed against HMRC's decision issued on 1 July 2015.
2. Ms Lynch, the second respondent in this appeal, was an employee of FCH.
3. The matter in dispute concerns Ms Lynch's entitlement to Statutory Sick Pay ('SSP') for the period from 2 November 2014 to 8 November 2014, and 11 November 2014 to 18 December 2014, in the sum of £525.31.
- 10 4. FCH contend that the Ms Lynch was not genuinely sick in the said periods to be entitled to any sick pay.

Hearing in absence

- 15 5. There was no appearance or representation of the appellant or the second respondent on the day of the hearing. The Tribunal was satisfied that both the appellant and the second respondent had been duly notified of the hearing, and that no postponement application had been made.
6. In accordance with Rules 2 and 33 of the Tribunal Rules, the Tribunal decided that it would be in the interests of justice to proceed with the hearing in the absence of the appellant and the second respondent.

20 Factual background

7. On 11 December 2014, Ms Lynch contacted HMRC in respect of the dispute she had with FCH concerning her SSP entitlement from 2 November 2014 to 18 December 2014.
8. On 12 December 2014, HMRC issued questionnaires to both parties to request
25 information.
9. On 30 December 2014, HMRC received SP50 questionnaire from FCH, which provided the following information:
- (1) Ms Lynch's employment started on 7 July 2012.
- (2) Her first day of sickness was 1 November 2014, being also the date she
30 last worked and reported her sickness.
- (3) She returned to work on 19 December 2014.
- (4) The dates she was sick in the 8-week period prior to 1 November 2014 are: 4 September 2014, 9 September 2014, and from 14 October to 20 October 2014.
- 35 (5) Her normal working days were Sunday to Saturday (shift work).

(6) She was paid SSP on 14 November 2014 of £122.57 and 12 December 2014 of £175.10.

(7) FCH did not believe Ms Lynch's incapacity was genuine.

5 10. On 12 February 2015, HMRC received SP14 questionnaire from Ms Lynch, with the following information:

(1) Ms Lynch's employment started on 7 June 2012.

(2) Her first day of sickness was 1 November 2014, being also the date she last worked and reported her sickness to the staff nurse by telephone.

(3) She had provided medical evidence to her manager.

10 (4) She returned to work on 19 December 2014.

(5) She had not been sick in the 8 weeks before the last period of sickness.

(6) She was paid SSP on 14 November 2014 of £122.57 and 12 December 2014 of £175.10.

15 (7) She believed she was entitled to SSP from 25 November 2014 to 18 December 2014.

11. Ms Lynch also provided HMRC with three medical certificates on form MED 3, which together cover a consecutive period from 11 November 2014 to 19 December 2014. The statements advised that Ms Lynch was 'not fit to work' for the said period due to 'soft tissue injury, right foot'. Payslips dated 19 September 2014 and 17
20 October 2014 were also submitted to HMRC. (The certificates were issued by the GP surgery, and it is possible that different doctors were consulted on the three separate occasions. We consider the medical certificates as representing the collective opinion of the GP surgery.)

12. On 2 March 2015, HMRC wrote to Ms Lynch and FCH to inform the parties
25 that the case would be referred to Medical Services for an independent assessment. A copy of Ms Lynch's job description as a Care Assistant was requested, together with any copies of medical certificates held. The job description lists 28 tasks under 'Main Responsibilities' of a care assistant, including: (a) support clients who require assistance with personal hygiene tasks; (b) using aids provided, assist clients with
30 mobility; (c) monitor clients who may be confused or have behaviour problems due to a learning disability; (d) ensure that bedrooms and en-suites are kept clean, tidy, commodes empty where necessary, make and change beds as required

13. On 8 April 2015, HMRC referred the case to Medical Services to assess whether Ms Lynch was fit for work in the said period.

35 14. On 1 May 2015, Ms Lynch attended an assessment with Medical Services. The conclusion given by Medical Services in a report of the same date is as follows:

'[Ms Lynch's] right foot problems have now resolved fully, and she would currently be able to carry out the type of work described in form IB57 of 8/4/15.'

However for the period from 2/11/14 until 19/12/14 her right foot problems would, in my opinion, have prevented her from doing the type of work described on IB57 of 08/04/15.’

5 15. By letter dated 15 May 2015, HMRC advised the parties that based on the evidence held, and Medical Services’ opinion, Ms Lynch was entitled to SSP totalling £525.31 for the period from 2 November to 18 December 2014.

16. As FCH had already paid Ms Lynch £297.67 (being £122.51 and £175.10) in relation to the period from 2 to 18 November, the balance outstanding was £227.64.

10 17. On 27 May 2015, Ms Bignall, Financial Administrator of FCH wrote to HMRC, questioning the validity of the medical opinion and referred to ‘video evidence of Mrs Lynch jumping about and dancing at not one but three separate [singer’s name] concerts during this period’ (emphasis original). Ms Bignall asked the question:

15 ‘... would that medical complaint be exempt from her social life and allow her the flexibility and pain free movement to travel on foot to each venue, jump about and dance for hours at a time and then egress the venue on foot again?’

20 18. Referring to the job description, Ms Bignall requested Medical Services to ‘provide evidence’ why Ms Lynch should be considered unable to carry out ‘light duties’ during the disputed period. She gave examples of these light duties, such as: talk with the residents and read them the daily newspaper; watch television with the residents to give them company’; feed residents (while seated); listen to the residents and interact with them while they have an opportunity to have a one-to-one chat with a carer; clean equipment (while seated); answer the call system; attend staff meetings.

25 19. Ms Bignall clarified that Ms Lynch was paid all SSP up until the video footage of her jumping and dancing came to her attention.

30 20. Ms Bignall concluded her letter by asking how accurate a medical examination result can be with reference to an injury which happened six months earlier. Furthermore, Ms Bignall queried whether it would be possible that a separate injury was sustained ‘after November or indeed after the dancing and jumping about for hours at concerts’ to give rise to Ms Lynch’s doctors certifying her as unfit for work.

35 21. On 1 July 2015, HMRC issued a formal decision that FCH was liable to pay the total SSP of £525.31 for the periods 2 November to 8 November, and 11 November to 18 December 2014. This letter noted and explained that 9 November was excluded from the calculation ‘as no medical evidence has been provided for that day’, and 10 November was excluded because HMRC understood that ‘Ms Lynch attended work on 10 November 2014, although she was only able to last an hour as her foot began to swell again’.

22. By letter dated 14 July 2015, Ms Bignall appealed against the decision, adding the following as reasons for the appeal:

5 ‘... there is more than one witness who saw Ms Lynch happily jump about, dance and climb on chairs at these concerts, this was done whilst it would appear that she was medically assessed as being incapacitated in her movement and ability to carry out even light duties at work.’

23. On 6 August 2015, FCH provided HMRC with copies of Facebook pages of Ms Lynch. One Facebook entry was dated 28 November 2014, with a picture of Ms Lynch and her posted comment being: ‘Just after a [sic] made my move and louped [sic] at him hilarious’. However, it was said that the video evidence previously
10 alluded to had subsequently been deleted. FCH offered to ‘send statements from senior management and professional with regard to what they witnessed on the video footage when it was brought to our attention’. No such statements appear to have been sent, nor produced to the Tribunal.

24. HMRC referred the case to Medical Services for re-assessment in the light of
15 Ms Bignall’s comments, and asked specifically for an assessment whether Ms Lynch would have been capable of travelling.

25. On 21 August 2015, Ms Lynch was examined by a different doctor, whose conclusion is as follows:

20 ‘This is clearly a difficult issue to resolve here. When Ms Lynch was reviewed by Dr Brown it was several months after the resolution of the soft tissue injury to her foot, the cause of original incapacity. As one would anticipate, there were no relevant residual clinical findings in respect to the foot ... No additional medical evidence was available to Dr Brown beyond Med 3 certificates and he has clearly accepted
25 her account in good faith.

 Though a soft tissue injury to the foot would not necessarily preclude either travel or attendance at a concert, it would likely have made both a challenge. Similarly, such an injury would likely prevent manual,
30 physical work but not sedentary activity. However, jumping and dancing about would not likely be possible with such an injury.

 There is no new evidence to corroborate that such activity took place though. ... Social media records confirm only that she went to
35 concerts, rather than what took place there. Accordingly, I do not see any substantially new evidence that would lead me to change our original advice.’ (paragraph divisions added)

26. HMRC therefore wrote to FCH on 26 August 2015, stating that the decision of 1 July would be upheld. By letter dated 28 September 2015, Ms Bignall requested a review. She reiterated that ‘the video footage of Ms Lynch dancing and jumping about on the chair at these concerts’ had since been deleted from Ms Lynch’s Facebook
40 account. Ms Bignall conceded that she had ‘no legal right to ask why she has done this or to locate copies of the footage’.

27. Another point raised in Ms Bignall’s September letter concerns the nature of evidence given by Ms Lynch on the day of the examination, which had been

‘accepted in good faith’ by Medical Services. Referring again to the video footage ‘showing the same, more able person doing things’ for which Medical Services had opined that ‘jumping and dancing about would not likely be possible with such an injury’, Ms Bignall pointed out that it ‘would suggest that there is a contradiction in the evidence given’. For this reason, she reiterated why she had placed such emphasis on the video footage showing Ms Lynch dancing and jumping about at the concerts.

28. Ms Bignall continued her letter by suggesting that ‘the information given by Ms Lynch is subjective and unviable’; that ‘Ms Lynch is not a medical expert and will only say what she wants Medical Services to consider’.

29. Apart from the video footage, Ms Bignall also referred to the ‘actual comments made by Ms Lynch while at the concerts – where she openly admits her actions verbally’. (What Ms Bignall was referring to is the Facebook comment by Ms Lynch: ‘Just after a [sic] made my move and louped [sic] at him hilarious’.) Ms Bignall highlighted that Medical Services had failed to take account of Ms Lynch’s verbal comment in reaching their conclusion, and that she ‘would presume’ Medical Services would not have thought ‘this behaviour and movement possible for the type of injury Ms Lynch apparently suffered’.

30. In closing, Ms Bignall indicated that she would be ‘more than happy to provide statements from qualified, professional nurses and management staff regarding the footage they witnessed, posted on Facebook by Ms Lynch whilst she was on sick leave’, and that she is ‘prepared to take this matter as far as [she] can to put an end to this claim which [she] believe[s] is unfair and unjust’.

31. HMRC carried out a review of their decision. The review conclusion was issued on 18 November 2015, and upheld the decision in the letter of 1 July 2015.

The Law

32. The liability and qualifying conditions for SSP are set out in ss 151-154 of the Social Security Contributions and Benefits Act 1992:

‘**151** (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 ... a payment (to be known as “statutory sick pay”) in respect of that day ...

(4) For the purposes of this part of this Act a day shall not be treated as a day of incapacity for work in relation to any contract of service unless on that day 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 ...

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

(2) ... “period of incapacity” means any period of four or more consecutive days, each of which is a day of incapacity for work ...

(3) Any two periods of incapacity for work which are separated by a period of not more than 8 weeks shall be treated as a single period of incapacity for work.

...

153 (1) The second condition is that the day in question falls within a period which is, as between the employee and his employer, a period of entitlement.

(2) ... a period of entitlement ... is a period beginning with the commencement of a period of incapacity for work and ending with whichever of the following first occurs –

(a) the termination of that period of incapacity for work;

(b) the day on which the employee reaches, as against the employer concerned, his maximum entitlement to statutory sick pay ...

(c) the day on which the employee’s contract of service with the employer concerned expires or is brought to an end;

(d) in the case of an employee who is, or has been, pregnant, the day immediately preceding the beginning of the disqualifying period.’

33. The definition of ‘incapacity’ includes deemed incapacity as provided under regulation 2 of the Statutory Sick Pay (General) Regulations 1982 (SI 1982/894):

‘Persons deemed incapable of work

2(1) A person who is not incapable of work of which he can reasonably be expected to do under a particular contract of service may be deemed to be incapable of work of such a kind by reason of some specific disease or bodily or mental disablement for any day on which either –

(a) (i) he is under medical care in respect of a disease or disablement as aforesaid,

(ii) it is stated by a registered medical practitioner that for precautionary or convalescent reasons consequential on such disease or disablement he should abstain from work, or from work of such a kind, and

(iii) he does not work under that contract of service, or

(b) he is –

(i) excluded or abstains from work, or from work of such a kind, pursuant to a request or notice in writing lawfully made under an enactment; or

(ii) otherwise prevented from working pursuant to an enactment,

by reason of it being known or reasonably suspected that he is infected or contaminated by, or has been in contact with a case of, a relevant infection or contamination.

5 2(2) A person who at the commencement of any day is, or thereafter on that day becomes, incapable of work of such a kind by reason of some specific disease or bodily or mental disablement, and

(a) on that day, under that contract of service, does no work, or no work except during a shift which ends on that day having begun on the previous day; and

10 (b) does not work under that contract of service during a shift which begins on that day and ends on the next,

shall be deemed to be incapable of work of such a kind by reason of that disease or bodily or mental disablement throughout that day.’

34. Sub-section 14(1) of the Social Security Administration Act 1992 provides that:

15 ‘14(1) Any employee who claims to be entitled to statutory sick pay from his employer shall, if so required by his employer, provide such information as may reasonably be required for the purpose of determining the duration of the period of entitlement in question or whether a period of entitlement exists as between them.’

20 35. Regulation 2 of the Statutory Sick Pay (Medical Evidence) Regulations 1985 provides that:

‘2(1) Medical information required under section 14(1) of the 1992 Act relating to incapacity for work shall be provided either –

25 (a) in the form of a statement given by a doctor in accordance with the rules set out in Part I of Schedule 1 to these Regulations; or

(b) by such other means as may be sufficient in the circumstances of any particular case.

30 (2) An employee shall not be required under section 14(1) of the 1992 Act to provide medical information in respect of the first 7 days in any spell of incapacity for work ...’

36. Sub-sections 9(2) and (3) of the Social Security (Transfer of Functions, etc) Act 1999 provide that:

35 ‘9 (2) Where it appears to an officer of the Board that a matter before him involves a question of fact requiring special expertise, he may direct that in dealing with that matter he shall have the assistance of one or more experts.

40 (3) In subsection (2) above “expert” means a person appearing to the officer of the Board to have knowledge or experience which would be relevant in determining the question of fact requiring special expertise.

The Appellant's case

37. By notice dated 1 April 2016, Ms Bignall appealed to the Tribunal on behalf of FCH, stating the grounds of appeal as those related in her correspondence with HMRC on this matter.

- 5 38. For 'result', it is stated: 'Based on the evidence provided Rose Lynch proved by travelling around the country and jumping up and down dancing that her "foot injury" would not have interfered with her working. We should not need to pay SSP.'

HMRC's case

10 39. HMRC consider that Ms Lynch has satisfied all the conditions for entitlement to SSP for the period from 2 November 2014 to 18 December 2014, based on the medical evidence provided.

40. Ms Lynch was examined by three different medical practitioners, including her own GP, and they all concluded that she was incapable of carrying out her normal duties. HMRC consider the medical evidence to be strong evidence.

- 15 41. FCH is therefore liable to pay Ms Lynch the balance of SSP, being £227.64.

Discussion

The matter in dispute

20 42. FCH does not dispute that HMRC's calculation of SSP is correct, in the event that Ms Lynch was entitled to it. What is in dispute is her entitlement, based upon her capacity for work. The appeal is against the decision letter of 1 July 2015.

The onus of proof

25 43. The claimant of SSP has the onus to prove incapacity. The Tribunal considers that Ms Lynch has discharged the onus by providing three contemporaneous statements by a registered medical practitioner to certify that she was unfit for work. The first certificate covered the two weeks from 11 November to 25 November 2014; the second certificate covered the three weeks from 25 November 2014, and the third certificate from 16 to 19 December 2014. Ms Lynch returned to work on 19 December 2014.

HMRC's reliance on special expertise

30 44. The video footage and the Facebook comment posted by Ms Lynch have caused FCH to contend that Ms Lynch's incapacity was not genuine.

45. On this matter that 'involves a question of fact requiring special expertise', HMRC have sought the advice of an independent medical practitioner, not just once, but twice, in accordance with statutory provisions.

35 46. In all, the opinion of no fewer than three different medical practitioners have been involved in assessing the length of Ms Lynch's incapacity. HMRC's decision

that the qualifying period is determined as from 2 November to 18 December 2014 has been based on the strength of their collective opinion.

The possibility of contravening evidence

47. The Tribunal would remark on the cogent account given by Ms Bignall for disputing the incapacity. The video footage she relied on for making her case is, however, no longer available. The Tribunal only has the benefit of the Ms Lynch's Facebook comment as evidence.

48. Notwithstanding the fact that Ms Bignall was not at the hearing to give evidence, we do not doubt what she has written about the video footage, or that her colleagues had viewed the footage when it was available and could have testified to the content of the footage. However, the fact that the video footage did exist, and that it showed Ms Lynch dancing and jumping up and down, does not directly lend itself to becoming contravening evidence to the medical opinion as noted above.

49. Had the footage been available for Medical Services to view, and had their viewing influenced their assessment of Ms Lynch's period of incapacity, then the relevance of the video footage as a piece of evidence would have entered this appeal via the medical opinion. In other words, the video footage could only have become contravening evidence through the expert assessment of the medical practitioners.

50. The Tribunal has no medical expertise to assess the relevance of the footage independent of medical opinion, any more than Ms Bignall has in reaching her conclusion that Ms Lynch was not incapacitated based on her movement and conduct shown in the video footage. Ms Bignall's view is not a medical opinion on which the determination of this appeal can be based.

51. We have noted the discrepancy between FCH and Ms Lynch in their respective questionnaires in relation to Ms Lynch's former periods of incapacity in the 8-weeks prior to 1 November 2014. FCH noted 9 days of incapacity and Ms Lynch noted none. We note also the point made by Ms Bignall that that if Ms Lynch could attend concerts by travelling the country, she could have been fit for 'lighter duties' at the care home. We can understand the indignation from the staff who had viewed Ms Lynch's Facebook postings of her attendance at these concerts while Ms Lynch had reported herself to be on sick leave.

52. These factors may point in one direction in assessing the credibility of Ms Lynch as a witness. However, we have regard to the fact that a case of this nature is ultimately determined by medical evidence, not the evidence of the employee.

The definition of incapacity

53. The statutory provisions for 'incapacity' also allow a person to be *deemed* incapable of work 'by reason of some specific disease or bodily or mental disablement' for which it is 'stated by a registered medical practitioner that for precautionary or convalescent reasons consequential on such disease or disablement he should abstain from work'.

54. The job description provided to Medical Services includes core duties such as mobility assistance to residents and facilitation of their hygiene needs, which would have been taken into account when assessing Ms Lynch's incapacity, and not just the 'lighter duties' as referred to by Ms Bignall.

5 55. The provisions of 'deemed incapacity' extend to cover bodily or mental
disablement for which a registered medical practitioner may consider 'for
precautionary or convalescent reasons consequential on such disease or disablement',
that the person concerned should abstain from work, or from work of such a kind. In
10 assessing the length of Ms Lynch's incapacity, the medical practitioners would have
to take in the *precautionary* reasons for *deeming* incapacity as much as the
convalescent reasons.

15 56. Furthermore, the medical practitioners had to refer to the *full* job description as
submitted by FCH, that being in the contract of employment. There is no discretion
for the assessors to remove the core duties on Ms Lynch's job description, and to
reach their conclusions based on the 'lighter duties' as listed by Ms Bignall.

20 57. The discretion to reduce Ms Lynch's responsibilities to the 'lighter duties' only
would have been a matter of discussion between the employer and the employee. It is
not a matter for the Tribunal, or the medical practitioners involved in assessing the
duration of Ms Lynch's incapacity, to consider what Ms Lynch *could* have been able
to do out of the job list, or to re-assess her period of incapacity according to the
'lighter duties' as proposed by Ms Bignall.

25 58. The fact in issue concerns the duration of incapacity, and this is a question of
fact that can only be established by the expert evidence from medical practitioners. At
least three medical practitioners have reached the same conclusion concerning the
length of incapacity, and is conclusive for the purpose of determining this appeal.

Decision

59. For the reasons stated, the appeal is dismissed.

30 60. 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.

35 **DR HEIDI POON**
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2017