



COT3s, settlement agreements and maternity pay

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In the settlement of employment claims the employee may have an outstanding entitlement to statutory maternity pay. Below, in the wake of Campus Living Villages, we examine the drafting requirements for effective compromise of the SMP claim and the calculation of SMP rates where an annual bonus payment has been paid within the 'relevant period'.

It is well established that settlement agreements cannot prevent the employee concerned later being able to bring a claim for personal injury or pension loss; however, courts and employment tribunals have not yet applied the same approach to maternity pay. According to the FTT's decision in *Campus Living Villages*, they should do, as any agreement that purports to exclude an entitlement to SMP is void under s.164(6) of the Social Security Contributions and Benefits Act 1992.

Furthermore, the decision parallels the recent litigation on what payments should be included in calculating holiday pay by providing that Ms Sexton's annual bonus payment did fall to be included in the calculation of her SMP.

The facts

Ms Sexton had been employed as head of finance for Campus Living Villages Ltd when she became pregnant. Her 'expected date of confinement' for the purpose of her SMP entitlement under the 1992 Act was 28 January 2015. Her employment was terminated for the stated reason of 'redundancy'. The baby was born on 5 February 2015.

Ms Sexton commenced a claim against Campus Living for unfair dismissal and pregnancy discrimination. The claim was compromised without admission of liability. In the course of the negotiations, Ms Sexton submitted a calculation of her claim totalling £98,394.46, including a sum of £41,143.45 in respect of 'maternity pay entitlement'. That sum was based on contractual maternity pay, not an SMP calculation. Her claim was ultimately compromised under a COT3 for the total sum of £60,000.

Clause 1 of the COT3 provided: 'Without admission of liability, [Campus Living] 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 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.'

Clause 5 of the COT3 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 settlement was specifically 'not limited to' the legislation set out and applied to 'all and any claims'.

Calculation of SMP

Under her employment contract Ms Sexton was, subject to her employer's discretion, entitled to a short-term incentive scheme payment (the bonus), which would be determined and advised along with her annual salary review. In October 2014 she had received a bonus payment under this scheme in the sum of £44,077 in respect of performance in the year to 30 June 2014. This payment was within the reference period for calculating her 90% of normal weekly earnings under the 1992 Act at ss.166 and 171(4), read together with regs 20 and 21 of the regulations.

Campus Living argued that as the annual payment related to the previous year, it could not be part of Ms Sexton's 'normal weekly earnings'.

The FTT held that the bonus did fall within the relevant period and was part of her 'normal weekly earnings' for the purpose of calculating her SMP (see paras 35-42).

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'the settlement agreement ... was not able to exclude her entitlement to SMP'

Compromise of SMP

The FTT noted that under s.164 of the 1992 act, Ms Sexton had an absolute right to payment of SMP and that s.164 (6) provides that any agreement that purports to exclude the right to SMP is void to that extent. The FTT noted that the settlement payment may have included an element in respect of maternity rights, but it was 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 (ss.3 to 6 of the 1992 act). On the contrary, the settlement agreement expressly stated that the parties believed NICs were not payable.

Accordingly, although the settlement agreement purported to be in full and final settlement of all Ms Sexton's claims, that provision was not able to exclude her entitlement to SMP and was void to the extent that it purported to do so. Thus, Campus Living had an outstanding obligation to pay the SMP and the NICs due on it.

Alternative options for the employer to recoup the loss

In this case Campus Living had also pleaded that it relied on Acas assistance with the settlement and wording of the COT3,

so culpability lay with them. The FTT held that the acts or omissions of Acas could not affect HMRC's correct application of the law (paras 27 and 49).

The FTT noted that Campus Living would be entitled to recoup most of the amount of the SMP paid from the government.

It would appear on the facts set out in the FTT decision that Campus Living would have a good claim for negligence against its legal advisers. If they had properly identified the effect of s.164(6), the claim could have been avoided by clearly identifying what element of the payment was for SMP as opposed to a discretionary compensatory payment, and ensuring that the NICs were identified and paid, although the loss suffered by the employer would be limited to the costs of the litigation in the FTT and any interest or charges arising therefrom.

Conclusions and strategic lessons

Where drafting a settlement agreement or COT3 in relation to an employee who has or will have a relevant entitlement to SMP, that entitlement should be provided for explicitly, not be treated as part of a compensatory sum. Care should be taken to ensure that appropriate tax and NICs are paid in relation to the sum. Employers should be reminded of their entitlement to reclaim most of the amount of SMP from the government.

Where incentive payments are paid annually, there may be unintended consequences for both SMP and holiday pay. A move to a quarterly or monthly distribution would ameliorate that risk.

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KEY:

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| The regulations | Statutory Maternity Pay (General) Regulations 1968 SI 1960 |
| The 1992 Act | The Social Security Contributions and Benefits Act 1992 |
| <i>Campus Living Villages</i> | <i>Campus Living Villages UK Ltd v The Commissioners for Her Majesty's Revenue and Customs v Joanne A Sexton</i> [2016] UKFTT 0738 (TC) |