Appeal numbers: FTC/35/2009, FTC/42/2009 and FTC/43/2009

STATUTORY MATERNITY PAY – date from which statutory maternity pay can be claimed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DEBORAH WADE **Appellant**

- and -

NORTH YORKSHIRE POLICE AUTHORITY

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

AND:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellant**

- and -

DEBORAH WADE

NORTH YORKSHIRE POLICE AUTHORITY **Respondents**

AND:

NORTH YORKSHIRE POLICE AUTHORITY **Appellant**

- and -

DEBORAH WADE

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

Tribunal: Mr Justice Newey
Judge Malcolm Gammie QC

Sitting in public in London on 8 November 2010

Miss Sally Robertson, instructed by Russell Jones & Walker, for Mrs Wade

Mr James Arnold, instructed by the solicitor to the North Yorkshire Police Authority, for North Yorkshire Police Authority

Mr James Maurici, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Commissioners for Her Majesty's Revenue and Customs

DECISION

Introduction

1. Mrs Deborah Wade is a police officer in the North Yorkshire Police. In 2005 and 2007 she claimed statutory maternity pay ("SMP") in respect of the pregnancies leading to the births of her two children. The question raised by the present appeals is as to the date from which she was entitled to SMP as regards each pregnancy.

2. The case arises against the background of a parallel regime for police (as opposed to statutory) maternity leave and pay. As a police officer, Mrs Wade qualified for police maternity pay, under the Police Regulations 2003, as well as for SMP. Further, while she was not eligible for statutory maternity leave, she was entitled to police maternity leave pursuant to the 2003 Regulations. Police maternity leave can be taken from six months before the expected date of confinement.

3. The appeals before us stem from Mrs Wade's attempts to maximise the sums she received, in aggregate, by way of police maternity pay and SMP. The interrelationship between police maternity pay and SMP means that it is in an employer's interests for SMP to be payable, so far as possible, at the same time as police maternity pay and, correspondingly, in the employee's interests for it not to be so payable.

4. What happened with each of Mrs Wade's pregnancies was that she took police maternity leave earlier than the 11th week before the expected week of confinement ("EWC"), but gave notice that she wished to claim SMP from a much later date (in one instance, the EWC and, in the other, the 4th week before the EWC). The North Yorkshire Police Authority ("the Authority"), which was Mrs Wade's employer for SMP purposes, contends that, on those facts, SMP was payable from the 11th week before each EWC. Mrs Wade, on the other hand, argues that SMP became payable only four weeks before the EWCs. She is supported in that by HM Revenue and Customs ("HMRC").

The facts

The first pregnancy

5. Mrs Wade's first child was expected in the week beginning 18 December 2005.

6. On 1 August 2005 Mrs Wade notified the Authority that she wanted her police maternity leave and pay to commence on 18 September 2005 (the 13th week before the EWC) and her SMP to run from 18 December 2005 (the EWC itself).

7. In the event, Mrs Wade's police maternity leave began on 25 September 2005 (the 12th week before the EWC), and her first child was born on 1 December 2005 (in the 3rd week before the EWC).

The second pregnancy

8. Mrs Wade's second child was expected in the week beginning 24 June 2007.

9. On 18 January 2007 Mrs Wade notified the Authority that she wanted her police maternity leave and pay to commence on 28 February 2007 (in the 18th week before the EWC) and her SMP to run from 28 May 2007 (in the 4th week before the EWC).

10. As intended, Mrs Wade took police maternity leave from 28 February 2007. Her second child was born on 21 June 2007 (in the week before the EWC).

The legislative framework

11. SMP is provided for by Part XII of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act").

12. Section 164(2) of the 1992 Act lists three conditions which a woman must satisfy to be entitled to SMP. They 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."

13. The word "confinement" is defined in section 171 of the 1992 Act to mean:

> "(a) labour resulting in the issue of a living child, or
>
> (b) labour after 24 weeks of pregnancy resulting in the issue of a child whether alive or dead"

"Confined" is to be construed accordingly.

14. Sub-sections (4) and (5) of section 164 impose a notice requirement. They state:

> "(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 that 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 …."

15. Section 165 of the 1992 Act provides for SMP to be payable "during a prescribed period ('the maternity pay period') of a duration not exceeding 52 weeks". Sub-section (2), which is of particular significance in the present case, reads:

> "(2) Subject to subsections (3) and (7), the maternity pay period shall begin with the 11th week before the expected week of confinement."

The section goes on to state:

> "(3) Cases may be prescribed in which the first day of the period is to be a prescribed day after the beginning of the 11th week before the expected week of confinement, but not later than the day immediately following the day on which she is confined.
>
> (4) Except in such cases as may be prescribed, statutory maternity pay shall not be payable to a woman by a person in respect of any week during any part of which she works under a contract of service with him.
>
> …
>
> (7) Regulations may provide that this section shall have effect subject to prescribed modifications in relation—
>
> (a) to cases in which a woman has been confined before the 11th week before the expected week of confinement; and

(b) to cases in which—
(i) a woman is confined at any time after the end of the week immediately preceding the 11th week before the expected week of confinement; and
(ii) the maternity pay period has not then commenced for her.

(8) In subsections (1), (4) and (6) "week" means a period of seven days beginning with the day of the week on which the maternity pay period begins."

16. In its present form, regulation 2 of the Statutory Maternity Pay (General) Regulations 1986 ("the 1986 Regulations") provides as follows:

"(1) Subject to paragraphs (3) to (5), where—

(a) a woman gives notice to her employer of the date from which she expects his liability to pay her statutory maternity pay to begin; and

(b) in conformity with that notice ceases to work for him in a week which is later than the 12th week before the expected week of confinement,

the first day of the maternity pay period shall be the day on which she expects his liability to pay her statutory maternity pay to begin in conformity with that notice provided that day is not later than the day immediately following the day on which she is confined.

(2) The maternity pay period shall be a period of 39 consecutive weeks.

(3) In a case where a woman is confined—

(a) before the 11th week before the expected week of confinement; or

(b) after the 12th week before the expected week of confinement and the confinement occurs on a day which precedes that mentioned in a notice given to her employer as being the day on which she expects his liability to pay her statutory maternity pay to begin,

section 165 of the Contributions and Benefits Act shall have effect so that the first day of the maternity pay period shall be the day following the day on which she is so confined.

(4) In a case where a woman is absent from work wholly or partly because of pregnancy or confinement on any day—

> (a) which falls on or after the beginning of the 4th week before the expected week of confinement; but
>
> (b) not later than the day immediately following the day on which she is confined,
>
> the first day of the maternity pay period shall be the day following the day on which she is so absent.
>
> (5) In a case where a woman leaves her employment—
>
> (a) at any time falling after the beginning of the 11th week before the expected week of confinement and before the start of the maternity pay period, but
>
> (b) not later than the day on which she is confined,
>
> the first day of the maternity pay period shall be the day following the day on which she leaves her employment."

17. At the time of Mrs Wade's first pregnancy, regulation 2 varied slightly from its present form, but the differences are quite minor. We should perhaps set out the version of regulation 2(1) which was in force:

> "Subject to paragraphs (3) to (6), where a woman gives notice to her employer of the date from which she expects his liability to pay her statutory maternity pay to begin and in conformity with that notice ceases to work for him in a week which is later than the 12th week before the expected week of confinement, then the first week in the maternity pay period shall be the week following the week in which she ceased to work, or the week immediately following the week in which she is confined, whichever is the earlier."

18. It is also relevant to note regulation 23(4) of the 1986 Regulations, which states:

> "Subject to paragraph (5), section 164(4) of the Contributions and Benefits Act (statutory maternity pay-entitlement and liability to pay) shall not have effect in the case of a woman who leaves her employment with the person who will be liable to pay her statutory maternity pay after the beginning of the week immediately preceding the 14th week before the expected week of confinement."

The proceedings before the First-tier Tribunal

19. Where an employee disagrees with the approach her employer proposes to take to SMP, she can ask HMRC, the Government department responsible for

administering and in some cases paying statutory payments, to make a decision on the point. Employees and employers are both entitled to appeal such decisions to the First-tier Tribunal (or, formerly, the General Commissioners). In the present case, Mrs Wade asked HMRC to give decisions in relation to each of her pregnancies, and both she and the Authority then appealed to the First-tier Tribunal.

20. With Mrs Wade's first pregnancy, HMRC initially took the view that SMP began in the 11th week before the EWC. However, it later concluded that SMP was payable from the 4th week before the EWC. In the case of the second pregnancy, it again decided that SMP ran from the 4th week before the EWC.

21. Mrs Wade appealed HMRC's decisions on the basis that regulation 2(1) of the 1986 Regulations applied in both cases, but by the time of the hearing before the First-tier Tribunal she supported HMRC's position that regulation 2(4) was applicable in relation to each pregnancy, with the result that SMP commenced in the 4th week before each EWC. The Authority's primary case was at first that regulation 2(3) was in point, but it argued in the alternative that section 165(2) of the 1992 Act applied. At the hearing before the First-tier Tribunal, it pursued the argument that section 165(2) governed and, hence, that SMP began in the 11th week before the EWC.

22. The First-tier Tribunal (Judge David Williams) held that the maternity pay period for the first pregnancy began on 21 November 2005 (the 4th week before the EWC) and that for the second pregnancy began on 9 April 2007 (the 11th week before the EWC). With regard, therefore, to the first pregnancy, the Judge allowed Mrs Wade's appeal and dismissed that of the Authority. With the second pregnancy, the position was reversed: the Authority's appeal was allowed and Mrs Wade's dismissed.

23. In the course of his decision, the Judge rejected a submission made by the Authority to the effect that, for regulation 2(4) of the 1986 Regulations to apply, regulation 2(1) must also be satisfied, with the result (so the Authority said) that regulation 2(4) was "to be read as applying to a subset of the circumstances covered by paragraph (1)". The Judge concluded that regulation 2(4) was freestanding and "applies if the conditions in the paragraph, plus the more general conditions of entitlement to SMP that are not replaced by these conditions, are met". The upshot was that (as the Judge explained):

> "paragraph (4) applies in precedence to any other rule to start Mrs Wade's maternity pay period if her maternity pay period has not otherwise started and on any day at or after the beginning of the 4th week before her expected week of confinement she is absent from work wholly or partly by reason of her pregnancy."

24. The Judge went on to consider the interaction between regulation 2 and the default rule laid down by section 165(2) of the 1992 Act. He concluded that, if

an employee has by the 11th week before the EWC both notified her employer of her pregnancy and ceased work, it will be possible to see at that stage that regulation 2(1) cannot be complied with (because the regulation's requirements can be satisfied only if the employee "ceases to work for [the employer] in a week which is later than the 12th week before the [EWC]" – emphasis added), and the default rule will then apply. The maternity pay period will accordingly begin at the 11th week before the EWC.

25. The Judge's reasoning can be seen from the following passage from his decision:

> "53 What is the situation facing an employer at the beginning of that 11th week for one of its employees? It may not have been given any notice of her expected confinement. In that case, the employee has as yet no right to SMP. So the employer is not yet concerned with the point and has no decision to take. The question arises only when the notice is given.
>
> 54 If the employee has given notice, then the employer will have been informed by the employee of the date on which she wished her SMP to start. That could be the 11th week or it could be some later week. If it is the 11th week, then the employer can give effect to the notice and, at the same time, apply the default rule. If it is a later week, then in my view the employer must nonetheless at that time consider if regulation 2(1) may apply. Regulation 2(1) may apply to the employee's claim if she sets a date for the start of her SMP after the start of the 11th week and it appears at that time (that is, at the 11th week) that she intends to comply with it. If she continues to work after the 11th week, then the employer must wait to see whether regulation 2(1) applies or, if it comes first, whether regulation 2(4) applies.
>
> 55 There is another situation. This is where the employer, as at the 11th week before the employee's expected week of confinement, can already see that the employee will not be complying with the conditions in regulation 2(1) because she has already ceased work. In that case, the employer can decide at that time that regulation 2(1) is not going to apply.
>
> 56 In that case, the question facing the employer is whether there is any other rule to consider rather than applying the statutory default rule and starting the maternity pay period at the beginning of the 11th week. My interpretation of regulation 2(4) is that it provides a limit at the 4th week if there is any pregnancy-related absence after the 11th week. But that rule, as a free-standing rule, does not operate prospectively to stop the statutory default rule operating. It applies only if that time limit is reached with no other rule having applied.

> 57 My conclusion is that when an employer decides the matter at the 11th week, then as between regulation 2(4) and the statutory rule in section 165(2) it is the statutory rule that applies. This applies in any case if at that time an employer can establish that regulation 2(1) does not apply without having to wait and see if it does. And the same approach should be applied by HMRC."

26. Applying his conclusions to Mrs Wade's second pregnancy, the Judge said this:

> "65 As at the beginning of the 11th week before the expected week of Mrs Wade's confinement, I find that the employer already knew that she had stopped work. And she had given her employer notice saying when she expected her SMP to start. I find therefore that the employer knew as at the start of the 11th week before her expected week of confinement that she could not 'in conformity with that notice cease to work' for the employer. It follows that in respect of her second claim it is the statutory default rule that applied and her maternity pay period started on the 11th week before her expected week of confinement."

27. The Judge held that, with the first pregnancy, the maternity pay period did not begin until the 4th week before the EWC, but it is common ground between the parties that in this respect the Judge made a slip in applying his interpretation of the law to the facts. There is thus no dispute that, if we accept the Judge's conclusions on the law, SMP should be payable from the 11th week before the EWC in the case of each pregnancy.

The appeals

28. There is no challenge to the Judge's views on the relationship between regulations 2(1) and 2(4) of the 1986 Regulations. The Authority has not revived its contention that the former applies only where the latter also does so.

29. Each of the parties has nonetheless appealed. The Authority has challenged only the application of the Judge's reasoning to the first pregnancy, as to which, as already mentioned (paragraph 27 above), there is common ground between the parties. In contrast, Mrs Wade and HMRC both challenge the Judge's conclusions on the interaction between regulation 2 and section 165(2) of the 1992 Act.

The parties' cases in summary

30. The submissions of Miss Sally Robertson, who appears for Mrs Wade, and Mr James Maurici, who represents HMRC, were to similar effect.

31. Miss Robertson argued that the phrase "in conformity with that notice ceases to work for him" in regulation 2(1) of the 1986 Regulations has to be read as a composite. She said that a woman who has gone on leave before the date given in a notice might have ceased to work before the relevant date, but could nevertheless cease to work in conformity with the notice at that point; the woman could, said Miss Robertson, change the label at that stage. Mr Maurici agreed.

32. Miss Robertson pointed out that it is not uncommon for a woman to take annual leave or "time off in lieu" ("TOIL") immediately before starting statutory maternity leave. It would, she said, be undesirable if that meant that a notice seeking SMP from the start of the maternity leave could not be complied with – because the woman had ceased to work before then.

33. Miss Robertson also referred to provisions dealing with statutory maternity leave found in the Employment Rights Act 1996 and in the Maternity and Parental Leave Regulations 1999. These allow a woman to choose the date from which she would like her statutory maternity leave to begin, subject to the date being no earlier than the 11th week before the EWC. There is also provision in regulation 6(1) of the Maternity and Parental Leave Regulations 1999 to the effect that, if the woman is absent from work wholly or partly because of pregnancy on a day after the beginning of the 4th week before the EWC, the maternity leave period should begin the next day. There is thus considerable similarity between the regimes for statutory maternity leave and SMP. Miss Robertson contended that the provisions governing the two regimes could be expected to work harmoniously, or at least not to be inconsistent with each other. Mr Maurici likewise argued that the provisions relating to SMP and statutory maternity leave represented a package and should be construed together.

34. Miss Robertson said that, in the case of Mrs Wade's second pregnancy, where she had given notice that she was claiming SMP from the 4th week before the EWC, it was regulation 2(1) that applied. With the first pregnancy, she said that regulation 2(4) was applicable.

35. Mr Maurici stressed that the words "subject to" in section 165(2) of the 1992 Act showed that the 1986 Regulations took priority. He also argued that the Judge's decision served (a) to limit a woman's choice and (b) to undermine the notice requirements, neither of which, he said, was desirable or in keeping with the legislation. Mr Maurici expressed particular concern that the Judge's approach could encourage women to delay giving their employers notice of their intentions.

36. It was Mr Maurici's position that, with the second pregnancy, the first applicable case under regulation 2 was that in regulation 2(4). In the alternative, he supported Miss Robertson's submission that regulation 2(1) was applicable.

37. In contrast, Mr James Arnold, who appears for the Authority, contended that the Judge's interpretation of the law was correct. He argued that, in the present case, the Authority was in a position to know by the 11th week before the EWCs that Mrs Wade could not comply with the notices she had served on the Authority. That was because Mrs Wade had in each instance already ceased to work by the 11th week. There was therefore no question of Mrs Wade ceasing to work at a later stage, in conformity with her notices.

38. Mr Arnold drew a distinction between, on the one hand, annual leave and TOIL, and, on the other, maternity leave of whatever kind. The words "ceases to work" in regulation 2(1) referred, Mr Arnold said, to more than taking time off as annual leave or TOIL, and a woman away from work on such a basis was not to be regarded as having ceased to work for the purposes of regulation 2(1) even if she was planning to combine that leave/TOIL with maternity leave. On the other hand, a woman on maternity leave of any type was, Mr Arnold submitted, to be taken to have ceased work for regulation 2(1) purposes.

39. Mr Arnold took issue with the suggestion that his approach would discourage women from giving notice. He said that section 164 would mean that a woman who did not give notice was running a considerable risk. He also argued that his submissions would leave women with a large measure of choice. The question at issue was, Mr Arnold submitted, whether Mrs Wade could choose to claim SMP in such a way as to maximise the amounts she received in total from SMP and police maternity pay; that, said Mr Arnold, was not what the SMP regime was about.

40. Mr Arnold accepted that his submissions could mean that a woman who gave notice in advance of the 11th week before the EWC was worse off than a woman who gave a similar notice in the 10th week.

41. None of the parties attempted to suggest that the police maternity regime could have any bearing on the interpretation of the provisions relating to SMP.

Discussion

42. The appeals boil down, as it seems to us, to the meaning of the words "in conformity with that notice ceases to work for him" in regulation 2(1) of the 1986 Regulations. The Judge took the view that, Mrs Wade having already taken police maternity leave by the 11th week before each EWC, there was no possibility of her ceasing to work in conformity with the notices she had given. Implicit in that is the proposition that a woman cannot so cease to work if she is already on (non-statutory) maternity leave before the date given in her notice.

43. A literal reading of regulation 2(1) might suggest that a woman who had stopped work for any reason could not cease to work "in conformity with [a] notice" at a later date. However, none of the parties advanced a submission to that effect, and in our view they were right not to do so. The literal interpretation would mean that regulation 2(1) could not apply to (say) a woman who sought to take outstanding leave or TOIL immediately before statutory maternity leave or even, on the face of it, to a woman who had to take time off sick before her maternity leave began. That cannot have been Parliament's intention.

44. As already mentioned, Mr Arnold sought to distinguish annual leave and TOIL from maternity leave. However, we can find no support for this distinction in regulation 2(1). The regulation speaks of a woman who "ceases to work", not of a woman ceasing to work because she is taking maternity leave.

45. The preferable construction, as it seems to us, is that for which Miss Robertson and Mr Maurici contended. In other words, a woman may cease to work "in conformity with [a] notice" for the purposes of regulation 2(1) even if she has previously ceased to work on some other basis. In our judgment, that interpretation is consistent both with the terms of regulation 2(1) (which speaks simply of "in conformity with that notice ceases to work") and with the scheme of the legislation.

46. Under the rival interpretation espoused by Mr Arnold, a woman who took maternity leave of any kind before giving notice under section 164(4), or before the date specified in such a notice, would be unable to cease to work "in conformity with that notice", and regulation 2(1) could not apply. The beginning of the maternity pay period could then be only either (a) the day after the first day the woman was away sick for a pregnancy-related reason in the last four weeks before the EWC (regulation 2(4)) or (b) the 11th week before the EWC (section 165(2)). Both could be unsatisfactory. Neither need correspond with either the start of the woman's maternity leave or the date from which she wished to claim SMP.

47. We consider, moreover, that the analogy with the regime for statutory maternity leave lends support to Miss Robertson's and Mr Maurici's submissions. A woman eligible for statutory maternity leave can claim it from a date of her choosing, regardless of whether she has by then already been away for annual leave, TOIL or sick leave, or under a contractual scheme for maternity leave, provided only that (a) the date is no earlier than the 11th week before the EWC and (b) during the last four week before the EWC she is not absent from work because of pregnancy in advance of the specified date. It makes sense that she should be able to claim SMP from a similar date, especially given the symmetries between the regimes for SMP and statutory maternity leave.

48. A further pointer is perhaps to be found in section 164(4) of the 1992 Act. That requires a woman to give notice of the date from which she expects her employer's liability to pay SMP to begin. There is no requirement that the date should be that of the first day that she envisages being off work.

49. The Judge considered that he should look for an interpretation that could be operated by an employer when the employer has to make a decision. It appears to us that the interpretation advanced by Miss Robertson and Mr Maurici, under which a woman can nominate a date from which she wishes to claim SMP, produces clarity for both employer and employee.

50. It follows, in our view, that the Judge was mistaken in thinking that it was apparent by the 11th week before each EWC that Mrs Wade would not be complying with the conditions in regulation 2(1). There was, accordingly, no basis for applying section 165(2).

51. The result is that Mrs Wade was entitled to SMP from the 4th week before each EWC. We do not think it matters whether, so far as the second pregnancy is concerned, it is regulation 2(1) (as Miss Robertson suggested) or regulation 2(4) (as posited by Mr Maurici) that governs. The date is the same either way.

Conclusion

52. We shall allow the appeals of Mrs Wade and HMRC and dismiss that of the Authority.

Mr Justice Newey

Judge Malcolm Gammie QC

RELEASE DATE: 11 January 2011