



TC04043

Appeal number: MAN/2009/00042

PAYE – assessment - penalties – were certain persons employees? – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

S AHMED & J IQBAL t/a AL BADAR

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE RICHARD BARLOW
MRS SHAMEEM AKHTAR**

Sitting in public in London on 3 and 4 February 2014 (further submissions of the parties completed 14 May 2014).

Mr T Nawaz FCA for the Appellant

Mr W Kelly of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against decisions relating to income tax and national insurance
5 payments and penalties alleged to be due from the appellant partnership trading as an
Indian restaurant in Luton, Bedfordshire. The appeals relate to PAYE deductions and
national insurance payments which the respondents allege should have been
accounted for in respect of three workers employed by the appellant. The appellant
denies that those persons were employed by it and we will deal first with the evidence
10 about that issue and make our findings before considering the legal position.

2. The appellant was a partnership at the relevant time though by the time the
appeal was heard Mr Iqbal had died.

3. On 4 November 2010 a number of officers of the United Kingdom Border
Agency (UKBA) attended the appellant's business premises accompanied by two
15 police officers. Their purpose was to make enquiries about the immigration status and
right to work in the UK in respect of any staff employed by the appellant.

4. Three staff who were allegedly not entitled to work in the UK were identified
that are relevant to this appeal.

5. These were three men named Mehtab Hussain Shah (Mr Shah), Naseer Ahmed
20 (Mr N Ahmed) and Nasir Uddin Hamyun Butt (Mr Butt). The names were given in
slightly different forms in some of the evidence but we will refer to them as indicated.

6. The three men spoke inadequate English, if any, and the UKBA staff used
interpretation services available to them by telephone. The interviewing officer asked
25 questions or made statements in English in the hearing of both the person being
interviewed and the interpreter (the latter hearing it through the phone). The officer
then handed the phone to the interviewee and the interpreter interpreted the officer's
words into the appropriate language and the interviewee answered in his own
language and then handed the phone back to the officer who then received an
interpretation of the interviewee's answer; and so on. No doubt this is not an ideal
30 form of interpretation but it is a tried and tested method used by the UKBA.

7. UKBA officer Alexander Swain interviewed Mr Shah but was unable to attend
the hearing as he was then working overseas. The tribunal is entitled to have regard
to evidence produced in the form of a witness statement even when the witness is not
called and indeed the appellant relied on a number of such statements. We have to
35 bear in mind, when assessing the evidence, that the appellant was unable to cross
examine Mr Swain.

8. Mr Swain says in his statement that Mr Shah was interviewed using the Urdu
language. Mr Nawaz pointed out, in respect of Mr Butt, that someone from Kotli,
Pakistan, would have spoken Punjabi and we take it the same point applies to Mr
40 Shah. However, Mr Swain's statement records in English and in detail a sequence of
questions and answers and we can only conclude that interpretation was possible

either because Mr Swain was wrong when he said in his statement that Urdu was used or because Mr Shah could speak enough Urdu to understand or for that matter because the interpreter could speak Punjabi as well as Urdu and realised that was Mr Shah's language when he came on the line.

5 9. Mr Shah told Mr Swain that he was a chef at Al Badar and that he had worked there for three and a half years working 48 hours a week spread over six days and that Tuesday was his day off. He said he was paid £160-170 a week. According to Mr Swain's statement Mr Shah said he had been given the job by Kaqub. He said Shabir was the manager. He signed Mr Swain's notebook though we assume he did not have
10 the means to know if it was accurate.

10. On 13 January 2011 Mr Nigel Reed an officer of HMRC visited the appellant and saw Mr Shabir Ahmed (Mr S Ahmed). We will return to his evidence later, but Mr Reed alleges Mr S Ahmed said in respect of Mr Shah, Mr N Ahmed and Mr Butt that they worked part time for the business but that he did not agree with the hours
15 they worked as alleged by HMRC (based on the UKBA evidence), the time they had worked in the business and the amount they had been paid.

11. The UKBA and HMRC also spoke to a man named Waqar Shah and subsequently HMRC included amounts relating to him in the assessments before realising PAYE and NI had in fact been accounted for in respect of him and amended
20 the assessments.

12. Mr Waqar Shah's involvement, as far as the evidence relating to Mr Mehtab Shah is concerned, is that a letter was produced dated 8 March 2011 in which Waqar Shah said:

25 "I Mr Shah can confirm that I am working Al-Badar from long time approx 2002/2003.

I would further confirm that concerning this continue employment at Al Badar I have never seen the following.

- 1) Naseer Ahmed.
- 2) Naseer Uddin Hamyun.
- 30 3) Mehtab Shah to working as a employee here that people were come to the premises and start volunteerly cleaning few time of my and other colleague enquiry they say we only food for this volunteer works further these people start come quite recently and have not known me before.

35 Any further query please contact me and can be confirmed from othe staff member.

Yours faithfully

WAQAR H SHAH”.

13. We have reproduced the wording of that document and how it is set in the form we have received it because HMRC claimed it only says that Mehtab Shah was never seen to be working as an employee and that in respect of Naseer Ahmed and Naseer Uddin Hamyon it is claiming never to have seen them at all. In other words they say that the words after the reference to Mehtab Shah refer only to him. (The reference to Naseer Uddin Hamyon is a reference to the person we have referred to as Mr Butt). We hold that the whole letter refers to all three. That is because the natural meaning of the words “the following” is that the letter refers to all three and the reference later in it to “that [we substitute “those”] people” is clearly a reference to all three.

14. We note that the signature is written in capital letters and is in a far less educated hand than the rest of the letter and that the date and the word “come” in both places is apparently written with a different instrument than the rest of the letter. We find that Mr Waqar Shah did not write it himself.

15. Mr William Livingstone of the UKBA gave evidence that he had dealt with Mr Butt (under the name Hamyun) through an interpreter in the same way as already described. Mr Butt had told Mr Livingstone that his job was kitchen assistant and dish washer. He said he had been working at Al Badar for two years and Shabir Ahmed was the boss and paid the wages. He said he worked 48 hours a week for £180.00.

16. The evidence about what Mr S Ahmed is alleged to have said to Mr Reed about the three men being part time workers and the letter from Mr Waqar Shah apply in respect of Mr Butt as applied to Mr Shah.

17. A document dated and signed on 22 February 2011 calling itself a statement from Mr Butt was produced to the Tribunal at the hearing. The statement gives an address in Kotli as Mr Butt’s address.

18. In that statement Mr Butt admits telling Mr Livingstone that he had been working at the restaurant for two years and that he had been paid £180.00 per week. He added that he had said he worked there with the owner’s knowledge. However he then went on to say he retracted those statements and that at no time had he been a paid employee of the business though he frequently visited and spent most of his day there. He said that at times he would help out by cleaning the tables and helping customers “of my own accord even though the owner advised me not to”. He claimed the statement to the UKBA officers, in which he described himself as an employee, had been made because he thought that if he was thought to be in employment that would assist his desire to achieve residency status. He said he was retracting his statement because he was leaving the country.

19. A letter was produced also dated 22 February 2011 in which Mr Butt apologised to Mr S Ahmed for the statement he had made to the UKBA which he described as “false as I was never a paid employee”. He also said that he was “on the premises frequently and against your wishes I did at times clean tables or help customers but I

admit that at no time did you ask me to carry out any task which I may have construed as being employed”.

20. It is noticeable that both Mr Butt’s statement and the letter are typed and written in perfect English.

5 21. When Mr S Ahmed gave evidence he was asked how this statement and the letter came into existence. He was unable to give a convincing explanation of that simply saying that he had got in touch with relatives of Mr Butt who lived in Luton and they said they had then got in touch with Mr Butt and they got the statement and letter.

10 22. Mr S Ahmed said when he was cross examined that he never asked Mr Butt to clean tables and in fact he added he had “never seen him doing it so I did not object”. He therefore contradicted Mr Butt’s statement and letter in both of which Mr Butt said that Mr S Ahmed had objected to what he was doing. Later in his evidence, Mr Ahmed said his staff may have asked Mr Butt to do tasks. When he was re-examined
15 he said he “may have asked him not to do it” referring to clearing up which contradicts his earlier statement that he had never seen him doing it.

23. In a witness statement Mr S Ahmed gave before the tribunal hearing he had said he had not paid wages to the three alleged employees and “if they were there they were perhaps visiting others, or on trial, taken on as such by my staff”.

20 24. Mr S Ahmed denied in his statement and his oral evidence that he had admitted to Mr Reed that the three were part time staff.

25. Turning to the evidence about Mr N Ahmed, we heard evidence from Mr David Thomson of the UKBA. He interviewed Mr N Ahmed through a telephone interpretation service as described. He said that the language spoken by N Ahmed
25 was “Pashtu” (sic). The same point was made about that as with the interview of Mr Shah and we make the same points about it. Whatever language was used, Mr N Ahmed was in fact interviewed and he has now made admissions in a letter that he had told the UKBA he was a paid employee though he now denies the truth of what he told them.

30 26. Mr Thomson recorded that Mr N Ahmed said he worked as a dishwasher from 10.00 to 18.00 for £150.00 for one year and was paid in cash by Mr S Ahmed.

27. The letter from Mr N Ahmed produced at the hearing is dated 19 September 2011 and is typed and expressed in near perfect English. It is noticeable that Mr N Ahmed admits in that letter that he made a statement to the UKBA officers that he had
35 been a paid employee for two years and that his salary had been £180.00 per week. Those admissions about what he said to the UKBA are identical to the admissions made by Mr Butt in his letter though Mr N Ahmed thereby contradicts the details of what he actually said to the UKBA as recorded by Mr Thomson.

40 28. Mr N Ahmed states in his letter that he did sometimes clean tables and help customers but that Mr S Ahmed did not ask him to do that and that it was “against

your wish”. That contradicts Mr S Ahmed’s evidence in his witness statement in which he says Mr N Ahmed may have been taken-on on trial by a member of staff.

29. Mr S Ahmed’s evidence about how the letter came to be written is the same as his explanation for Mr Butt’s statement and letter namely that by contacting relatives these letters and that statement arrived without further explanation.

30. The letter from Mr Waqar Shah relates to Mr N Ahmed in the same way as to the other two alleged employees.

31. Mr S Ahmed, or the partnership, paid a penalty to the UKBA for employing persons not legally entitled to work in the UK in respect of two of the three alleged employees and, although Mr Nawaz said there may be some kind of appeal still under consideration but not yet commenced, we regard the fact that he paid the penalty as evidence that he accepted they were employed. As we pointed out during the hearing and as Mr Nawaz reminded us in his closing submissions, we ruled that that was not conclusive evidence that Mr S Ahmed had accepted he employed those persons. HMRC were submitting it was conclusive which we say is wrong but we do regard it as relevant non-conclusive evidence in support of the contention that he did employ those persons.

32. We find that the three alleged employees did all tell the UKBA investigators that they were employees. The questions about the interpretation of their statements to the UKBA staff suggest that the method of interpretation may not have been completely satisfactory but we have no reason to doubt that the gist of the statements made by the appellants were as recorded even though the recording is not verbatim. That conclusion is of course re-enforced by the fact that the statement and two letters referred to above and relied upon by the appellant are entirely predicated upon the acceptance by the appellant that two of the three persons concerned did indeed make admissions to the UKBA staff.

33. We have the gravest doubts about the reliability of that statement and the two letters but the appellant has produced them and cannot say they should be disregarded. There is no satisfactory explanation of how they came into existence and how illiterate non-English speakers were able to make them. We reject as untruthful the assertion by Mr S Ahmed that the statement and two letters came about simply because some unspecified relatives of the two men who made them contacted them in Pakistan. That would not explain the content of the statement and the letters. The relatives would necessarily have had to be told what the issues were in order to arrange for the documents to be provided. Equally, before we could place any credence on them, it would be necessary for us to understand how the illiterate men making the statement and signing the letters were made aware of what they were signing. We have not been told the whole story about them and we find that Mr S Ahmed has deliberately attempted to mislead us by giving the inadequate explanation he has.

34. We also find Mr S Ahmed’s evidence to be untruthful in a number of other respects in particular what he has said about whether he knew the men were on the

premises and whether he tried to stop them volunteering to work and whether they did so despite his opposition. Those statements are both farfetched and contradictory and we have pointed out the contradictions above.

5 35. We find accordingly that he gave his evidence in a dishonest way and that he lied in material respects.

36. We also find that Mr S Ahmed did tell Mr Reed that the three men were part time workers though that itself was also a lie as we have found they were full time workers as they told the UKBA that was the case.

10 37. In a letter dated 17 January 2011 Mr S Ahmed was sent a note of the meeting with Mr Reed in which Mr Reed recorded that Mr S Ahmed had admitted the three men were part time workers and in that letter he asked Mr S Ahmed to either sign those notes to indicate he agreed with them or to make amendments if he did not agree. Mr S Ahmed did neither of those things and he said in evidence that he had not received the notes though he also said he had received some documents with that letter which he passed to his accountant. As the notes are the only document referred to in that letter we find that they were sent. Mr S Ahmed may not have understood the need to question the statements attributed to him in the notes but we find his
15 assertion that he never received it to be untruthful.

20 38. We find Mr Waqar Shah's letter gives no support to the appellant's case. No explanation was given about why he did not attend as a witness.

25 39. We also regard it as relevant that the appellant partnership had paid a penalty for employing illegal workers on another previous occasion. Again that is not conclusive at all, but it shows that Mr S Ahmed's assertions that he always checked the status of employees before taking them on are unlikely to have been true. In addition, a third penalty of that sort had been imposed after the events relevant to this appeal but before Mr S Ahmed gave evidence at the hearing. That is not logically probative of the issue whether the three persons concerned were employees but we do regard the fact that Mr S Ahmed has been penalised three times for employing illegal workers is relevant to the issue whether his actions on the occasion we are considering
30 were deliberate which is an issue under consideration in respect of the penalties imposed by HMRC. He clearly had no regard for the proper enquiries he should have made before employing staff (and which he asserted he did make though obviously he did not) and so his failure to deal correctly with their tax affairs can be judged in light of that.

35 40. He must have known the staff were not legally entitled to work for the business and indeed that is probably why he did not declare them to the authorities. His actions were therefore deliberate.

41. We turn now to the legal issues and the specific issues about the assessments and penalties.

40 42. The basis for the assessments is the statements made to the UKBA by the three men we have found to be employees based on their admissions to the UKBA and the

5 other evidence we have already dealt with. The amounts earned and the length of time they worked were taken as stated to the UKBA. The calculations themselves were not challenged. However, Mr Nawaz submitted that in the case of each of the three men a personal allowance at the relevant rate for the tax years in question should have been taken into account.

43. The National Insurance contributions were calculated on the same basis and were also not challenged so far as the calculation was concerned.

10 44. The question about the personal allowances gave rise to a good deal of correspondence and became complicated by reference to special rules relating to Commonwealth Citizens and whether persons working in the UK illegally could claim personal allowances. However, belatedly the respondents clarified the basis on which they said there was no requirement to take account of personal allowances. They argued that regulation 49 of the Income Tax (Pay As You Earn) regulations 2003 apply to this case. That provision provides that where an employee is taken on
15 under a Form P46 procedure that is to say because he does not have a P45 then tax is payable at the basic rate until the employer and/or the employee comply with certain requirements about providing information.

20 45. Those requirements were never met in this case and we hold that the tax was properly due as calculated because the personal allowances were never proved to have been allowable in respect of this employment and the basic rate tax remained payable throughout.

46. It is certainly a point of criticism that HMRC did not clarify this sooner than they did but we have to decide the appeal on the basis of the statutory rules rather than the efficiency, or otherwise, of the parties.

25 47. Mr Nawaz put forward a number of complaints about withholding evidence on the part of HMRC but at the beginning of the proceedings we asked him if he had any application to make for an adjournment or an order about further evidence and he said he was prepared to continue without pressing for any such adjournment or order.

30 48. He also criticised the respondents for an alleged failure to comply with requirements of the Human Rights Act in that they had not made full and early disclosure of their case against the appellant particularly in respect of the penalty. We hold that there had been no breach of the appellant's human rights in the relevant sense.

35 49. The penalties under section 98A(4) of the Taxes Management Act 1970 for the year 2007/08 and under Schedule 24 of the Finance Act 2007 for the years 2008/09 and 2010/11 were assessed at 35% of the Tax and National Insurance due. We regard the reduction to 35% as being generous to the appellant in the circumstances and we do not hold that it should be reduced further.

50. Accordingly, in light of the above holdings and findings we dismiss the appeal.

51. 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.

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**RICHARD BARLOW
TRIBUNAL JUDGE**

RELEASE DATE: 29 September 2014

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