



TC05355

Appeal number: TC/2015/04632

***NATIONAL INSURANCE CONTRIBUTIONS – strike out application–
understatement of employer’s liabilities – statutory maternity pay where
employee had no entitlement – no offset of national insurance contributions
due to employer – Tribunal’s lack of jurisdiction for judicial review – no
reasonable prospect of the appeal succeeding – Rule 8 of Tribunal Rules
2009 applies – application granted***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JON STEWART & COMPANY LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE HEIDI POON

**Sitting in public at the Darlington Magistrates’ Court, Parkgate, Co. Durham on
6 April 2016**

Mr John C Stewart, Director, and Mr Ian Stewart for the Appellant

**Mrs Christine Cowan, Presenting Officer of HM Revenue and Customs, for the
Respondents**

DECISION

Introduction

1. The hearing was to consider HMRC's application dated 27 October 2015 to
5 strike out the proceedings in relation to the appeal by the appellant company, Jon
Stewart and Company Ltd ('JSC') against an assessment for an underpayment of
National Insurance Contributions ('NIC') in the two tax years ended 5 April 2012.

Factual background

2. The appellant company is the owner of a restaurant in Carlisle. HMRC
10 conducted a check of JSC's company tax return for the accounting period ended 31
October 2012 under the terms of para 24(1) Sch 18 of FA 1998. A Closure Notice was
issued on 8 May 2015 under para 32 Sch 18 FA 1998, which confirmed that no
amendments were required to the company accounts.

3. From the payroll records, which formed part of the company records for the
15 check, it was noted that SMP of £3,344.66 was paid to an employee Miss L Dougall
during the tax years ended 5 April 2011 and 5 April 2012, and the company had offset
the SMP paid against its Class 1 NIC liabilities payable to HMRC.

4. Miss Dougall's earnings, however, did not meet the qualifying threshold set by
Lower Earnings Limit ('LEL') for SMP to be paid in the periods. She was eligible to
20 apply for Maternity Allowance ('MA') in her own capacity from the state benefits
system at JobCentre Plus, but did not qualify for SMP as an employee from JSC. The
Maternity Allowance, if it had been claimed, is calculated to total £2,974.14.

5. By letter dated 1 December 2014, HMRC informed JSC that since there was no
entitlement to SMP by the employee, there was no entitlement to an offset by JSC
25 against its NIC liabilities. An underpayment of NIC equal to the sum of SMP paid
arose in consequence in accordance with s 8 of the Social Security Contributions
(Transfer of Functions) Act 1999.

6. By letter dated 6 January 2015, the agent acting for JSC agreed that there had
30 been an error with the SMP payments, and the error was caused by the SAGE payroll
software calculating SMP as due; that it was not a deliberate error and the agent
applied for any penalty to be suspended.

7. By letter dated 11 February 2015, HMRC offered a settlement figure of £4,152,
comprising NIC underpayment of £3,344.66, interest of £305.65, and a penalty of
35 £501.69. HMRC considered that the error, while not deliberate was 'careless', and
was caused by a failure to take reasonable care. HMRC highlighted that records of
how the SMP was calculated was not available for check, nor was the form MAT B1;
that the SAGE software would have calculated SMP from the information input from
the employer. HMRC agreed to suspend the penalty as conditions can be imposed.

8. By letter dated 10 March 2015, JSC contended that the difference between SMP paid of £3,344.66 and Maternity Allowance claimable of £2,974.14 is only £370.52; that it is unjust to require the full repayment of the SMP deducted by offset.

5 9. The case was referred for an internal review and the review decision by letter dated 19 March 2015 stated that the error had resulted in an underpayment of NIC which the law requires to be made good. The employee could have made an application for MA within 3 months of the Maternity Allowance Period. Had the error been realised within that timescale, the SMP paid could have been recovered from the employee and an SMP1 issued to enable the employee to apply for MA.

10 10. A meeting between HMRC and Mr John Stewart, (Director), and Mr Ian Stewart (Father of John Stewart and Accounts Administrator of JSC) took place on 6 May 2015. Mr Ian Stewart had been dealing with HMRC directly on behalf of JSC, taking over from David Allen Accountants who were dealing with the payroll for a while. According to Mr Ian Stewart, as recorded in the meeting notes, [the
15 accountants] had even made a mistake calculating the SMP and they were professionals so how could a small employer get it right.'

11. No agreement was reached at the meeting in May 2015. A notice of decision which carries the right of appeal was issued on 30 June 2015.

Appellant's case

20 12. In response to HMRC's decision, the appellant stated its intention to appeal to the Tribunal in the following terms in its reply to HMRC on 6 July 2015:

25 'We wish to submit an appeal to the Tribunal on the grounds that, although the decision is technically correct and we are not disputing the facts, we consider that the requirement for this small company to find this amount of money is unjust and heavy handed as there has been no loss to public funds ...

We believe that a public body has a duty to apply common sense and fairness in reaching decisions and these principles seem to be lacking in this case.'

30 13. By Notice of Appeal dated 31 July 2015, Mr Ian Stewart appealed on behalf of JSC against HMRC's decision, stating as its main grounds the following:

35 'We are aware that government departments have to administer the law consistently and fairly but contend that there are circumstances when common sense also needs to be applied. HMRC have accepted that the error was not deliberate, all of the company's tax affairs are dealt with honestly and, with a couple of very minor exceptions, the company records are in good order ... There has been no loss to the Exchequer, in fact there had been a saving.

40 The company provides employment for 20 people but is struggling to survive in very competitive trading conditions.

...

In all the circumstances we consider the HMRC decision to be oppressive, unfair and lacking in plain common sense.’

14. The reference to there being ‘no loss to the Exchequer’ pertains to the fact that Mr Stewart calculated that Miss Dougall would have received £4,733.29 of Maternity Allowance, and that the Treasury had an overall saving over £1,000 through the SMP payments. (The Maternity Allowance figure calculated by the appellant’s accountants and endorsed by HMRC is £2,974.14.)

15. Per the Notice of Appeal, under section 8 for ‘Result’, the appellant states:

‘Taxpayers, particularly small businesses such as this which are already struggling to survive, are entitled to feel that they have been treated fairly by the tax authorities. We know that all public bodies have some discretion to apply statutes with common sense and fairness. HMRC have failed to do this and have instead taken a blinkered view of the situation. As there has been no loss to the Exchequer, and no gain to this business which has a record of paying all taxes honestly and on time, we would contend that HMRC decision is clearly unfair and unreasonable and we would ask that the decision to repay be reversed.’

16. At the hearing, Mr Ian Stewart spoke eloquently along the same vein; of the duty by a public body to apply common sense where no public funds were lost; of the unjust pressures on a small business that had a near impeccable compliance record, that had kept 20 people in employment, and had contributed to the Exchequer through various forms of tax; of the unjustified expectation that an average business person can be familiar with the intricacies of the benefits system; and of the financial plight faced by the company after being submerged in six feet of water in the December 2015 floods that beset Carlisle and Cumbria regions. A letter from John Stevenson, Member of Parliament for Carlisle, was produced in support of the appeal.

HMRC’s case

17. There is no dispute about the facts; the appellant has accepted that no SMP payments were due to Miss Dougall, and that the adjustments to JSC’s employer liabilities are correctly calculated in accordance with the relevant legislation.

18. The legislation as currently in force does not permit HMRC to offset Class 1 NIC due from an employer against a potential benefit or allowance that may be due from another Government Department. HMRC have no discretion to set aside the NIC on the basis that the employee *could* have made a claim to another allowance from another Government Department. What the appellant is asking HMRC to do is to apply a discretion for which there is no legal provision. Furthermore, the Tribunal has no jurisdiction to direct HMRC to apply such discretion.

19. Given that the appellant company has accepted HMRC’s Decision (of 30 June 2015) as technically correct, and that the facts are not in dispute, HMRC have applied for the proceedings to be struck out under Rule 8(3)(c) of the Tribunal Procedure

(First-tier Tribunal) (Tax Chamber) Rules 2009 ('Tribunal Rules') if the Tribunal considers there is no reasonable prospect of the appellant's case succeeding.

Discussion

Tribunal's lack of jurisdiction for judicial review

5 20. From the grounds of appeal as stated in the Notice of Appeal, and from Mr Ian Stewart's representations at the hearing, it would seem that the chief tenet of the appellant's case against HMRC's decision is on grounds for judicial review.

21. Judicial review is a special area of public law, and the jurisdiction for judicial review is reserved to the High Court and its appellate courts. The function of the
10 court in judicial review proceedings is to review decisions of statutory and public authorities to see if they are lawful, rational and reached by a fair process. The normal grounds of challenge in a judicial review action include: (a) illegality (where a decision has involved an error/errors of law or fact), (b) irrationality (*Wednesbury* unreasonableness from the Court of Appeal precedent in *Associated Provincial*
15 *Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223), (c) procedural impropriety, (d) fettering of discretion, and (e) proportionality.

22. The appellant's case is advanced on the grounds that HMRC's decision to collect the underpayment of NIC is *unreasonable*; that as a public body, it has failed to exercise *discretion*; that the decision is unfair and unjust and infringes the principle
20 of *proportionality*. These are grounds for judicial review consideration.

23. This Tribunal, however, has no general powers to carry out judicial review function, and has only very limited powers prescribed by statute to review HMRC's decisions in a judicial review sense, such as in some instances where a penalty has been imposed. The Tribunal simply has no powers to consider the appellant's case as
25 put forward in the Notice of Appeal, which is principally on judicial review grounds.

24. Under Rule 8(2)(a) of the Tribunal Rules, it is stated that the Tribunal *must* strike out the whole or a part of the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings or that part of them. Insofar as the appellant has advanced a case on judicial review grounds, the Tribunal has no jurisdiction in
30 that respect, and *must* therefore strike out the proceedings.

No reasonable prospect of success

25. If I were to consider beyond the appellant's appeal as advanced on judicial review grounds, to the substantive matter of the dispute in front of me, I have come to the conclusion that the strike out application should also be granted under Rule
35 8(3)(a) of the Tribunal Rules – that '*there is no reasonable prospect of the appellant's case, or part of it, succeeding*'.

26. The prospect of an appeal succeeding is referential to the relevant law as applied to the facts of the case. There is no dispute as regards the facts – the appellant accepts

that it was an error to have paid SMP in the relevant years; the calculation of the total SMP erroneously paid is agreed. There is no error in HMRC's application of the relevant legislation – where there is no entitlement of SMP, there is no offset against the NIC liabilities by the employer; since there is no entitlement to an offset, the appellant has underpaid in national insurance contributions to HMRC.

27. HMRC have applied the law correctly in assessing the appellant company for the underpayment of NIC. It was an error on the appellant's part that had caused the underpayment, and HMRC as a public body has the statutory duty to pursue the underpayment that has been correctly assessed according to the current legislation.

28. Furthermore, there is no statutory provision for HMRC to exercise the kind of discretion as requested by the appellant. The law has not authorised HMRC to set aside an underpayment of NIC just because another Government Department did not have to meet a potential claim for Maternity Allowance. The regime governing Maternity Allowance is distinct from SMP, and it is not a foregone conclusion that Miss Dougall would have qualified for Maternity Allowance. Had HMRC agreed to such a 'cancellation', they would have been acting 'unlawfully', in the sense of going beyond the confines of their powers as provided by the statutes.

29. Where there is no reasonable prospect of an appeal succeeding, it serves no good purpose for the parties and the tribunals service to expend further time and resources by allowing the appeal to proceed to substantive hearing. The application to strike out the proceedings is therefore also granted on the basis that there is no reasonable prospect of the appellant's substantive appeal succeeding.

Other considerations

30. As expressed at the hearing, the Tribunal has great sympathy for the appellant's plight, of being caught out in the attempt of doing the right thing as an employer, and of having to meet the additional NIC liabilities and interest charge in a period of financial hardship caused by the enforced closure of the restaurant premises for months following the floods.

31. These are factors, however, that can have no bearing on determining the outcome of this application. The relevant factors for my consideration are set out above, and pertain principally to two aspects: first, whether the Tribunal has jurisdiction to adjudicate on the case as advanced; secondly, whether the appellant's case has any reasonable prospect of succeeding on the substantive issues.

32. However unjust it may seem to the appellant to have to make good the underpayment, the error that has caused the underpayment has originated with the appellant. The error is not deliberate, but its origin is a factor that sits firmly in the foreground of the case. The origin of the error also means, even if the appellant were to seek judicial review remedy at the relevant court, that action is unlikely to succeed.

33. From HMRC's meeting notes of May 2015, Mr Ian Stewart indicated that the payroll was dealt with by the accountants and questioned how a small employer could

get it right if even professionals like the accountants made a mistake calculating the SMP. If the accountants were dealing with the payroll and were responsible for the error, there may be a course of action for remedy in contract or tort, but that is not a matter for this Tribunal.

5 34. It was raised at the hearing that the SMP paid to Miss Dougall might be eligible
for deduction as part of staff costs, against the appellant's profits for relief to be
obtained at JSC's corporation tax rate. While the sum of NIC underpayment is
identical to the SMP paid in error, their respective tax treatments may not be identical.
10 There is no doubt that the NIC underpayment is eligible for deduction as staff costs,
as the sum represents Class I NICs that would have been paid to HMRC without the
offset. For SMP which is correctly paid, it forms part of the taxable income of the
employee and is subject to PAYE; there is tax symmetry in that the receipt is taxable
as income for the employee and hence deductible as an expense for the employer. As
15 regards the SMP paid to Miss Dougall for which she did not qualify, the employee has
received 'overpaid wages' and the employer has borne the costs of additional pay
which are not contractually due. Whether the additional costs incurred in this manner
by the employer are deductible as a trading expense against profits is a matter for
determination by HMRC, and is dependent to a large extent on tax symmetry.

20 35. The appellant indicated that there had been no profits for tax to be payable.
Nevertheless, such a deduction, if allowed, can create a loss, or augment an existing
loss, and the loss can be utilised by being carried back against profits from previous
years, or carried forward against future profits. The carry-back option is likely to
generate a corporation tax repayment and assist with the appellant's cash flow.
25 HMRC were unable to confirm whether the SMP erroneously paid is deductible as
staff costs during the hearing. In the absence of an agreement as regards the
deductibility of the SMP so paid, that matter can become a subject of appeal.

Decision

36. For reasons aforesaid, the application to strike out the proceedings is granted
under Rule 8 of the Tribunal Rules 2009.

30 37. 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
35 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)"
which accompanies and forms part of this decision notice.

**DR HEIDI POON
TRIBUNAL JUDGE**

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RELEASE DATE: 5 SEPTEMBER 2016