[2016] UKFTT 0656 (TC)

TC05399

Appeal number: TC/2013/00740

Unauthorised payment charge under pension scheme legislation – preliminary issue of Tribunal's jurisdiction in relation to HMRC conduct and fairness – ground of appeal struck out as not within Tribunal's jurisdiction

FIRST-TIER TRIBUNAL
TAX CHAMBER

EDEN CONSULTING SERVICES (RICHMOND) LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL: JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 16 September 2016

Ms Moira Browne, HMRC officer, for the Respondents

DECISION

Introduction

1. The Appellant appeals against the decision of HMRC to assess two unauthorised payments charges on the Appellant under the pension provisions of the Finance Act 2004. The charges arise from two loans made by an approved occupational pension scheme to the Appellant, a sponsoring employer of the scheme, in 2007 and 2009.

2. The Appellant argues that the charges do not arise under the legislation. It also makes several complaints regarding HMRC's abuse of powers, inappropriate behaviour, and unfair conduct.

3. The Tribunal considered as a preliminary issue whether it has jurisdiction to consider the issues regarding HMRC conduct, behaviour and abuse of power, in determining the appeal.

Evidence

4. The Appellant was not represented in person, but I was provided with sufficient documentation and information to consider fully the preliminary issue regarding jurisdiction.

The Appellant's Arguments

5. The hearing before me related solely to the preliminary issue of the Tribunal's jurisdiction in relation to the allegations concerning HMRC's conduct. On that preliminary issue, Mr Sanjeev Sharma, the Appellant's representative, set out the following points in his skeleton argument:

> "1. A meeting took place at HMRC (Nottingham) on 16 December 2010 that was attended by Mr Sharma and representing HMRC Ian Burns and Alan Bush. As a result of this meeting a serious allegation was made by Mr Sharma resulting in a formal complaint being made. Whilst the allegations were denied it is still the position of Mr Sharma they did happen. It is our position that as a result of this, HMRC chose to ignore Mr Sharma, acting as an agent for the appellant, and issued the penalties further ignoring Mr Sharma's request for a meeting with the appellant.
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> 2. Consequently Mr Sharma was unable to properly assist his client. Attached email from Ian Burns (HMRC) dated 3 August 2011, omitting Mr Sharma and offering a meeting after the penalties were missed. Instructions were given by Mr Goodall (appellant) to Mr Sharma to arrange another meeting. Mr Sharma did attempt to phone Mr Burns and no return call was received and no meeting arranged.
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> 3. A meeting took place 25 April 2014 attended by Mr Sharma, Mr Goodall and from HMRC Ms Dixon and Mr Harrison (Specialist PT Dispute Resolution) where Mr Goodall raised the issue of HMRC not arranging a meeting pre determination of the penalty. During the meeting this was 'brushed over'. Attached email dated 5 June 2014.
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> 4. After the Case Management Hearing [before the Tribunal] of 12 June 2015 it was subsequently agreed that HMRC would provide copies of all documents in relation to

> Eden Executive Pension Scheme by 17 July 2015. Documents were received by email at 11:02pm but did not include all documents and no emails were attached. Attached is a letter dated 5 August 2010 received from HMRC that was not included.
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> 5. In *Hok v HMRC* [2011] TC 01286 HMRC's policy resulting in [unfairness], delay or inaction. It is submitted that the appellant (and his agent) had requested on more than one occasion a meeting with HMRC that was ignored and offered (although not arranged) after the penalty determination was issued.
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> 6. In *Rowland v HMRC* [2006] STC (SCD) 536 it is submitted that the appellant had a reasonable excuse as the agent was ignored and not represented, contrary to his right.
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> 7. In *Pacific Computers Ltd v HMRC* both sides have to abide by the tribunal process and it is submitted HMRC have not, as all the documents, including emails, have not been delivered as advised for the 17 July 2015. HMRC are withholding documents that may undermine their case or advance the case for the appellant.
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> 8. As the above cases were determined in the First Tier Tribunal, it is submitted that the jurisdiction should remain in the First Tier. Further the Appellant is unable to seek Judicial Review as the matter is out of time."

6. Although not referred to in his skeleton argument, Ms Sharma has also complained that HMRC failed to provide him or the appellant with notes of the meeting of 16 December 2010.

7. The Appellant does not argue in this case that HMRC conduct created a "legitimate expectation" regarding the charges which are the subject of the appeal.

Discussion

8. I have no general "supervisory" jurisdiction in this tribunal to consider a taxpayer's claims based on public law concepts such as fairness or inappropriate conduct by HMRC. The decision of the Upper Tribunal in *HMRC v Hok Limited* [2012] UKUT 363 (TCC), which is binding on me, sets out the position as follows, at [56]:

> "Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither source is within its jurisdiction. As we explain at paragraphs 36 and 43 above the [Tribunals, Courts and Enforcement Act 2007] gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include – whatever one chooses to call it – a power to override a statute or supervise HMRC's conduct".

9. Neither *Hok* nor the Upper Tribunal decision in *HMRC v Abdul Noor* [2013] UKUT 071 (TCC) has the effect that public law rights can never be within the jurisdiction of the First-tier Tribunal. As stated in *Simon Newell v HMRC* [2015] UKFTT 0535, at [97]:

> "While… the absence of a supervisory jurisdiction does not preclude public law rights being considered or given effect to [the passage at [31] of *Abdul-Noor*] makes it clear that whether that can happen or not depends on the statutory construction of the provision conferring jurisdiction."

10. I have therefore given careful consideration to the relevant statutory provisions conferring jurisdiction on this tribunal in this appeal in order to determine whether, as a matter of construction, they permit of any such public law jurisdiction.

11. In this case the appeal was made under section 49G of the Taxes Management Act 1970 (the "TMA"), against an HMRC review notice of 12 April 2012 which upheld the decision by HMRC to assess the relevant unauthorised payment charges. Under section 49G(4), the tribunal determines the matter in question.

12. The statutory framework under which the assessments were made is somewhat convoluted. Unauthorised payments are charged under sections 208 and 209 of the Finance Act 2004 ("FA 2004"). Section 255 FA 2004 empowers HMRC to make regulations for the making of assessments under those sections. The relevant regulations are the Registered Pensions Schemes (Accounting and Assessment) Regulations 2005 (SI 2005/3454). Regulation 9 effectively ties the provisions to the TMA by providing that section 29(1)(a) TMA (assessment where loss of tax discovered) applies, with modifications, to a tax assessment issued under the Regulations in respect of a charge under sections 208 or 209.

13. The assessments were therefore issued under section 29(1) TMA. This provides that where an officer of the Board (broadly) discovers that the relevant tax has been under-assessed, then:

> "… the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."

14. The jurisdiction of the tribunal is set out in section 50(6) TMA as follows:

> "If, on an appeal notified to the tribunal, the tribunal decides –
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> … (c) that the appellant is overcharged by an assessment other than a self-assessment,
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> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

15. As a matter of statutory construction, the relevant provisions do not confer on me any public law rights of the type sought by the Appellant. Section 29(1) does say that HMRC "may" make an assessment, and in determining the amount so assessed it refers to their opinion. However, as *Hok* makes clear (in particular at [38] to [57]) I do not have jurisdiction over the duty of a public body such as HMRC to act fairly in administering its statutory powers. Matters relating to the conduct of HMRC fall outside the jurisdiction of this tribunal.

16. I respectfully agree with the analysis of Judge Popplewell in this tribunal in the recent decision in *Stephen Michael McGrevey v HMRC* [2016] UKFTT 600 (TC). In that case, the appellant argued – in circumstances very different to this appeal – that an unauthorised payment charge assessed by HMRC under section 208 was unfair, and that HMRC should have used their discretion to waive the liability. Judge Popplewell stated as follows, at [18]:

> "… I make [four] preliminary points:
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> (1) The appellant submitted that it is the role of Parliament to enact legislation, and for the Courts to interpret it. There is no role for the respondents [HMRC] in interpreting laws. I disagree. The respondents are charged with collecting tax in accordance with the law, and to do that they must interpret the law. Should a taxpayer disagree with that interpretation, he or she has the right to appeal to this Tribunal. That is what the appellant has done in this case. He disagrees with the respondent's interpretation of the law.
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> (2) I must apply the law as it has been enacted by Parliament, and interpret it in accordance with cases which are binding upon me. I have no discretion in this.
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> (3) The respondents, too, have no discretion under the Finance Act 2004 as to whether they should apply [the unauthorised payment legislation], and in particular whether they should visit an unauthorised payment charge on the appellant. However, they do have a broad general discretion under section 1 of the TMA. By virtue of section 51(3) of the Commissioners for Revenue and Customs Act 2005, the respondents' responsibility for the collection and management of income tax is defined as having the same meaning as their previous statutory responsibly for "care and management of revenue". As Lord Diplock said in *IRC v National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617 at 636, section 1 TMA gives HMRC "a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection." In my view it might be open to the respondents under these discretionary powers to relieve the appellant from the unauthorised payment charge on the grounds that given the circumstances of his retirement and subsequent payment… it would be unfair to visit the unauthorised payment charge on him.
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> (4) But it is clear that the exercise of this discretion is not a matter which falls within my jurisdiction. As was held by the Upper Tribunal in *HMRC v Hok*… the First-tier Tribunal is a creature of statute and can only exercise such jurisdiction as Parliament has chosen to confer on it. The jurisdiction imposed on me in respect of this appeal is to determine whether an unauthorised payment charge should be visited on the appellant. I have no jurisdiction to go any further, and, for example, to direct that the respondents exercise their care and management function to relieve the appellant of his liability. Such care and management function is a matter for HMRC. Whilst the exercise of any such discretion is subject to oversight by the courts, that must be by way of an application for judicial review, which should be brought either before the Upper Tribunal or the Administrative Court. But not before me. I have no supervisory jurisdiction to review whether it was appropriate for the respondents to consider or exercise any discretion in this case."

17. I have considered the preliminary jurisdictional issue by reference to the specific complaints against HMRC raised by Mr Sharma for the Appellant, and the authorities which he cites in his skeleton argument. I should make it clear

that I have not considered the merits or otherwise of those complaints, but only the issue of whether I have jurisdiction.

18. Although Mr Sharma refers throughout his skeleton argument to HMRC issuing "penalties", the only assessments which are the subject of appeal are the charges arising under the unauthorised payments legislation.

19. As regards the allegations made by Mr Sharma regarding HMRC conduct, none of these relate to the statutory requirements governing the raising of the relevant assessments or the HMRC review process.

20. Mr Sharma has suggested that HMRC have failed to disclose to the Appellant and the Tribunal documents relating to the appeal which might be unhelpful to HMRC. HMRC vigorously contested that that remained the case at the hearing. It is not clear whether Mr Sharma still makes that allegation. In any event, the provision of the documents relevant to an appeal is a matter properly dealt with by case management directions by the Tribunal, with the potential sanctions for failure to comply in a timely fashion set out in the Tribunal Rules.

21. The reference in Mr Sharma's skeleton argument to *Hok* is to the decision of the First-tier Tribunal, which was reversed by the Upper Tribunal.

22. The reference in Mr Sharma's skeleton argument to *Rowland v HMRC* [2006] STC (SLD) is not in point, since the case solely concerned whether or not a "reasonable excuse" existed in respect of a surcharge liability.

Decision

23. The arguments raised by the Appellant in these proceedings in relation to HMRC conduct and fairness are properly for judicial review proceedings and/or the HMRC Adjudicator. They are outside the jurisdiction of this tribunal. Under Rule 8(2)(a) of the Tribunal Rules, those arguments are accordingly struck out.

24. The remainder of the appeal proceedings, regarding whether or not the relevant charges properly arise under the legislation, is unaffected by this preliminary decision.

25. This document contains full findings of facts and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

THOMAS SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 4 October 2016