[2015] UKFTT 0533 (TC)

TC04687

Appeal number: TC/2014/4591

NATIONAL INSURANCE CONTRIBUTIONS – police officer seconded to Kosovo – contract with FCO - whether liable for employee Class 1 NIC – whether bilateral agreement between UK and former Yugoslavia binding – SI 1958/1263 - whether bilateral letters between UK and Kosovo binding – whether a government employee

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr PAUL MARTIN **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster
Mr Roger Freeston FRICS

Sitting in public at Centre City Tower, Birmingham on 13 October 2015

Mr Anthony Peacock (Affordable Tax Services LLP) for the Appellant

Mrs Linda Ramsay (HMRC Appeals Unit) for the Respondents

DECISION

1. By a notice of appeal dated 14 August 2014 the Appellant appealed against a decision by the Respondents ("HMRC") that he was liable to pay employee Class 1 National Insurance Contributions ("NIC") whilst he was working in Kosovo for the Foreign and Commonwealth Office ("FCO").

Facts

2. In 2011 the Appellant was a serving police officer with a police authority in England. From 24 February 2011 he was seconded to work in Kosovo as an adviser to the Chief of Investigations/Intelligence for the Integrated Rule of Law Mission in Kosovo ("EULEX Kosovo").

3. The Appellant retired as a police officer on 31 October 2011. In September 2011, in anticipation of that retirement, the Appellant signed a contract with the FCO which included the following:

> "CONTRACT FOR FCO SECONDMENT AS ADVISOR TO THE CHIEF OF INVESTIGATION/INTELLIGENCE FOR THE EUROPEAN UNION INTEGRATED RULE OF LAW MISSION IN KOSOVO
>
> 1. I am writing to offer you an appointment as a Advisor to the Chief of Investigations/Intelligence for the Integrated Rule of Law Mission in Kosovo (EULEX Kosovo), from 1 November 2011 to 24 February 2012. You will be an UK government funded secondee. For the duration of your appointment you will be employed by the Foreign and Commonwealth Office (FCO) and seconded to EULEX Kosovo. Either party (FCO or you) may terminate this contract on one calendar month's written notice and the FCO reserves the right to make a payment in lieu of notice. This contract is issued on the express understanding that this is a temporary appointment. There is absolutely no guarantee that it will be renewed or extended, and neither party should expect that it would be, regardless of any previous extensions or renewals, or of any subsequent extension, which you may be offered.
>
> 2. You will report to, and be obliged to, take lawful instructions from the manager appointed to you by EULEX Kosovo.
>
> …
>
> *Remuneration*
>
> 6. You will be paid [amount] monthly in arrears. This salary is deemed to accrue from day to day and is subject to UK income tax and National Insurance which will be deducted under PAYE. If you are not ordinarily resident in the UK for tax purposes you may apply to the Inland Revenue for tax exempt status. ..."

4. By a further contract between the Appellant and the FCO, his appointment was extended from 25 February 2012 to 24 August 2012. The relevant terms were the same as above.

5. Class 1 NIC were deducted from the Appellant's salary throughout the period of his secondment by the police authority and subsequently the period of his appointment with the FCO. It is common ground that those deductions were correct for the first 52 weeks of the Appellant's engagement in Kosovo (ie up to 24 February 2012). What is in dispute is the Appellant's claim for a repayment of such contributions (totalling £2,169.41) deducted in respect of the period 25 February 2012 to 24 August 2012.

Law

6. Liability for Class 1 NIC is stipulated by s 6 Social Security Contributions and Benefits Act 1992. This replaced earlier legislation including the National Insurance Act 1946.

7. The Family Allowances, National Insurance and Industrial Injuries (Yugoslavia) Order 1958 (SI 1958/1263) ("the 1958 Order") gave effect to the Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal People's Republic of Yugoslavia ("the Convention"), which is contained as the schedule to the Order. The schedule provides, so far as relevant:

> "ARTICLE 2
>
> (1) The provisions of the present Convention shall apply-
>
> (a) In relation to the United Kingdom, to-
>
> (i) the National Insurance Act, 1946, …
>
> (2) … the Convention shall apply also to any law or regulation which amends, supplements or consolidates the legislation specified in paragraph (1) of this Article.
>
> …
>
> ARTICLE 4
>
> (1) Subject to the provisions of paragraph (2) of this Article and Article 6, where a national of either Contracting Party is employed in the territory of one Party, the legislation of that Party shall, and the legislation of the other Party shall not, apply to his employment.
>
> (2) If a person, not ordinarily resident in the territory of one Party, is employed in that territory by an employer who is resident in the territory of the other Party or has his principal place of business there, then, during the first twelve months of his employment in the former territory-
>
> (a) the legislation of the latter Party shall apply to his employment, as if he were employed in the territory of that Party;
>
> (b) the legislation of the former Party shall not apply to his employment.
>
> (3) When the employment specified in paragraph (2) of this Article lasts longer than twelve months, the provisions of that paragraph shall

continue to apply to that employment, if the social security authority of the Party in whose territory he is employed agrees thereto before the end of the period of twelve months specified in that paragraph.

…

ARTICLE 6

(1) Subject to the provisions of paragraph (1) of Article 8, the present Convention shall not apply to established members of the foreign service of the United Kingdom or to diplomatic and consular officers of Yugoslavia.

(2) Subject to the provisions of paragraph (1) of this Article, where a national of one Contracting Party is employed in the territory of the other Party in the government service of the former Party and is not permanently settled in that territory, or any person is employed in the private service of such a national so employed and is not so settled, the legislation of the former Party shall apply to his employment as if he were employed in the territory of that Party, and the legislation of the latter Party shall not apply to his employment.

(3) Subject to the provisions of paragraph (1) and (2) of this Article, where a national of either Party is employed in the territory of one Party in a diplomatic or consular post of the other Party, or any person is in the private service of a national of either Party so employed, the legislation of the Party in whose territory he is employed shall apply to his employment."

8. On 17 February 2008 the Republic of Kosovo declared independence from the Republic of Serbia. On 19 September 2008 the FCO in Pristina wrote a "*note verbale*" stating:

"The British Embassy presents its compliments to the Ministry of Foreign Affairs of the Republic of Kosovo and has the honour to refer to the Parliamentary Assembly of Kosovo's Declaration of Independence of 17 February 2008.

The British Government has the honour to note the affirmation by the Kosovo Assembly in that Declaration, reaffirmed in a letter dated 17 February 2008 from the President and Prime Minister of the Republic of Kosovo to the Secretary of State for Foreign and Commonwealth Affairs, that Kosovo shall be legally bound to comply with the provisions contained in that Declaration, including, especially, the obligations for Kosovo contained in the Comprehensive Proposal of UN Special Envoy Ahtisaari, and that the Government is entitled to rely on that affirmation.

The British Government further has the honour to note that, in that Declaration, Kosovo expressly undertook its international obligations, including those concluded on its behalf by the United Nations Interim Administration Mission in Kosovo and those to which Kosovo was bound as a former constituent part of the Socialist Federal Republic of Yugoslavia, and the British Government hereby confirms that the British Government regards treaties and agreements in force to which the United Kingdom and UNMIK, and the UK and the SFRY, and as

> appropriate the UK and the Federal Republic of Yugoslavia, were parties as remaining in force between the United Kingdom and the Republic of Kosovo."

The *note verbale* scheduled "Bilateral treaties in force between the UK and Serbia which it is proposed should apply between the UK and Kosovo", and this included the Convention.

9. On 22 April 2010 the Republic of Kosovo wrote to the FCO stating:

> "The Ministry of Foreign Affairs of the Republic of Kosovo presents its compliments to the British Embassy in Prishtina, and acknowledging the latter's Note Verbale No. 02/2008 dated 19 September 2008, has the honour to inform the Embassy of the following:
>
> The Ministry of Foreign Affairs of the Republic of Kosovo confirms that the Note dated 19 September 2008 and this reply constitute joint confirmation that, the bilateral agreements and arrangements which are both listed below and listed in the Note dated 19 September 2008, remain in force between the Republic of Kosovo and the United Kingdom of Great Britain and Northern Ireland, without prejudice to the possibility that other bilateral agreements and arrangements may remain in force between the two countries in accordance with international law."

Item 6 in the said list was the Convention.

Appellant's case

10. Mr Peacock for the Appellant submitted as follows.

11. Mr Peacock's firm acted for more than two dozen individuals who had been seconded to EULUX Kosovo, including police officers, barristers and legal assistants, under broadly identical contracts. In all cases except the Appellant and one other individual, HMRC had accepted that NIC liability expired after the first 52 weeks of employment abroad; that was the position as stated in HMRC's own manuals. Only in the other two cases had HMRC claimed that NIC liability was due under art 6 of the Convention. The information available to the public, including on the Government's websites, was contradictory and confusing.

The 1958 Order

12. The 1958 Order did not apply to Kosovo. When the 1958 Order was enacted Kosovo was an autonomous region of Serbia. No new legislation had been enacted to cover the position post-2008, when Kosovo declared independence. The proper course would have been for the UK Government to legislate with a new statutory instrument to cover the position post-2008.

13. The 1958 Order could not be treated as reciprocal as Kosovo has no means to pay and carry out its obligations; that was why the secondment contracts provided for

private medical insurance; pensions and other social security provision in Kosovo were completely different from those matters in the UK. The 1958 Order was ambiguous, sexist (in that it treated women more favourably than men), and referred to out-of-date legislation; the 1958 Order was illegal under both UK and EU law. The 1958 Order had been translated into Serbo-Croat whereas Kosovo was almost entirely Albanian-speaking.

Article 6 of the Convention

14. Even if, which was disputed, the 1958 Order was good law, the government employee exception in art 6 was not applicable to the Appellant. From the outset in February 2011 the Appellant had been seconded to EULEX Kosovo; that had continued during the period when the Appellant was contracted to the FCO. The Appellant's employer during that period was not FCO but instead EULEX Kosovo, which Mr Peacock understood was a Kosovan company.

15. That arrangement was governed by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794) ("TUPE") and thus, although described as a secondment, took effect as an employment by EULEX Kosovo, not FCO. That was supported by the House of Lords decision in *Astley and others v North Wales Training and Enterprise Council Ltd (trading as Celtec Ltd)* [2006] 4 All ER 27.

16. As art 6 was not applicable to the Appellant, liability for Class 1 NIC ceased after the first 52 weeks of foreign service – ie after 23 February 2012.

Respondents' case

17. Mrs Ramsay for the Respondents submitted as follows.

18. The contracts were explicit that (a) the employer was the FCO; and (b) the salary was subject to UK income tax and NIC. There were different statutory liability tests for income tax and NIC; for NIC there was a continuing liability for NIC pursuant to art 6.

19. HMRC accepted that a number of other FCO secondees to EULEX Kosovo had been informed by HMRC that they were due refunds of NIC deducted after the first 52 weeks of overseas service, and a number of repayments had been made. That information was, unfortunately, incorrect; the general 52 week rule in art 4(2) was overridden by art 6(2) for government employees. As the mistake was due to HMRC error, the contributions records of those individuals who had been repaid would be protected as if full payments had been made.

Consideration and Conclusions

The 1958 Order

20. The Appellant's first argument is that the 1958 Order is not applicable to Kosovo.

21. The Convention which was enacted by the 1958 Order was between the UK and the Government of the Federal People's Republic of Yugoslavia, and art 1(a) states: "For the purpose of the present Convention, unless the context otherwise requires 'territory' means, … in relation to Yugoslavia, the territory of the Federal People's Republic". At that time, as we understand the position from the documents submitted by Mr Peacock, the territory of the Federal People's Republic comprised a number of Socialist Republics including the Socialist Republic of Serbia, which in turn contained two Socialist Autonomous Provinces: Vojvodina and Kosovo. With the break-up of Yugoslavia from 1991 onwards there is scope for uncertainty as to what international commitments of the former Yugoslavia would be accepted as available to and binding on the successor states – which from February 2008 included Kosovo. However, for the purposes of the matters before this Tribunal in this appeal we are confident that:

(1) The territory that became the independent Republic of Kosovo in February 2008 had been part of "the territory of the Federal People's Republic" for the purposes of the Convention and thus also for the purposes of the 1958 Order.

(2) Any doubt as to whether the Convention continued to apply to Kosovo after its declaration of independence was put beyond doubt by the bilateral exchange of notes between the respective governments, described at [8-9] above.

(3) For UK law purposes the 1958 Order has continued in force throughout and, at the very latest from April 2010 when the Republic of Kosovo confirmed its agreement to the earlier *note verbale*, clearly covers the territory of the Republic of Kosovo.

(4) Therefore the 1958 Order did apply to the territory of Kosovo during the period relevant for this appeal – ie when the Appellant was working in Kosovo between February 2011 and August 2012.

22. Further, we do not accept the argument that the Tribunal should disregard the 1958 Order because, in the opinion of the Appellant, Kosovo may not be in a position to provide social security benefits reciprocal to those provided by the UK. While co-operation and equal treatment are stated aims of the Convention (per preamble), strict reciprocity is not legislated anywhere and, in any event, cannot, in our view, be grounds for the Tribunal going behind the validity of a UK statutory instrument.

Article 6 of the Convention

23. The Appellant's second argument is that he is not within the scope of art 6. It is common ground that art 6(1) (established members of the UK foreign service) and art 6(3) (diplomatic and consular posts) are not applicable, leaving only art 6(2)

(government service employees). For the purposes of the current appeal art 6(2) can be particularised as:

> Where a national of the UK is employed in Kosovo in the government service of the UK and is not permanently settled in Kosovo, or any person is employed in the private service of such a national so employed and is not so settled, the legislation of the UK shall apply to his employment as if he were employed in the UK, and the legislation of Kosovo shall not apply to his employment.

24. The Appellant's work in Kosovo did not lead to him being permanently settled there. Accordingly, the question is whether he was "employed in Kosovo in the government service of the UK".

25. We are not required to consider whether the Appellant was within art 6 in the period 24 February 2011 to 31 October 2011, when he was a serving police officer. The Appellant accepts that a Class 1 NIC liability arises for that period, although he contends that is by virtue of art 4 rather than art 6.

26. From 1 November 2011 to 24 August 2012 the Appellant was under contract to the FCO. The relevant contracts are explicit that "For the duration of your appointment you will be employed by the Foreign and Commonwealth Office (FCO) …". Mr Peacock submits that because the Appellant was seconded by the FCO to EULEX Kosovo (which is also clear from the contracts) then he was not "employed in Kosovo in the government service of the UK", and he cites the *Astley* decision in support of that contention.

27. The situation in *Astley* was that a number of claimants were initially employed by the Department of Education (DoE). In the early 1990s the Government decided to transfer part of the DoE's vocational training responsibilities to privately managed Training and Enterprise Councils (TECs). The DoE issued invitations to its staff to volunteer for secondment to the TECs and a large number of civil servants, including the claimants, volunteered. A few years later the claimants were told that they could either take up direct employment with the TEC or return to the DoE. The claimants decided to resign from the DoE and accept the offer of direct employment with one of the TECs. An issue then arose as to when the claimants' continuous employment began - that is, whether their civil service employment was continuous with their employment by the TEC. This depended on whether their employment transferred to the TEC under TUPE. After some conflicting decisions in the lower courts, the matter was referred to the CJEU for a ruling on the question of whether a TUPE transfer could occur at a particular point in time or over a period of time. The transfer of vocational training responsibilities from the DoE to the TECs actually took place in September 1990 but the claimants took up direct employment with the TEC in 1993. The CJEU ruled that a TUPE transfer can only occur at a particular point in time, and this date could not be postponed to another date at the will of the transferor, the transferee or the employees. When the case reverted to the House of Lords, their lordships held that the claimants' employment had automatically transferred upon the transfer of vocational training responsibilities to the TEC, despite their agreement to be seconded and therefore their continuity of employment was preserved.

28. We do not consider that the *Astley* decision assists the Appellant's case. While *Astley* is authority that merely labelling transferred employees as "secondees" does not postpone the date of a TUPE transfer, it was clearly the case that there had been a TUPE transfer of vocational training responsibilities from the DoE to the TECs – the point at issue was *when* that transfer took place. In the case of the Appellant there was no *undertaking* of the FCO *transferred* to EULEX Kosovo; rather, the FCO provided "UK government funded secondee[s]" as international co-operation and support for law enforcement; there was no TUPE transfer and thus *Astley* is irrelevant.

29. For the above reasons we are confident that the Appellant was "employed in Kosovo in the government service of the UK" in the period from 1 November 2011 to 24 August 2012, and thus was within art 6 during that period. Accordingly, art 4 (which is expressly subject to art 6) was not applicable and instead the Appellant was liable for Class 1 NIC throughout.

Decision

30. The appeal is DISMISSED.

31. 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.

Peter Kempster
TRIBUNAL JUDGE
RELEASE DATE: 28 OCTOBER 2015