



TC07663

Appeal number: TC/2019/06798

INCOME TAX and NATIONAL INSURANCE CONTRIBUTIONS – notice of requirement to provide security – whether original decision was flawed – no – whether review decision was flawed – yes – power of the Tribunal – notice of requirement varied – appeal allowed to that extent only

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DARREN SWANN

Appellant

- and -

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

**TRIBUNAL: JUDGE JANE BAILEY
MR MOHAMMED FAROOQ**

Sitting in public at Centre City Tower, Birmingham on 16 March 2020

The Appellant did not appear and was not represented

Ms Savita Mistry, HMRC litigator, for the Respondents

DECISION

Introduction

1. The Appellant's appeal, received by the Tribunal on 28 October 2019, is made against the requirement, imposed upon it by a Notice to provide security to the Respondents in the total sum of £84,485.24. The Notice, served on 20 May 2019 and affirmed in a review decision dated 23 September 2019, was issued by the Respondents under Regulation 97N of the Income Tax (Pay As You Earn) Regulations 2003 (the "PAYE Regulations") and Regulation 29N of the Social Security (Contributions) Regulations 2001 (the SSC Regulations").

Our decision to proceed in the absence of the Appellant.

2. The first decision we were required to take was whether to proceed in the absence of one of the parties. Both parties had been instructed to attend the hearing venue half an hour before the hearing was due to commence. However, by 10:00 on 16 March 2020, when the hearing was due to begin, there was still no one who had appeared on behalf of the Appellant.

3. We asked the Tribunal clerk to telephone the Appellant (on the mobile telephone number provided on the Appellant's appeal form) to enquire if he would be attending, or if anyone else would be attending on his behalf. The clerk made three telephone calls to the Appellant's mobile number. There was no response to any of those three telephone calls. The clerk left a voicemail but there was no response.

4. We were satisfied from our inspection of the Tribunal file that the Appellant had been correctly notified of this hearing, and that the email address to which the hearing notification had been emailed on 29 January 2020 was the email address which appeared on the Appellant's appeal form. We noted that the Respondents had also emailed the Appellant on the same date to inform him about the hearing date.

5. On the basis of the hearing notification we were satisfied that the Appellant had chosen not to attend the hearing or to instruct an agent to attend on his behalf. The Respondents had attended the Tribunal and were ready to proceed with the hearing. In the circumstances we considered it was in the interests of justice that the hearing should proceed in the absence of the Appellant.

Our decision to admit this late appeal out of time

6. The second decision we were required to take was whether to admit this late appeal out of time. The review decision was dated 23 September 2019 and the deadline for an appeal to be received by the Tribunal was 23 October 2019. The Tribunal received the Appellant's appeal on 28 October 2019, and so it was five days late.

7. The Tribunal has the power (under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) to extend the time for a would-be appellant to make an appeal to the Tribunal but must decide, in each case, whether it would be appropriate to do so given the particular circumstances of that case. When a party is late in undertaking any action, the onus of proof is upon that party to explain the reasons for their delay and to make the case for being given relief from their failure to comply with the relevant time limit.

8. In considering whether to extend time in this case, we had regard to the guidance set out in *Martland v HMRC* [2018] UKUT 178 (TCC). We took into account that the delay was just five days and so neither serious nor significant, that the Appellant's explanation for his delay was that he had been on holiday in late September 2019 when the review decision was received and then ill, the possible prejudice to the Appellant if the appeal was not admitted, and that the Respondents did not object to an extension of time being granted, which indicated that they would suffer no prejudice if the appeal was admitted. Weighing all these circumstances, we decided to admit this appeal for consideration.

This Tribunal's jurisdiction on appeal

9. In an appeal against the imposition of a Notice of Requirement to provide security in respect of PAYE and NICS, the Tribunal has a supervisory jurisdiction in deciding whether HMRC acted reasonably in deciding that it was requisite to seek security. In this regard, an appeal against a Notice to provide security for PAYE and NICs is the same as if it was an appeal against a Notice to provide security for Value Added Tax – see *D-Media Communications Limited v Revenue and Customs Commissioners* [2016] UKFTT 430 (TC). However, in all other regards, the Tribunal's jurisdiction is an ordinary appellate jurisdiction. The Tribunal may confirm or vary the requirements in the notice – we are entitled to form our own view on matters such as the amount of security which may be required, or the length of time over which security is held.

10. The supervisory jurisdiction was explained in *John Dee Limited v Customs & Excise Commissioners* [1995] STC 941 where Neill LJ held (at page 952):

It seems to me that the statutory condition (as Mr Richards termed it) which the Tribunal has to examine in an appeal under s 40(1)(n) is whether it appeared to the commissioner's requisite to require security. In examining whether that statutory condition is satisfied the tribunal will, to adopt the language of Lord Lane, consider whether the commissioners had acted in a way in which no reasonable panel of commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The tribunal may also have to consider whether the commissioners have erred on a point of law. I am quite satisfied however, that the tribunal cannot exercise a fresh discretion on the lines indicated by Lord Diplock in *Hadmor*. The protection of the revenue is not a responsibility of the tribunal or of a court.

11. In considering whether it was reasonable for the decision-maker to have required security at the time that security was required, we do not take into subsequent events. As Dyson J set out in *Customs and Excise Commissioners v Peachtree Enterprises Limited* [1994] STC 747 (at page 751):

In my judgment, in exercising its supervisory jurisdiction the tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of the commissioners was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time it was effected.

12. The original decision to require security was taken on 20 May 2019. This decision was affirmed by a review decision, dated 23 September 2019. All events since then are irrelevant when considering whether it was reasonable for the decision-maker to have required security. There remains the issue of which decision is under review by the Tribunal: the original decision (of 20 May 2019) or the review decision (of 23 September 2019), or both.

13. In considering this we have regard to Section 49E Taxes Management Act 1970, which sets out the nature of a review conducted by HMRC. The relevant parts of Section 49E provide as follows:

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

...

(4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that HMRC's view of the matter in question is to be—

- (a) upheld,
- (b) varied, or
- (c) cancelled.

14. Those powers are similar to those granted to the Tribunal. We take the view that subsection (5) gives the reviewing officer a similar power as that given to the Tribunal. Therefore, the reviewing officer has the power to decide certain matters for himself, based on the information in front of him/her. In particular, it is possible for a reviewing officer to increase the amount of security sought (a point noted by the reviewing officer in this case). Given the extent of the power of the reviewing officer to uphold, vary or cancel the original decision, we have concluded that the review decision can be as relevant as the original decision and so we should subject it to the same scrutiny as the original decision. If a reviewing officer was to decide to double the security sought, without any justification for that increase, it would be of no consolation to the affected taxpayer if the Tribunal was to conclude that the original amount sought was not unreasonable.

15. Our conclusion fits with the comments of Dyson J in *Peachtree* about the remedy open to a taxpayer if further information came to light. Dyson J said at p 752:

If after a requirement has been made under para 5(2) fresh material comes to light or into existence which the taxpayer considers justifies a modification of the requirement, the taxpayer may ask the commissioners to reconsider the matter. The commissioners have a duty to reconsider in the light of the fresh material in those circumstances.

16. We consider that the Respondents' review is, in essence, the kind of "reconsideration" of the requirement which was contemplated by Dyson J. and, therefore elements of the review decision are as susceptible to review by the Tribunal as the original decision taken by the Respondents.

17. In this case, the original decision to require security was taken on 20 May 2019. This decision was affirmed by a review decision, taken on 23 September 2019. In limiting ourselves to the facts and matters which existed at the time, we focus upon the events at the time of the original decision (20 May 2019) when considering the original decision but, when considering the basis on which the review decision was reached, we update to the facts known at the time of review decision (23 September 2019).

The issues to be determined

18. Therefore, the issues for us to determine are whether, on 20 May 2019 and again on 23 September 2019, it was reasonable of the Respondents to consider it necessary for the protection of the Revenue to require the Appellant to provide £84,485.24 by way of security (£32,731.55 in respect of the tax and £51,753.69 in respect of National Insurance Contributions ("NICs")).

19. If we are satisfied that it was reasonable for the Respondents to require security, we will then consider whether, in the circumstances of this case, the security was sought from an appropriate person, whether the amount sought was appropriate, and the length of time over which the security should be held.

Facts found

20. We heard evidence from Mr Gary Butler, the original decision maker, for the Respondents. We consider Mr Butler to have been an honest witness with an excellent command of the detail. We are satisfied that he gave truthful answers to the best of his ability and that he made every effort to assist the Tribunal.

21. On the basis of the witness evidence and the documents in the bundle before us, we find the following facts:

- a. Auto Claims (UK) Limited was incorporated on 19 August 2002 and had traded successfully providing support services for a number of years. From 1 May 2003 the Appellant had been a director and majority shareholder of Auto Claims (UK) Limited, and he controlled the company.

- b. The Appellant was also director of a number of other companies, including one called Supreme Arc Limited. Supreme Arc Limited had been affected by the January 2018 collapse of Carillion and had applied to HMRC for assistance. On an unknown date but at some point after January 2018, HMRC had agreed a Time To Pay arrangement with Supreme Arc Limited to help it with the financial difficulties it was suffering as a result of the Carillion collapse.
- c. The Appellant was aware, from his involvement with Supreme Arc Limited, that it was possible to seek help from HMRC. However, HMRC had not, at any stage, received a request from Auto Claims (UK) Limited for assistance as a result of the collapse of Carillion.
- d. Auto Claims (UK) Limited was registered with HMRC as an employer, and was required to file Real Time Information (“RTI”) returns to HMRC no later than the fifth day of each month. The tax and National Insurance Contributions declared under each return was to be paid to HMRC no later than the 22nd day of each month.
- e. Until October 2018, Auto Claims (UK) Limited had paid its PAYE and NICs in full and on time.
- f. On or before 5 October 2018, Auto Claims (UK) Limited filed its RTI return, declaring £8,488.59 in tax and NICs. However, by the deadline for payment, Auto Claims (UK) Limited had paid only £190.86 to HMRC for this month.
- g. On or before 7 November 2018, Auto Claims (UK) Limited filed its VAT return for the quarter ended 09/18. Under this return, Auto Claims (UK) Limited declared VAT due of £26,834.98 but claimed to be entitled to a repayment of £44,113.39. That resulted in the return being a net repayment return, with £17,278.41 claimed by Auto Claims (UK) Limited. HMRC began a repayment check of this VAT return.
- h. For the next three months – November and December 2018, and January 2019 – Auto Claims (UK) Limited filed RTI returns with HMRC on time, but no amount of tax or NICs was paid by the deadline for payment. The total amount of tax and NICs due under these three returns was £24,202.48. Interest was also accruing. By 22 January 2019, the amount of PAYE and NICs due from Auto Claims (UK) Limited exceeded the amount of VAT which had been claimed by Auto Claims (UK) Limited for the period ended 09/18.
- i. On an unknown date in late 2018 or early 2019, the Respondents began to consider whether security was required from the Appellant. Mr Butler, a Higher Officer within HMRC with three and a half years’ experience within the Notice of Requirement team, was given responsibility for considering this issue.

- j. On or before 5 February 2019, Auto Claims (UK) Limited filed a RTI return. The amount of PAYE and NICs due under this return was £8,804.41.
- k. On or before 7 February 2019, Auto Claims (UK) Limited filed its VAT return for the quarter ended 12/18. Under this return, Auto Claims (UK) Limited declared VAT due of £22,064.78 but claimed to be entitled to a repayment of £26,890.68. That resulted in the return being a net repayment return, with £4,825.90 claimed by Auto Claims (UK) Limited.
- l. The deadline of 22 February 2019 passed without Auto Claims (UK) Limited making payment of the PAYE and NICs due under the RTI return filed on 5 February 2019.
- m. By letter dated 27 February 2019, HMRC rejected Auto Claims (UK) Limited's claim to be entitled to repayment of VAT of £44,113.39 for the period ended 09/18. The result of HMRC rejecting this claim was that, instead of £17,278.41 being due to be refunded to Auto Claims (UK) Limited, VAT of £26,834.98 was due from Auto Claims (UK) Limited for the period ended 09/18. There is no evidence before us that Auto Claims (UK) Limited challenged this rejection and we find, on the balance of probabilities, that there was no appeal or challenge to the rejection of the VAT claim for the period ended 09/18.
- n. On 28 February 2019, a member of HMRC's Notice of Requirement team attempted to telephone the Appellant. A voicemail message was left on the Appellant's mobile telephone, asking him to call HMRC.
- o. On 28 February 2019, Auto Claims (UK) Limited paid £23,236.65 to HMRC in respect of outstanding PAYE and NICs. This payment was not enough to clear the PAYE and NICs debt of Auto Claims (UK) Limited but it reduced the amount of PAYE and NICs owed to HMRC to £18,067.97, plus the interest which had accrued due to the late payment.
- p. On 1 March 2019, the Respondents made a further attempt to telephone the Appellant, again leaving a voicemail message.
- q. On 4 March 2019, the Respondents sent Auto Claims (UK) Limited and the Appellant a letter each to inform them that HMRC might issue a Notice of Requirement to provide security. The amount of PAYE and NICs owed by Auto Claims (UK) Limited at that date was said to be £55,736.86. From the oral evidence of Mr Butler, we accept that correspondence which is sent out by the Respondents does not always take account of recent developments. On the balance of probabilities, we find that this figure for the arrears is incorrect because it does not take account of the payment made by Auto Claims (UK) Limited on 28 February 2019. The warning letter explained that a Notice of Requirement, if issued on that date, would be in the sum of £87,071.86.

- r. On 5 March 2019, Auto Claims (UK) Limited filed its RTI return but did not pay any of the tax or NICs due under this return by the deadline of 22 March 2019. A further £9,095.82 was due, and so the amount of PAYE and NICs outstanding from Auto Claims (UK) Limited increased to £27,163.79 plus accrued interest.
- s. On 20 March 2019, a member of HMRC's Notice of Requirement team attempted to call the Appellant but there was no answer. A voicemail message was left asking the Appellant to call back as soon as possible. Further voicemail messages were left on 21 and 25 March 2019.
- t. On 26 March 2019, the Appellant telephoned HMRC's Notice of Requirement team. From the note made of this call we find that the Appellant advised that he received paperwork from HMRC all the time so did not know if he had received a letter warning him about a Notice of Requirement. The Appellant said that his PAYE was up to date and that HMRC must have lost his money. The Appellant was given the PAYE helpline number so he could check the PAYE position. It seems from HMRC's note that this call was ended abruptly at that stage by the Appellant.
- u. On 5 April 2019, Auto Claims (UK) Limited again filed its RTI return on time but did not pay any of the tax or NICs due under this return. A further £10,595.21 was due no later than 22 April 2019, increasing the amount of PAYE and NICs outstanding from Auto Claims (UK) Limited to £37,759 plus interest.
- v. On 2 May 2019, HMRC sought further information from Auto Claims (UK) Limited with regard to the repayment VAT return filed for the period ended 12/18.
- w. On or before 5 May 2019, Auto Claims (UK) Limited filed a further RTI return showing that a further £7,374.27 of PAYE and NICs would be due to be paid no later than 22 May 2019.
- x. On or before 7 May 2019, Auto Claims (UK) Limited filed its VAT return for the quarter ended 03/19. Under this return, Auto Claims (UK) Limited declared net VAT due of £833.98. On the basis of subsequent correspondence between the parties, we find that this amount of VAT was not paid by the due date.
- y. On or before 20 May 2019, Mr Butler took the decision that security was required from Auto Claims (UK) Limited for the protection of the revenue. In making this decision, Mr Butler took into account:
 - i. the amount of PAYE and NICs which was then in arrears;
 - ii. that Auto Claims (UK) Limited had been trading for a number of years without default but that it had begun to default in October 2018, and that a number of PAYE and NICs payments had not been paid in full or on time since that date; and
 - iii. Auto Claims (UK) Limited's VAT position.

- z. The amount of PAYE and NICs said to be in arrears on 20 May 2019 was said to be £52,191.24. On the balance of probabilities, we find that this sum includes the amount due to be paid no later than 22 May 2019, and also includes the accrued interest. We are satisfied that this figure does take into account the 28 February 2019 payment from Auto Claims (UK) Limited.
- aa. In respect of the VAT position Mr Butler told us, and we accept, that he had noted there was a VAT refund of £4,825.90 claimed by Auto Claims (UK) Limited for the period 12/19, but also noted that (if that repayment was agreed) that would only reduce the VAT arrears then owed of £27,668.96 (comprising £26,834.98 for the period ended 09/18, and £833.98 for the period ended 03/19). Therefore, Mr Butler took the view that there was no remaining VAT credit which could be applied to reduce the amount of PAYE and NICs which was due.
- bb. Mr Butler concluded that Auto Claims (UK) Limited constituted a risk to the revenue.
- cc. Having reached that decision, on 20 May 2019, the Respondents issued a Notice to Provide Security to each of Auto Claims (UK) Limited and the Appellant. The Notice required security of £84,485.24 over the period of 24 months. This security was calculated as being the current arrears plus the estimated amount of PAYE and NICs due to be paid over a four month period. This estimated amount, in the sum of £32,294, was based upon averaging the amounts of PAYE and NICs which had been due in recent months. The period of four months recognised the average time which it would take to bring winding up proceedings.
- dd. The Appellant and Auto Claims (UK) Limited were jointly and severally liable to provide this security. On the basis of the statements in the bundle before us we find that the Notices were duly served on each of the Appellant and Auto Claims (UK) Limited.
- ee. As Mr Butler had anticipated, Auto Claims (UK) Limited did not pay the £7,374.27 due under the May 2019 RTI return. On 30 and 31 May 2019, a member of HMRC's Notice of Requirement team telephoned the Appellant. On both occasions she left a voicemail asking the Appellant to ring back. The Appellant did not return either call.
- ff. On 5 June 2019, Auto Claims (UK) Limited filed its RTI return. That return showed that £7,644.87 in PAYE and NICs was due to be paid no later than 22 June 2019.
- gg. On 12 June 2019, a member of HMRC's Notice of Requirement team, attempted to call the Appellant. (A file note made at that time refers to the VAT repayment of £4,825.90 but also notes that the VAT outstanding at this point had increased to £51,771.98. This is not the amount of VAT arrears taken into account by Mr Butler only a few weeks earlier, and there is nothing in the bundle before us to indicate the origin of this figure. We find this figure to be incorrect.)

The Respondents left a voicemail message for the Appellant, asking him to call back.

- hh. On 14 June 2019, Mr Clark, a member of HMRC's Notice of Requirement team, attempted to call the Appellant and left a voicemail. Mr Clark then called the agent on the record for Auto Claims (UK) Limited who was unaware of the Notice of Requirement but who agreed to take the relevant HMRC telephone numbers to pass on to the Appellant.
- ii. Later on 14 June 2019, the Appellant telephoned the Respondents. The Appellant advised HMRC that his accountant had been ill but would look into the PAYE and VAT on Monday [17 June]. The Appellant also said that Carillion had owed Auto Claims (UK) Limited a lot of money and that two VAT repayments had been withheld so it wasn't right that security should be sought. The Appellant was advised that he could appeal the Notice of Security.
- jj. Yet later on 14 June 2019, Mr Khan, the internal accountant for Auto Claims (UK) Limited telephoned the Respondents. Mr Khan advised that there were two VAT repayments expected and that these would be offset against the PAYE and NICs which was due. When told that the PAYE should be paid to HMRC on time even if VAT was due to be repaid, Mr Khan said that the company had always done this and that the reason for the debt build up was the collapse of Carillion. Mr Khan advised that he would call the VAT helpline to resolve the outstanding repayments.
- kk. On 17 June 2019, the Respondents issued a reminder letter to each of the Appellant and Auto Claims (UK) Limited, reminding them that the security was due and that if it was not paid by 26 June 2019 then the Appellant and the company would each be committing an offence.
- ll. On 19 June 2019, the Appellant telephoned HMRC's Notice of Requirement team. During that telephone call the Appellant agreed that he had received the Notice of Security but said that he thought it was in relation to a previous business which was owed money by Carillion. The Appellant said that Auto Claims (UK) Limited was owed two VAT repayments which had been withheld and it was unfair for him to be penalised. The Appellant was advised to appeal in writing if he wished to do so.
- mm. On 20 June 2019, the Appellant emailed HMRC officer Lynne Hughes. Ms Hughes was not involved with the 20 May Notice of Requirement. The Appellant wrote:

We have had another security request for our other company that I feel is very unjust and again causing us problems.

Obviously I strongly disagree with the decision and would welcome any help and assistance.

have had a few telephone conversations with the revenue, and now put our case to you in writing.

We really feel very let down in the fact that we were caught up heavily in the Liquidation of Carillion PLC. Despite the News and Media bringing great news that the revenue will help all companies caught up in the demise of Carillion, we have had none!

That said, because of the collapse of Carillion our Turnover reduced massively and was inevitable, and because of this it is also inevitable that when you downsize you end up paying out more than you take creating a VAT refund. This has happened on the last 3 occasions, and the HRMC has made it difficult and despite explanations and proof, the HRMC have held on to our money and struggled to return it to us as it should be.

The fact we find ourselves in this position is clear and obvious. Yet despite this we are still owed the last 2 vat return refunds, which obviously is now some 6 months old or over

If this was the other way round we would be being hit heavily with interest charges etc !!

With all this going on your vat department said they would not return it to us as it is common practice to apply it to another areas namely our PAYE, of which we were quite happy with as you would pay us and we would give it straight back clearing our debt.

It is down to this we never paid the Paye, but it seems now you are still holding our money from the VAT refund and you have now classed us as a risk for not paying the Paye, and I'm horrified yet again that you hold our money to pay over to the PAYE and as you haven't paid it over you now class us as a bad risk !!! but you have held it for over 6 months !

I hope you can see our frustration as times are very hard at the moment just dealing with the Carillion liquidation and we have fought very hard and are almost through it but every penny counts ...

We have incorporated our VAT refund into our accounting and as you have not paid it us back we can't pay our PAYE, but you stated you were going to, either way please either do it ? or refund us and we will.

This complication has caused you to class us as a risk and ask for a security amount of which we do not have in these hard times, but we have really done nothing wrong and we can only plead with you to reconsider the security amount and instead help us to fix the problem by either paying it off the PAYE or refunding us so we can.

I really hope you will see common sense that you have caused us a very stressful time and situation, but find the correct way to correct this situation by helping us as we have been around for a long time and always paid our taxes, I would have thought we are one of the type of companies with a long history that you would like to help.

I could understand it if we had done something wrong but in this instance we clearly have not, I am in the process of trying to confirm with the VAT to either pay us or contra it and then we can pay any little bit left.

I am of course happy to speak to you in this regard and would ask as its something we do not really deal with that you help us get this to the correct department.

- mn. We have already found that Auto Claims (UK) Limited had not applied for help in respect of the January 2018 collapse of Carillion, and also that the first default by Auto Claims (UK) Limited was in October 2018, some nine months after the collapse of Carillion. With regard to the Appellant's claims regarding the VAT refunds we find that the Appellant either was, or should have been, aware that on 27 February 2019, the Respondents had rejected Auto Claims (UK) Limited's claims to be entitled to a refund of VAT for 09/18, and that on 2 May 2019, the Respondents had sought more information with regard to the VAT claim made for 05/19.
- oo. On 21 June 2019, Ms Hughes replied to the Appellant's email, giving him the details of Mr Butler and asking him to contact Mr Clark (who had left the voicemail for the Appellant on 14 June 2019).
- pp. The deadline of 22 June 2019 passed without Auto Claims (UK) Limited making payment of the PAYE and NICs due under the RTI return filed on 5 June 2019. The arrears of PAYE and NICs increased to £59,836.11, plus the interest which had accrued since 20 May 2019.
- qq. On 25 June 2019, the Appellant again emailed Ms Hughes, saying that he had had no internet access for a few days but that he would try to call Mr Clark the next day. Later on 25 June 2019, Mr Stubbings, a member of HMRC's Notice of Requirement team, called the Appellant. Mr Stubbings informed the Appellant that Ms Hughes would be unable to help as she had no involvement in the case, and that the Appellant should write to the Notice of Requirement team if he wanted to seek a review. The Appellant confirmed during that telephone call that he had received the Notice of Requirement, and said that he would collate all the information he needed to request a review.
- rr. On 2 July 2019, the Appellant again emailed Ms Hughes, stating that he had been waiting for an email from the Notice of Requirement team which would be sent via Ms Hughes. The Appellant stated that he was trying to stay on top of matters as he was going away on holiday at the end of the next week [12 July]. Ms Hughes replied to the Appellant on the same day, referring him back to Mr Butler and Mr Stubbings.
- ss. On 3 July 2019, the Appellant agreed to communicate with the Respondents Notice of Requirement team via email. On 4 July 2019, Mr Stubbings attempted to call the Appellant but there was no answer. Mr Stubbings left a voicemail asking the Appellant to call him back.
- tt. On 5 July 2019, Auto Claims (UK) Limited filed its RTI return on time. This return showed £9,937.88 in PAYE and NICs was due to be paid no later than 22 July 2019.

- uu. On 11 July 2019, Mr Butler emailed the Appellant, and informed him that:
- the amount of VAT outstanding was £27,668.96 and that, although there was a repayment claimed of £4,825.90, that claim for repayment would still leave an amount of VAT outstanding; and
 - that the security for PAYE and NICs remained outstanding, and that if the Appellant wished to appeal he would find details of how to do so on the Notice of Requirement but should explain the reasons for being late.
- vv. The Appellant replied to Mr Butler on the same day as follows:

This is again very disappointing, as I have been waiting for a reply from yourselves for nearly 3 weeks as I did send in the appeal by email.

I also spoke to someone from your office a couple of Wednesday evenings ago who told me to do nothing until I got his letter, he said that it would be sent to Lynne Hughes and she would forward it on to me as he could not email me directly.

He also confirmed that in our last Vat refund that there was an element took off and not allowed of which we have no knowledge? as I was in my car out of hours and could take no notes of our LONG conversation HE SAID DON'T WORRY I WILL SEND YOU THE LETTER LATER THIS WEEK, this was last week and he said for me to rely to the comments and he would draft everything so we would know where we are ...

So you can imagine I have been awaiting urgently for this letter so we could understand the FULL position, and then work out where we are but nothing has been forthcoming as we have been left in the dark.

So to suddenly receive this response after so long is terrible, did anyone actually look into this? was it you I spoke to?

I even chased the response by emailing Lynne last week and still nothing ... this was so we could understand what VAT has not been allowed and what other monies have or haven't been applied so there are still some other areas you have not addressed, to be honest it would be a lot easier if you kept each area to itself and stop interlinking Vat to paye ect creating these problems ...

I chased Lynne as I go away tomorrow for 3 weeks and didn't want the stress of this ... I have emailed the Original appeal on: 20/06/2019 and I'm being told I have missed the deadline but it was way within the time scale.

Here was the original email contents: explaining why we disagree , we have had a very hard 18 months and it seems to me that the revenue are more keen to finish us off that help which I really find hard to take in ...

We have been in business for 30 years paying lots of tax, paye, etc ... but at this moment in time we just need a little help as we rebuild.

Please confirm receipt as I received a call saying this had been received and an email from Inne saying this his had been passed on.

It is going to be impossible for me to do anything now for the next few weeks but I really need the letter from the chap I spoke to explaining how much the Vat was that was disallowed and why, as we do not put anything through our vat returns that should be rejected, so we would obviously like that also reapplied.

The issue of the £90,000 vat / paye errors that you hold I will look at when I return.

- ww. A copy of the Appellant's email of 20 June 2019 to Ms Hughes (set out above) was then cut and pasted into the Appellant's 11 July email to Mr Butler.
- xx. In respect of the Appellant's 11 July 2019 email, we consider it is inherently unlikely that Mr Stubbings would tell the Appellant not to do anything until receiving a letter from HMRC. Mr Stubbings' contemporaneous note of the telephone call records the opposite. We have already set out our findings in respect of this call (above). We do accept it is possible that the Appellant could have been confused about what was said during that call. However, given the contents of the VAT letters sent on 27 February and 2 May 2019, explaining why no VAT refund was due for 09/18, and that further information was required for 12/18, we do not consider the Appellant could reasonably still be awaiting an imminent repayment of VAT.
- yy. We find that, even if the Appellant did honestly (but unreasonably) believe that two VAT repayments – of £17,278.41 and £4,825.90 – were due to be refunded to Auto Claims (UK) Limited, by 11 July 2019 these sums together were clearly insufficient to meet the PAYE and NICs arrears (£59,836.11 plus interest) which had accrued by 22 June 2019.
- zz. The Respondents agreed to treat the Appellant's email of 20 June 2019 as an appeal. On 16 July 2019, Mr Butler wrote to the Appellant and Auto Claims (UK) Limited setting out his view of the matter. Mr Butler recorded that there was £4,825.90 VAT due to be credited but noted that this would not be sufficient to clear Auto Claims (UK) Limited's VAT debt, and that it was inappropriate to fail to pay one type of tax in the hope that a credit from another tax would cover the debt at a later date. Mr Butler explained that the Appellant and/or Auto Claims (UK) Limited must provide the security sought, and that if the Appellant disagreed then he must write explaining why by 15 August 2019.
- aaa. The deadline of 22 July 2019 passed without Auto Claims (UK) Limited making payment of the PAYE and NICs due under the RTI return filed on 5 July 2019. The arrears of PAYE and NICs increased to £69,773.99 plus the interest which had accrued since 20 May 2019.
- bbb. Although he had said that he would be on holiday until 2 August 2019 and unable to act, on 25 July 2019, the Appellant emailed Mr Butler as follows:
- As a matter of principle, I need to understand for what reason has Auto Claims UK Ltd been placed on a requirement for security when we have never missed any payments and Carillion plc went into liquidation some 18 months ago and

are not our only customer. As we have never missed any payment I fail to see why as I feel this action is totally unjust. ?

ccc. Pausing there, it is clear from the facts we have found so far that Auto Claims (UK) Limited had failed to make several payments of PAYE and NICs. Therefore, it was not correct for the Appellant to suggest that no payments had been missed. Even if the Appellant believed that VAT repayments were due for 09/18 and 12/18, the arrears of PAYE and NICs far exceeded the VAT claimed.

ddd. The Appellant continued:

The reason this last paye hasn't been paid is due to the VAT office as usual withholding money due to us. (an action I feel also unjust as you really should not be able to withhold our monies for so long) that aside, it was the vat office that said they will apply our vat reclaim, to our PAYE of which they haven't done, we did not want to make the payment to the PATE as the VAT were going to make it. Its kind of a corrupt bribery really.

Any how I really do hope due to the revenue messing up our normal payment system that we are not going to be penalised as I must take it further if this is the case.

I have tried and tried to contact the VAT office and just cannot even get through it's a complete joke, so I feel the only way to resolve this, of which again I feel is totally wrong as we have done nothing wrong, is I am going to pay our PAYE up to date next week, and then we are just still in credit with our Vat, and hopefully this will all level out towards the next VAT payment.

...

That will bring us completely up to date apart from the Revenue VAT owing is money. And I will still have the £90,000 case that I am already owed by the revenue to sort when i'm back from annual leave. This 90k alone is a story I feel need bringing to the publics attention.

So you already hold £90k in incorrectly placed payments from a few years ago and £40k in Vat. Plus you want security from me ... this really is an unfair action, but I really must understand why firstly as we have done nothing wrong for this action to be set on us.

We do not have a financial problem in Auto Claims UK Ltd, We have one in Supreme ARC our sister company of which the revenue have been very helpful assisting us to rebuild after Carillion PLC really did affect this company.

...

All Paye will be paid next week and we just hope the VAT do not pay it too

I have approached the bank in respect of a loan to a security but I really hope this is not necessary as I will be paying interest for something I really should not be having to do.

- eee. There is no further explanation of the £90,000 said to be held by the Respondents. There is no evidence before us to suggest that the Respondents had been holding £90,000 in funds from Auto Claims (UK) Limited at any time.
- fff. On 2 August 2019, the Respondents sent out a further reminder to the Appellant and Auto Claims (UK) Limited to pay the security required.
- ggg. On 5 August 2019, Auto Claims (UK) Limited filed its RTI return. A further £8,425.01 in PAYE and NICs was due to be paid no later than 22 August 2019.
- hhh. On 9 August 2019, Mr Butler emailed the Appellant in reply to his email of 25 July 2019. Mr Butler gave the contact names for the Appellant to discuss Auto Claims (UK) Limited's rejected VAT repayment claims. Mr Butler also noted that, despite the Appellant's promise to pay the outstanding PAYE and NICs in the week beginning 29 July 2019, no payment had been received by HMRC. Mr Butler asked the Appellant to let him know if payment had been made, and also to let him know if the Appellant wished to have an independent review.
- iii. On 12 August 2019, the Appellant accepted the offer of a review. The Appellant added:
- I am on holiday until the 19th and will ensure all is sorted out on my return, I have asked my in house book keeper to resolve the issue but he has been of with stress for the last month, but I am led to believe he is back at work on Monday 12/08/2019 and I have asked that he resolves the Vat issue so we can pay the PAYE up to date, in the normal manor and to ignore the issues caused by the revenue.
- ...
- I will, if it has not been sorted by the time I get back from holiday, (as my book keeper is of sick and I am not sure how long I can only hope he returns on Monday) ensure everything is brought back up to date.
- jjj. On 16 August 2019, Mr Butler confirmed to the Appellant by email that no payment had yet been received by HMRC.
- kkk. On 21 August 2019, Auto Claims (UK) Limited made three payments (of £8,488.59, £6,855.20 and £7,552.85) towards its arrears of PAYE and NICS. Those three payments are the same amounts which were due under the October 2018, November 2018 and December 2018 RTI returns.
- lll. The deadline of 22 August passed without Auto Claims (UK) Limited making payment of the PAYE and NICs due under the RTI return filed on 5 August 2019.
- mmm. On 23 August 2019, Auto Claims (UK) Limited made three more payments (of £9,794.43, £8,804.41 and £9,095.82) towards its arrears of PAYE and NICS. Those three payments are the same amounts which were due under the January 2019, February 2019 and March 2019 RTI returns.

- nnn. Due to the accrual of interest, the six payments made by Auto Claims (UK) Limited did not clear the PAYE and NICs debt in respect of the period from October 2018 to March 2019. Nevertheless, those six payments (in the total sum of £50,591.30) significantly reduced the arrears. The arrears of PAYE and NICS (which would have increased to £78,226, plus the interest which had accrued since 20 May 2019) was reduced to £27,634.70, plus the interest which had accrued since 20 May 2019.
- ooo. On 5 September 2019, Auto Claims (UK) Limited filed its RTI return. A further £9,393.05 in PAYE and NICs became due no later than 22 September 2019.
- ppp. On 23 September 2019, the reviewing officer (Mr Crowley) issued his review decision to the Appellant and to Auto Claims (UK) Limited. Based on the evidence of Mr Butler, we find, on the balance of probabilities, that the information regarding the 22 September 2019 non-payment of PAYE would not have been available to the reviewing officer at the time that he made his decision.
- qqq. Mr Crowley upheld HMRC's decision to require security from the Appellant and Auto Claims (UK) Limited. Mr Crowley set out the relevant legislation and cited *Rosebronze Limited v HMCE* [1984] Lexis Citation 61, before setting out what he understood to be the relevant facts of this matter. The chronology outlined by Mr Crowley covered events up to the Appellant's 14 August 2019 acceptance of a review. Mr Crowley stated that the evidence he had seen was "all of the correspondence" and he then set out his response to the points made by the Appellant in that correspondence with HMRC. Mr Crowley then explained the calculation of the amount of security sought. He wrote as follows:

The quantum was calculated in accordance with HMRC's internal guidelines as follows:

- a. The estimated future revenue at risk should an employer fail to pay amounts due to HMRC. Where an employer makes monthly payments the estimated revenue at risk will be 1 month's PAYE/Class 1 NICs.
- b. the further estimated future revenue at risk built up while HMRC winds up the employer's business. HMRC estimate that the time taken to wind up a business is 3 months.
- c. the actual debt an employer has at the time we require security.

In this case, these amounts are:

4 months PAYE = £12,769.00

4 months NIC = £19,525.00

Total : £32,294.00

Plus an amount equal to any current arrears of PAYE and NIC due from the employer:

PAYE = £12,962.55

NIC = £32,228.69

Total: £52,191.24

Total security required: £84,485.24

- rrr. Pausing there, we note that this is the same amount that Mr Butler had calculated in May 2019. Mr Crowley recognised this, as he continues:

The original NOR included four months Real Time Information (RTI) submissions totalling £32,294. Using the most recent four months shown on RTI (June, July, August and September 2019), this figure increased to £36,265. However, I do not intend to vary the NOR upwards.

Was a security reasonably required?

Requiring a security is a means to protect existing and future revenue by way of seeking a deposit. Security will only be sought by HMRC where it is considered that there is a serious risk to the revenue; for example “phoenixism” or repeated refusal to pay until HMRC is about to start bankruptcy or liquidation proceedings.

Security is not a penalty nor is it a means of collecting debt but is used as a compliance tool and legislation was written for the following purposes –

- a. to remove unfair commercial advantage gained by rule-breaking
- b. to drive up and encourage compliance
- c. influence the behaviour of a taxpayer
- d. prevent losses to the Crown

As of September 2019, with the exception of a payment in February 2019, the last PAYE/NIC payments received from Auto Claims appears to have been in October 2018. The company is non-compliant and I consider this to be a genuine risk to the exchequer; consequently the security is required.

My conclusion

Decision	Date of issue	Amount
Notice of Requirement	20/05/19	£84,485.24

Having rejected the grounds of appeal and established that the NOR was required, fair and sent to the correct parties at the correct time, I uphold the decision made.

- sss. It is clear from that passage that Mr Crowley was aware of the amounts which were due from Auto Claims (UK) Limited for June, July, August and September 2019. We consider it likely that Mr Crowley was aware that the PAYE and NICs due under the June, July and August RTI submissions had not been paid. We have found, given the proximity of the dates (22 and 23 September, respectively) that Mr Crowley did not know that Auto Claims (UK) Limited had not made

payment under the September 2019 RTI return but had assumed this would be the case.

ttt. We find that Mr Crowley was aware of the standard basis on which HMRC will usually calculate the amount of security to be required. That standard basis requires the decision-maker to be aware of the current arrears.

uuu. We find that Mr Crowley had not taken into account that Auto Claims (UK) Limited had made six payments in August 2019 totalling more than £50,000 towards the outstanding PAYE and NICs. Those payments reduced the arrears of PAYE and NICs but Mr Crowley did not take those payments into account when calculating the arrears; instead he used the figures calculated by Mr Butler. We are satisfied that Mr Butler's calculation was correct when he made it, in May 2019. We are satisfied that Mr Butler's figure cannot still have been correct by 23 September 2019.

vvv. We note that Mr Crowley explicitly refers to Auto Claims (UK) Limited only making one payment, in February 2019, since October 2018. We are satisfied that is incorrect. As we have found, as at 23 September 2019, there had been seven payments towards the PAYE and NICs since October 2018.

www. On 28 October 2019, the Appellant filed an appeal with the Tribunal. The Appellant asked that the Notice of Requirement be removed on the basis that it was not required and there had never been default.

Discussion and decision

22. The burden of proof in this appeal is upon the Appellant. The standard of proof is the civil standard, of the balance of probabilities.

23. For the Appellant to succeed in this appeal, he must persuade the Tribunal that the decision to require security was, at the time it was taken, either a decision which no reasonable decision-maker could have reached or that it was flawed in the sense that irrelevant matters were taken into account or relevant matters were not taken into account.

The Appellant's arguments

24. The Appellant's arguments (as set out in his Notice of Appeal) are that:

- Matters were tight following the Carillion collapse;
- No payments had been missed;
- The PAYE would have been paid by the offsetting of a VAT refund; and
- The PAYE has been paid

The Appellant's first ground of appeal

25. Looking at the first of these points, we agree with the Appellant that the collapse of Carillion in January 2018 affected a number of companies and caused them financial difficulties. However, we have found that Auto Claims (UK) Limited did not apply to the Respondents for any assistance either at the time that Carillion collapsed or subsequently.

26. Although the Appellant mentioned Carillion in a call on 26 March 2019, it is unclear whether Mr Butler took into account the effect that the collapse of Carillion might have had on Auto Claims (UK) Limited. Mr Butler did consider this issue in his view of the matter and concluded that, due to the arrears that had built up, it was still requisite to demand security.

27. In his review decision Mr Crowley concluded that there was no evidence about whether or not Auto Claims (UK) Limited had applied for assistance but that the Appellant was obviously aware of how to apply for help as Supreme Arc Limited had previously applied. Mr Crowley then stated that he was rejecting the argument that HMRC had failed to help Auto Claims (UK) Limited as it was outside the scope of his review.

28. When setting out which decision we would review, we concluded that the reviewing officer had a similar power to the Tribunal. If that is correct, Mr Crowley's role on review was first to consider whether Mr Butler had acted unreasonably in requiring security. That is the same question that we consider in exercising our supervisory jurisdiction.

29. In considering whether Mr Butler acted unreasonably in requiring security, we conclude that – whether or not Mr Butler had taken into account the lack of assistance to Auto Claims (UK) Limited following the collapse of Carillion – it was inevitable that he would have concluded that the arrears of PAYE and NICs were such that it was requisite to seek security. We reach the conclusion that this was inevitable because that is what Mr Butler wrote in his view of the matter.

30. Where a decision taken is based upon a factor which should not have been taken into account, or without taking into account a factor which should have been taken into account but it is inevitable that the same decision would have been reached in any event, then the Tribunal will not strike down a decision. As Judge Bishopp stated in *Southend United Football Club Limited v HMRC* [2013] UKFTT 715 at paragraph 10:

If we are persuaded the decision was flawed but that, had HMRC approached the matter correctly they would inevitably have arrived at the same conclusion, we should dismiss the appeal.

31. Therefore, even if Mr Butler should have taken into account the lack of assistance given following the collapse of Carillion but did not, it is inevitable that Mr Butler would still have reached the same decision about the requirement to seek security.

32. Therefore, we dismiss the Appellant's first ground of appeal.

The Appellant's second, third and fourth grounds of appeal

33. Looking at the second to fourth of the arguments made by the Appellant in his Notice of Appeal, we have found as facts that payments of PAYE were missed, that the full amount of PAYE was not paid by Auto Claims (UK) Limited so that arrears did accrue, and that there was no VAT refund available to be offset against the arrears of PAYE and NICs.

34. It follows that we reject these three arguments put forward by the Appellant, as being unsupported by the facts we have found.

Did the Respondents act unreasonably in requiring security?

35. Given the absence of the Appellant before us, we have considered whether there might be any other points which might be made on his behalf.

36. On all of the information available to us, exercising our supervisory jurisdiction, we are unable to identify any matter which Mr Butler omitted to take into account, or took into account but which should not have done, or any error of law in Mr Butler's decision-making.

37. Therefore, we conclude that the Respondents did not act unreasonably in requiring security.

Was the security sought appropriate in all the circumstances?

38. Exercising our full appellate jurisdiction, we consider the security sought.

39. We are satisfied that it was appropriate for the Respondents to seek security for a period of two years, in accordance with their usual practice.

40. We are satisfied that the Respondents were entitled to seek security from the Appellant. The Appellant is a director of Auto Claims (UK) Limited and the majority shareholder. Therefore, he was in a position to control Auto Claims (UK) Limited.

41. We are satisfied that it was appropriate for the Respondents to calculate the amount of security according to their standard formula. Although the Respondents may deviate from that formula they have chosen not to in this case, and we have not identified any factor which makes us overturn that decision.

42. The standard formula is an amount equal to the estimate PAYE and NICs due over the next four months, plus an amount equal to the arrears of PAYE and NICs which have accrued. Mr Butler anticipated the 22 May 2019 default, but we are otherwise satisfied that Mr Butler's calculation of the amount of security was correct. We have found that Mr Crowley also anticipated a default, this time of the 22

September payment. More significantly, we have found that Mr Crowley failed to take into account six payments made by Auto Claims (UK) Limited towards the PAYE and NICs due when considering the size of the arrears which had accrued.

43. On the basis of the evidence before us and the facts we have found, we consider that the Notice of Requirement should be varied. We conclude that the amount of security sought under the Notice of Requirement should be:

- a) the arrears of PAYE and NICs, as at 23 September 2019, and
- b) the estimated PAYE and NICs due over the next four months, as at 23 September 2019.

44. As the default of 22 September 2019 is now known, we consider that should be taken into account. The figure for the PAYE and NICs arrears will be lower than previously calculated. The figure for the estimated PAYE and NICs due will be marginally larger, as Mr Crowley recognised. The overall amount of security sought will be lower.

45. We were not satisfied that Auto Claims (UK) Limited's tax arrears arose due to confusion over offsetting, as the Appellant asserted. Nevertheless, we recognise that some attempt has been made to pay the PAYE and NICs due, albeit several months late. We consider that a reduction in the amount sought – as will be the effect of the accurate application of the standard formula – will better reflect these attempts made by Auto Claims (UK) Limited to make payment towards its PAYE and NICs arrears.

Conclusion

46. The Appellant has failed to satisfy us that the decision to require security from him, as director and shareholder of Auto Claims (UK) Limited, was unreasonable. We confirm this decision.

47. However, because the reviewing officer did not take into account the six payments of PAYE and NICs made by Auto Claims (UK) Limited in August 2019, we consider that, on review, there was an incorrect calculation of the security which should be required. Therefore, the Respondents are required to recalculate the security which is required, using their standard formula and using the figures as at 23 September 2019.

48. To the extent that the amount sought under the Notice of Requirement is varied, the Appellant's appeal is allowed. In all other regards the Appellant's appeal is dismissed.

49. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 2 APRIL 2020