



[2021] UKFTT 0344 (TC)

TC08278

Income tax: Appeal against decision to withdraw Gross Payment Status. Decision withdrawn by HMRC. Application by appellant for costs on basis that HMRC unreasonably defended appeal. Application by Appellant for names of those involved in making the withdrawal decision. Application refused.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/04016

BETWEEN

MINSTRELL RECRUITMENT LTD

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE CHARLES HELLIER

The hearing took place on 6 September 2021. With the consent of the parties, the form of the hearing was by video on the Tribunal video platform. A face to face hearing was not held because of the covid 19 pandemic

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Tim Brown instructed by Duncan Lewis Solicitors Ltd for the Appellant

Paul Marks for the Respondents

DECISION ON APPLICATION FOR DISCLOSURE AND DIRECTION

Introduction

1. This is a decision on an application by the Appellant for a direction that HMRC disclose the names of those involved in the making and confirmation of a decision to revoke the Appellant's Gross Payment Status under Chapter 3 Part 3 Finance Act 2004.
2. The possession of Gross Payment Status permits the holder to pay certain sub contractors without deducting income tax. Lack of such status may have a serious commercial adverse effect on a business.
3. Under section 66 (1) HMRC may give notice of future revocation of that status if certain compliance failures take place. The status may be revoked immediately under section 66(3) if HMRC have reasonable grounds to suspect that the holder has been false, fraudulent or knowingly non compliant in certain matters. The revocation of the Appellant's Status was made pursuant to section 66(3). The nature of HMRC's decision thus carried serious implications about the conduct of the Appellant's business.
4. Following the revocation the Appellant sought a review. The review confirmed the revocation. The Appellant appealed to the tribunal and sought an expedited hearing. After an interval the officers of HMRC involved in the litigation wrote to the Appellant to say that they did not intend to contest the appeal. The appeal was then formally allowed and Gross Payment Status restored.
5. The Appellant then made an application for an order that HMRC pay its costs. This decision relates to a subsidiary application made in the course of that application for costs. The Appellant says that knowledge of the names of the officers involved in the revocation decision will enable the tribunal to hear evidence relevant to the costs application.
6. The tribunal's ability to award costs is limited by Rule 10(1) of its Rules:
"The tribunal may only make an order in respect of costs...-
 - (a) under section 29(4) of the 2007 Act (wasted costs)...
 - (b) if the tribunal considers that a party or their representative has acted unreasonably in bringing defending or conducting the proceedings;
 - (c) if...the proceedings have been allocated as a complex case...
 - (d) in an MP expenses case..."
7. The Appellant's appeal was not allocated as a complex case and wasted expenses (as defined in Rule 10(9)) are not in issue. Thus the tribunal has power to award costs only if HMRC or their representatives acted unreasonably in defending or conducting the proceedings.

The Appellant's arguments

8. Mr Brown says that HMRC unreasonably resisted the Appellant's meretricious appeal by failing to identify or take into account that HMRC's withdrawal under section 66(3) had no evidential basis or was done unreasonably without the proper authorisation. The Appellants also allege that, in making its original decision, HMRC relied on the testimony of an unreliable informant. Mr Brown says that it is only when the officers who actually made the decision(s) are known to the Appellant that directions can be made enabling their evidence to be heard and the tribunal assisted in its determination of whether or not HMRC's conduct was unreasonable and if so what pre appeal costs should be awarded.

9. Mr Brown says that this evidence is relevant both to (i) whether the conduct of the appeal by HMRC's litigators after they had received notice of the appeal from the tribunal was reasonable, and (ii) to the amounts of allowable costs incurred before the appeal was notified which were 'incidental' to the appeal.

10. There are two stages in the making of a costs order. The first is to determine whether the party's conduct was unreasonable. That is referred to as the 'threshold condition' in *Willow Court Management (1985) Ltd v Alexander* [2016] UKUT 290 (LC). The second, if the threshold condition is met, is to determine the costs of and incidental to the conduct of the appeal. In what follows I address the possible relevance of the evidence of those whose names are sought by reference to those two stages.

The Conduct of the Appeal

11. I understood that those who had conduct of the defence of the appeal were different from those who made and reviewed the original decision. I also understood from Mr Marks that those who managed the appeal on behalf of HMRC would give witness statements and be available for cross examination at the hearing of the costs application.

12. In *Distinctive Care Ltd v HMRC* [2019] EWCA Civ 1010 Rose LJ said at [19] that the earliest conduct which is relevant for the purposes of Rule 10(1)(b) is the bringing of the proceedings, namely the sending or delivering of the notice of appeal pursuant to Rule 20. It is therefore the conduct of HMRC's litigators once notice of appeal was served which is relevant to the determination of whether HMRC acted unreasonably.

13. In *Distinctive Care* Rose LJ quoted from two cases in which the UT had accepted that behaviour of a party prior to the commencement of proceedings could not be entirely disregarded. The UT in *Catana v HMRC* [2012] UKUT 172 had approved the statement in *Bulkliner Intermodal Limited v HMRC* [2010] UKFTT 395 (TC) that such behaviour might well inform actions taken during proceedings, as bad faith had in a 1996 Special Commissioners case; and *Willow Court* where the UT had said that the limitation should not be drawn too strictly and for example that it might be relevant to consider a party's motive in bringing proceedings.

14. But having referred to those cases Rose LJ sounded a note of caution, saying that although there may be circumstances in which behaviour prior to the commencement of proceedings is relevant to the tribunal's assessment of conduct post commencement, an applicant could not extend the scope of the tribunal's enquiry by alleging bad faith at an earlier stage. The focus should be on the handling of the appeal not the quality of the original decision.

15. To my mind the occasions on which prior behaviour may be relevant are limited to those in which the prior behaviour explains, colours or has influenced the conduct post commencement.

16. Thus if another person, before or after proceedings commenced had sought to influence a litigator's conduct or if there were policies or practices in existence prior to the start of proceedings which affected the litigators' conduct of the appeal, those influences, policies and practices could possibly be relevant to the assessment of the reasonableness of the conduct of the appeal.

17. Likewise, if there was some form of culpable conduct at an earlier stage and if the person having conduct of the litigation knew or should reasonably have known of that conduct (which might be the case where the decision maker and the litigator were the same as used in some former appeals to be the case), and if the nature of that conduct affected the correctness of the matter appealed against, then the tribunal might be assisted by the evidence of perpetrator of the impugned conduct.

18. But in my judgement it is only where there is some evidence either from the litigator or from some other source which puts the litigator's conduct into question that it would be just or fair to extend the scope of the enquiry by requiring evidence from others who might in some way have affected the conduct of the litigation: otherwise considerations of proportionality, delay and cost weigh against that course of action.

19. It is of course possible that the litigators give evidence (or there is other evidence) which indicates to the tribunal that there was or may have been such conduct or that the litigators were influenced improperly to defend a meretricious appeal. If so the tribunal might at that stage wish to seek or permit further evidence, but until it is established that it is possible that the litigators were so influenced or aware of the impugned conduct, and that it is possible that that influence or conduct affected his or her conduct post commencement, it is in my view disproportionate to compel evidence of those involved in making or reviewing the contested decision or to seek their names.

20. In this appeal I have not been persuaded that the circumstances Mr Brown relates describe a sufficient likelihood that the evidence from the litigators will meet that test. Even if it is the case that the original decision was made without evidence and in reliance on a disreputable informant, and even if the standard procedures within HMRC for the making of a section 66(3) revocation were not followed, the first stage is to determine whether these matters affected the conduct of the litigators; at this stage that is most expeditiously addressed through their evidence.

21. I therefore refuse the application in relation to the first limb of the costs process.

22. But Mr Brown's concerns seem to me to make it appropriate to DIRECT that the litigators' witness statements shall include in particular answers to the following questions: (i) were there any policies or practices of HMRC or instructions or hints from others which affected or influenced their conduct of the litigation? (ii) what did they know of the reliance of HMRC on an informant, and, if they knew, how did it affect their conduct of the litigation?

Costs incidental to the appeal.

23. In *Distinctive Care* Rose LJ in [34 to 38] accepts that costs incurred before proceedings start may be recovered as costs incidental to the proceeding.

“Once unreasonable conduct has been established and the threshold condition ...satisfied it will be relevant in an appropriate case to consider ..conduct prior to the proceedings when the tribunal considers how to exercise the discretion given to it” (cited with approval at [24])

24. Thus evidence of what occurred before the proceedings started may be relevant. But the question before the tribunal will be to what extent the Appellant incurred costs incidental to the proceedings at those times which proved of “use and service” in the action (*Distinctive Care* [37]). That is a test which relates primarily to the nature of the result of the cost incurred: “[i]t is the nature of the work done and the scope of the ultimate appeal which will determine whether those costs are incidental to the appeal” ([39]). The nature and scope of the work done by an Appellant will be affected by what HMRC did or did not say to it: the conduct of HMRC in making or reviewing the decision is relevant only in so far as it was communicated to or affected the Appellant. Determining what was communicated to the Appellant does not require examination of the decision making process within HMRC.

25. I do not therefore consider that I should accede to the Appellant's application on the basis that the evidence of those involved in making the decision was relevant to the second stage in the determination of allowable costs.

Conclusion

26. I dismiss the application
27. I make the Direction at paragraph 22 above.

Rights of Appeal

28. 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.

**CHARLES HELLIER
TRIBUNAL JUDGE**

RELEASE DATE: 22 SEPTEMBER 2021