[2021] UKFTT 0101 (TC)

**TC08084**

*Procedure – Application to amend grounds of appeal – Application allowed*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/ 2019/01570**

**BETWEEN**

**GARY LINEKER & DANIELLE BUX**
**T/A GARY LINEKER MEDIA** **Appellants**

**-and-**

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

**TRIBUNAL: JUDGE JOHN BROOKS**

**The application was determined on the papers without a hearing**

## DECISION

### INTRODUCTION

1. This is my decision on the application, dated 16 March 2020, (the "Application") by the appellants, Gary Lineker and Danielle Bux trading as Gary Lineker Media ("GLM"), to amend their grounds of appeal and for further consequential directions in this matter which, because of administrative delays no doubt exacerbated by the various coronavirus restrictions in place since 23 March 2020, has unfortunately remained outstanding for far too long.

### BACKGROUND

2. The following summary of the background facts, which is taken from the documents provided particularly the Application, the response to it by HM Revenue and Customs ("HMRC"), dated 3 December 2020, and GLM's reply, dated 27 January 2021, is only to put the Application and my decision in context. Nothing in what I say below should be taken as a finding of fact for the purposes of the substantive appeal

3. GLM is a partnership, established in 2012, between Gary Lineker and his former wife Danielle Bux. Mr Lineker is now best known for the BBC's *Match of the Day* programme which he has presented since 1999. In addition, from 2015, he has been the lead presenter for BT Sport's coverage of the UEFA Champions League. During the tax years 2013-14 to 2016-17 (inclusive) Mr Lineker contracted to provide his services to the BBC through GLM. He also provided his services to BT Sport through GLM during the tax years 2015-16 to 2017-18 (inclusive).

4. HMRC considered that such arrangements fell within the ambit of the intermediaries legislation (generally known as IR35) and issued Determinations under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003, in respect of income tax deductible via PAYE (the "Determinations"); and Notices under s 8 of the Social Security Contributions Act 1999 (the "Notices") in respect of Class 1 National Insurance Contributions ("NICs").

5. As Judge Harriet Morgan explained, at [3], in *Red, White and Green Ltd v HMRC* [2020] UKFTT 109 (TC):

> "… IR35 applies where an individual provides services to a client under arrangements involving a third party, such as a [Personal Service Company], broadly, if the individual would be regarded for income tax purposes as an employee of the client if the services were provided under a contract directly between the client and the individual. In that case, the income received by the third party for the individual's services is treated as employment income."

6. In determining whether IR35 is applicable, the Tribunal is required to first, construct a hypothetical contract between the end user (here the BBC or BT Sport) and the individual providing the service (Mr Lineker) based on the terms of the contract between the personal service company (GLM) and the end user; and secondly, by reference to the well-established legal principles applied by the courts, determine whether an employment relationship exists (see *Usetech Ltd v Young (Inspector of Taxes)* [2004] STC 1617 and *Future On-Line Ltd v Foulds (Inspector of Taxes)* [2005] STC 198).

7. Paragraph 10 of HMRC's statement of case describes the "main issue" in the appeal as

> "… whether each of the hypothetical contracts between Mr Lineker and the BBC/BT would have been contracts of service (in which case the provision is satisfied) or contracts for services (in which case it is not)."

8. GLM contends that intermediaries legislation (IR35) is not applicable in this case because the circumstances are not such that Mr Lineker would have been regarded as an employee of the BBC and/or BT Sport.

9. The amounts of income tax and NICs in dispute and the approach that HMRC invite the Tribunal to adopt are set out at paragraphs 6 and 7 of the statement of case:

> "6. The total amount of income tax and NICs assessed (not including interest) is £3,621,735.90 and £1,307,160.46 respectively. HMRC's position is that the correct figure for NICs should be £1,313,755.38. However, if the Tribunal determines that the intermediaries legislation does apply to the engagements of Mr Lineker by the BBC and BT, HMRC will in any event give credit against these sums for the income tax and NICs that Mr Lineker has paid via self-assessment on his share of the partnership's profits in the relevant tax years.
>
> 7. HMRC therefore requests the Tribunal to give a decision in principle only on the above issue and that the matter be dealt with at a hearing, pursuant to Rule 25(3) of the First-tier Tribunal Rules. A further hearing should be listed, if required, to resolve any outstanding issues of quantum.

**THE APPLICATION**

10. The Application by GLM seeks:

> "(1) permission to amend its Grounds of Appeal pursuant to rule 5(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "FTT Rules").
>
> (2) directions:
>
> > i. that HMRC give particulars of its case on quantum either by (i) amending its statement of case (pursuant to rule 5(3)(c) of the FTT Rules or (ii) providing particulars (pursuant to rule 5(3)(d) of the FTT Rules);
> >
> > ii. that the hearing before the First-tier Tribunal consider both quantum and liability (rule 5(3)(g) of the FTT Rules);
> >
> > iii. to be updated to make allowance for the amended statement of case."

11. The proposed amendment, on which GLM now seeks to rely, adds two new grounds of appeal:

(1) The Determinations and Notices do not correctly state the quantum of the Appellant's liability: it has been overcharged; and

(2) The Notice in respect of 2013-14 is void because:

(a) section 8(1)(c) of the Social Security Contributions (Transfer of Functions) Act 1999 requires an officer of the Board to decide whether a person is or was liable; but

(b) on HMRC 's own account (see the letter dated 16 February 2018) the officer had not decided whether the Appellant was liable to pay contributions of any particular class, not having sufficient facts upon which he could issue an opinion.

I shall refer to the first as the "Quantum Ground" and second as the "Validity Ground".

12. HMRC oppose the Application on the basis that both grounds are "insufficiently precise for either HMRC or the Tribunal to understand what is being asserted or its factual

basis" and that further particularisation is needed to enable HMRC to determine what further documentary and/or witness evidence, if any, might be required.

13. Additionally, HMRC have raised the possibility that GLM was seeking to advance arguments which were not within the Tribunal's jurisdiction, in particular in relation to paragraph 6 of the statement of case which states that once GLM's liability to pay income tax and NICs has been determined in accordance with the primary legislation, HMRC will give GLM credit for any income tax and NICs already paid through self-assessment by Mr Lineker.

14. While the Tribunal has jurisdiction, under s 50 of the Taxes Management Act 1970 ("TMA"), to determine whether GLM has been overcharged or undercharged to tax it does not have the jurisdiction to consider the process of giving credit for tax and NICs paid as this is not governed by statute. However, having read the further and better particulars provided by GLM in reply to HMRC's representations opposing the Application, I do not understand GLM to be raising the issue of credit for tax already paid, rather it contends that it has been overcharged by the Determinations and Notices, something clearly within the jurisdiction of the Tribunal.

**LAW**

15. The Tribunal may, under Rule 5 of the FTT Rules, grant a party permission to amend its grounds of appeal. Rule 5 provides:

> (1) Subject to the provisions of the 2007 Act [ie the Tribunals, Courts and Enforcement Act 2007] and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> > (a) …
> >
> > (c) permit or require a party to amend a document; …

16. Under Rule 2(3) of the FTT Rules the Tribunal must, when exercising any power under the FTT Rules, "seek to give effect to the overriding objective" to deal with cases "fairly and justly". Rule 2(2) provides:

> Dealing with a case fairly and justly includes—
>
> > (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> >
> > (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> >
> > (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> >
> > (d) using any special expertise of the Tribunal effectively; and
> >
> > (e) avoiding delay, so far as compatible with proper consideration of the issues.

17. The principles to be applied when considering an application to amend were summarised by Carr J (as she then was) in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) ("*Quah*") as follows:

"36. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.

37. Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities: *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.

37. Drawing these authorities together, the relevant principles can be stated simply as follows :

> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations

> because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

18. *Quah* was applied by the Upper Tribunal (Newey J and Judge Bishopp) in *Denley v HMRC* [2017] UKUT 340 (TCC). Judge Mosedale, in *Asiana Limited v HMRC* [2019] UKFTT 267 (TC) ("*Asiana*"), having referred to the principles summarised in *Quah* said, at [15]:

> "… the law on pleadings is clear: the appellant must state what are its grounds of appeal. If it does not, it cannot rely on those grounds. And if it wants to rely on a new grounds of appeal, as it does here, it must apply for permission to amend. And *Quah* and *Denley* set out the principles the Tribunal will consider in determining such an application."

**DISCUSSION AND CONCLUSION**

*Quantum Ground*

19. Paragraph 6 of the statement of case, which sets out the total amount of income tax and NICs assessed by the Determinations and Notices at £3,621,735.90 and £1,307,160.46 respectively, goes on to say that HMRC consider the correct NICs figure to be £1,313,755.38, some £6,5959.80 more than the sum assessed (see paragraph 9, above). There is, therefore, clearly an issue with regard to quantum.

20. Section s 50 TMA which, by virtue of Regulation 80(5) of the Income Tax (Pay As You Earn) Regulations 2003, applies to the Determinations provides:

> **50 Procedure**
>
> (6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is overcharged to tax by a self-assessment;
>
> (b) that any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is undercharged to tax by a self-assessment;
>
> (b) that any amounts contained in a partnership statement are insufficient; or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly.

21. With regard to the Notices, Regulation 10 of the Social Security (Decisions and Appeals) Regulations 1999 provides:

> If on an appeal … it appears to the Tribunal that the decision should be varied in a particular manner, the decision shall be varied in that manner, but otherwise shall stand good.

22. In *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)* (1927) 11 TC 657 Lord Hanworth MR, referring to a previous incarnation of s 50(6) TMA, said, at 667:

> "Now it is to be remembered that under the law as it stands the duty of the Commissioners [and since 1 April 2009 the Tribunal] who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to a majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment as standing goods unless the subject – the Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside."

23. Similarly, the effect of s 50(7) TMA is that if HMRC produce evidence that the original assessment is too low it must be increased in accordance with that evidence. Indeed an appellant cannot withdraw his case to prevent an assessment being increased (see *HMRC v C M Utilities Limited* [2017] UKUT 305 (TCC).

24. As Henderson J, as he then was, observed in *Tower MCashback LLP1 and another v HMRC* [2008] STC 3366 at [115], ("entirely correctly" in the view of Lord Walker of Gestinghorpe JSC in the decision of the Supreme Court in that case, reported at [2011] 2 AC 457):

> "There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners in exercise of their statutory functions to have regard to that public interest."

I would add to this that in most cases the Tribunal will consider and determine both liability and quantum at the same hearing. It is, indeed, according to s 50 TMA, the purpose of an appeal.

25. The question is whether I should adopt such an approach in this case or accede to HMRC's request, at paragraph 7 of the statement of case, for the issue of Mr Lineker's employment status under the hypothetical contract with the BBC and/or BT Sport to be determined in principle with a further hearing only being listed if the parties are unable to reach agreement in relation to quantum (see paragraph 9, above).

26. In the absence of any explanation for the request, other than paragraph 6 of the statement of case, or any reference to the "key principles", as summarised by the Upper Tribunal at [28] in *Wrottesley v HMRC* [2016] STC 1123, to be considered in determining whether a preliminary hearing should be ordered, and having regard to both the applicable *Quah* principles and the overriding objective, I have come to the conclusion that the Tribunal should determine the quantum and liability issues at the same hearing.

27. However, as is clear from *Haythornwaite*, it is for GLM to adduce evidence to challenge the Determinations and Notices not for HMRC to justify them. As such, I see no reason why it should be necessary to direct HMRC to provide further particulars in relation to quantum to enable the Tribunal to determine the Quantum Ground at the substantive hearing. However, HMRC may (if so advised) respond to this ground by way of an amendment to the statement of case.

*Validity Ground*

28. GLM contends that the 2013-14 Notice is void as, unlike Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 which applies (with emphasis added) "i*f it appears to HMRC that there **may** be tax payable for a tax year … which has not been paid to HMRC*", s 8 of the Social Security Contributions Act 1999 ("SSCA") requires an officer of the Board

"*to decide whether a person **is or was** liable to pay contributions of any particular class and, if so, to the amount that he is liable to pay*".

29. This, GLM submits, requires a high degree of certainty before a decision can be made by an officer of the Board under s 8 SSCA to issue a Notice which was not present in this case as can be seen in the covering letter, dated 16 February 2018, to the 2013-14 Notice in which the officer explains:

> "My review of the contractual arrangements between Gary Lineker & Danielle Bux T/A Gary Lineker Media and the BBC and BT Sport to determine whether or not the intermediaries legislation, commonly known as IR35, applies is ongoing. Although I am **not yet in a position to issue a formal opinion** I am conscious that the contractual arrangements for the engagement with the BBC currently being reviewed will cover the tax year 2013/14.
>
> …
>
> As I have already mentioned I **do not have sufficient facts at present upon which I can issue an opinion** on your employment status and these assessments are not an indication of where we are in that process." [emphasis added]

30. Given that this ground raises a succinct and discrete legal issue and that these proceedings are at an early stage, I consider that GLM should be permitted to add the Validity Ground to the grounds of appeal. Clearly HMRC should be afforded an opportunity to respond to this new ground and may do so by way of an amendment to the statement of case.

**DIRECTIONS**

31. Therefore, for the reasons above, it is directed that:

(1) the appellants be granted permission to amend the grounds of appeal to include those grounds set out at paragraph 11, above.

(2) The respondents shall **either**, within 56 days of the date hereof, provide the appellant and Tribunal with an amended statement of case in response to the amended grounds of appeal **or**, within 28 days of the date hereof, notify the Tribunal and appellants that it is intended to rely on the statement of case dated 7 October 2019.

(3) The parties shall liaise and use their best endeavours to agree case management directions for the progress of this appeal and not later than 28 days following the provision of an amended statement of case or confirmation that it is intended to rely on the statement of case dated 7 October 2019 in compliance with direction (2), above, **either** provide to the Tribunal their agreed proposed directions **or** in the absence of agreement each party's own proposed directions.

(4) Any such proposed directions, whether agreed between the parties or not, shall take account of the requirement for electronic PDF bundles to be produced for the hearing in compliance with the General Guidance on PDF Bundles issued by the President of the Tax Chamber First-tier Tribunal on 23 June 2020 and the possibility that, due to social distancing requirements etc, a physical hearing may not be possible.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

32. 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.

**JOHN BROOKS**
**TRIBUNAL JUDGE**

**RELEASE DATE: 14 APRIL 2021**