



Neutral Citation: [2024] UKFTT 00513 (TC)

Case Number: TC09201

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

London, Taylor House

Appeal reference: TC/2022/12708

PROCEDURE – application for additional witnesses – application for further and better particulars – applications for disclosure – application for costs

Heard on: 14 May 2024

Judgment date: 6 June 2024

Before

TRIBUNAL JUDGE ANNE FAIRPO

Between

L.ROWLAND & COMPANY (RETAIL) LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr J Bremner KC of counsel, instructed by FieldFisher LLP

For the Respondents: Mr A Tolley KC and Mr C Kelly of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

Introduction

1. This decision relates to a number of applications made at a case management hearing in respect of this appeal.

2. For context, the substantive appeal relates to assessments in respect of income tax and National Insurance Contributions made under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 and s8 (1) of the Social Security Contributions (Transfer of Functions etc.) Act 1999. The principal issue which will need to be decided at the substantive hearing is whether the locum pharmacists engaged by the appellant are employees for tax purposes.

HMRC's application for additional witnesses and the appellant's application for further and better particulars

3. These two applications were closely linked and so were considered together.

4. The appellant contended that disclosure, and so witness evidence, should be driven by pleadings and that proper particulars of their case should be given by HMRC. In this context, specifically, HMRC had stated that they could not "presently plead a detailed case on the third stage of the *Ready Mixed Concrete* test" as they had been unable to interview any of the locum pharmacists. The appellant applied for HMRC to be required to provide that detailed case; HMRC did not dispute that they would provide a more detailed case on this point but applied for additional locum pharmacist witnesses to be called, to provide their witness statements before HMRC provided such detailed case.

5. The "third stage of the *Ready Mixed Concrete* test" refers to the multifactorial assessment of provisions of the contract between the worker and the engager, in effect to determine whether a worker is in business on their own account. The test as a whole is set out in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at [515].

6. In summary, HMRC stated that they had attempted to interview locum pharmacists, but that the appellants had written to advise that they would apply for judicial review of that attempt. In the hearing, the appellants contended that they were entitled to take the view that HMRC's actions were unlawful. They considered that HMRC could have defended any judicial review proceedings but chose not to do so.

7. The appellants also considered that HMRC had provided detailed pleadings on the first two *Ready Mixed Concrete* tests and that, if any interviews were required, they would be as relevant to these tests. On that basis, they considered that HMRC were not prevented from supplying the further and better particulars without further witness evidence.

8. The appellants contended that witness statements had been provided from people with a multiplicity of roles, all of which was contended to be relevant to the points in dispute. It was contended that this would provide the Tribunal with a wide representative range of perspectives dealing with the locum experience. The appellants also noted that this was not a group litigation exercise; there was only one appellant. The evidence of the witnesses would go to the points in dispute. Data from a questionnaire relating to employment status had also been provided to HMRC. It was a matter for the appellant to decide how to deal with its evidential burden and the Tribunal could not impose requirements on litigants to call particular witnesses.

9. The appellants contended that it would not be proportionate to include the additional witnesses requested by HMRC, as this would extend the length of the hearing, potentially doubling the number of days required.

10. HMRC contended that the *Ready Mixed Concrete* exercise is case specific and determined on an individual basis, as confirmed in *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501 (*Atholl*). For this reason, they argued that more than two locum pharmacist witness statements would be required in order to be able to provide anything other than a generic case with regard to the third *Ready Mixed Concrete* test.

Decision on these two applications

Further witnesses

11. This appeal will require the panel at the substantive hearing to reach a conclusion on the employment status of locum pharmacists engaged by the appellant (somewhere over 1,000 in number).

12. The question of employment status is specific to an individual in this context, as noted by Mummery J in *Hall v Lorimer* [1992] ICR 739, at p744:

“In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person’s work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.”

13. More recently the same point has been made in *Atholl House Productions Limited* [2022] EWCA Civ 501 at [123]:

“The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could be reasonably be supposed to be known, *to both parties* (emphasis added).”

14. Fairly obviously, it will not be practical for the Tribunal to decide the employment status of each of the locum pharmacists engaged by the appellants over the years on an individual basis. However, the witness statements provided by the appellant have been given by two locum pharmacists and six employees of the appellant. The appellant’s own correspondence refers to the “wide variety of backgrounds, circumstances and working patterns of locums” (email of 21 July 2023).

15. Given the task that will be before the panel at the substantive hearing, and considering the case law as to how that task is to be approached, I do not consider that it is sufficient only two locum pharmacists to be called in circumstances where the appellant agrees that their engagements are of a “wide variety”. Whilst it is for the appellant to decide how to discharge their evidential burden, the complexity of the issues here is such that I do not consider that

the panel would be able to deal with the case fairly and justly with such limited locum evidence in accordance with Rule 2.

16. The Tribunal can require that a specific person provide documents and information to the Tribunal (Rule 5(2)(d) and Rule 16 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009). The Tribunal Rules also require that parties assist the Tribunal to further the overriding objective (Rule 2(4)).

17. At this stage, no specific potential witnesses have been agreed, although HMRC have apparently identified six potential locum witnesses. The Tribunal therefore cannot issue witness summons under Rule 16 at this stage.

DIRECTION

18. The parties are therefore each DIRECTED TO provide the Tribunal with details of five further locum witnesses (that is, a total of ten locum witnesses), so that the total number of locum witnesses at the hearing shall be twelve including the two who have already provided witness statements. This information shall be provided within eight weeks of the date of this decision. The appellant should advise whether or not witness summons will be required under Rule 16 in respect of these additional witnesses; the Tribunal will issue such summons if necessary.

19. It would assist the Tribunal if each of these further ten locum witnesses would provide a witness statement, such statement to be provided within twelve weeks after the date of this decision. If a witness is not prepared to provide a witness statement voluntarily, the Tribunal will list one or more preliminary hearings for such witnesses to be examined in chief (noting the Tribunal powers in Rule 15 and Rule 16).

Timing of further and better particulars

20. Given the overriding objective, and noting that HMRC contend that they are only able to provide a generic case in respect of the third stage of the *Ready Mixed Concrete* test before the additional witness evidence is available, I DIRECT THAT HMRC provide further and better particulars of their case in respect of the third stage of the *Ready Mixed Concrete* test within twenty eight days of the date on which all of the witness evidence directed above is available to HMRC. That date will obviously depend on whether or not the witnesses provide statements or are required to attend a preliminary hearing to give evidence in chief.

21. On balance, I do not consider that there is anything to be achieved by requiring a generic case to be provided, as it would then seem inevitable that an application would be made to amend that case after the witness evidence is provided. The generic case is unlikely to provide any significant assistance in formulating witness evidence; the test and case law in respect of that test is well known.

22. I further DIRECT THAT:

(1) Within 28 days of the provision of the revised Statement of Case by HMRC the appellant shall state to the Tribunal and HMRC whether it wishes to file an additional Statement of Case in reply; and

(2) If the appellant does wish to file such a reply, it shall send such additional Statement of Case to the Tribunal and HMRC within 28 days of the date in (1) above.

Application for disclosure by appellant

23. The parties agreed the disclosure requested in principle, as modified in the hearing. The parties are at liberty to apply to the Tribunal if the sampling process cannot be agreed.

Interim costs application

24. The appellant applied for an interim costs order. They contended that HMRC had conceded a number of matters which meant that the appellant would inevitably be successful and had improved its position as a direct result of having taken steps to assert its rights at Tribunal and so must be regarded as a successful party, following the common sense approach in *Day v Day* [2006] EWCA Civ 415 at [16]. Recovery of its fees should not be unnecessarily delayed in the circumstances (per the *Woolf Report*).

25. The appellant applied in the alternative for a proportion of costs to be awarded on an interim basis by reference to the proportion of the quantum at stake, with the balance to be considered later in the litigation. The appellant confirmed that it was not proposing an issues-based costs order.

26. HMRC contended that it had not conceded anything other than a point on carelessness. There had been no relevant concession for the purposes of costs and none of the costs in the one page summary provided by the appellant had identified specific costs related to the concession on carelessness, or any other concession contended for by the appellant.

Decision on interim costs application

27. This has, unsurprisingly, been categorised as a complex case. The Tribunal therefore has power to award costs under Rule 10(1)(c) of the Tribunal Rules.

28. I do not agree with the appellant that HMRC's decision not to pursue various categories and elements of the assessments provides a reason to assume that the appellant will be 'the' successful party at the substantive hearing. Without deciding the substantive appeal I consider that it is not possible to determine whether all or even part of the costs should be awarded.

29. The fact that the appellant has appealed, and HMRC have subsequently declined to pursue aspects of the assessments, therefore does not mean that the appellant is a 'successful party' for these purposes at this stage. The decision in *Bastionspark* [2016] UKUT 425 at [19] makes it clear that the relative success or otherwise of a party can only be established after the substantive appeal has been decided.

30. The application is therefore refused and the issue of costs will be dealt with following the substantive hearing.

Right to apply for permission to appeal

31. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 06th JUNE 2024