Neutral Citation: **[2024] UKUT 00209 (TCC)**

Case Number: UT/2023/000088

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
Fetter Lane
London
EC4A 1NL

LATE APPEAL – whether FTT's decision wrongly premised on lateness of appeal being due solely due to a mistake – HMRC's failure to disclose material – inability of the appellant to consider properly an appeal or review in the absence of material not disclosed by HMRC

Heard on: 20 June 2024
Judgment date: 01 August 2024

Before

JUDGE PHYLLIS RAMSHAW
JUDGE GUY BRANNAN

Between

CRANHAM SPORTS LLP

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Simon Browne KC

For the Respondent: Marianne Tutin, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal from the decision of the First-tier Tribunal ("FTT") released on 18 April 2023 ("the Decision"). Essentially, the issue before the FTT was whether the Appellant should be granted permission to bring a late appeal. HMRC contested the Appellant's application for permission. In the Decision the FTT refused permission and on 3 August 2023 refused the Appellant permission to appeal the Decision. On 20 November 2023 this Tribunal (Judge Rupert Jones) granted permission to appeal on four grounds, which are explained below, and the appeal now comes before this Tribunal.

2. For the reasons given below, we dismiss this appeal.

BACKGROUND

3. The Appellant is a limited liability partnership, established on 24 August 2009, of which a member is Barry Cowan, a former professional tennis player and more recently a tennis commentator.

4. Mr Cowan performed services as a tennis commentator for Sky UK Limited ("Sky") from around 2013. The appeal, had it been admitted by the FTT, would have concerned the engagement between the Appellant and Sky in respect of the provision of Mr Cowan's services as a commentator on Sky Sports' tennis programmes during the 2013/14 to 2018/19 tax years (the "Sky Contract") and whether the intermediaries legislation, commonly known as IR35, applied to that engagement.

5. As a result of HMRC's review of the Appellant's Sky Contract, determinations made under regulation 80 of the Income Tax (Pay as Your Earn) Regulations 2003 (the "Determinations") and notices under section 8 of the Social Security and Contributions (Transfer of Functions) Act 1999 (the "Notices") were issued in respect of the 2013/14 to 2018/19 tax years, which were appealed by the Appellant to HMRC. The charges under the Determinations and Notices were stood over, pending the outcome of the review of the contractual arrangements. Essentially, HMRC assert that during the relevant tax years the arrangements between the Appellant and Sky are such that had they taken the form of a contract between Mr Cowan and Sky, Mr Cowan would be regarded as employed by Sky with the result that additional income tax and class 1 national insurance contributions were due.

6. So far as relevant to the present appeal, the following correspondence was exchanged between the parties:

(1) On 17 June 2021, HMRC issued an opinion (dated 18 June 2021) stating that HMRC had considered communications between HMRC and both the Appellant's representative and Sky. HMRC reached the conclusion that, applying IR 35, under a notional contract between Mr Cowan and Sky, Mr Cowan would be regarded as employed by Sky with the result that additional income tax and class 1 National Insurance Contributions were allegedly due. The letter stated:

> "… my opinion assumes that the information you have supplied accurately reflects the basis on which services are provided and only applies to the contract that has been supplied by you. If the contract is not fully acted upon in practice or there are other oral or implied conditions which have not been presented to me, my opinion may be modified.

…

> If I have misunderstood or misinterpreted anything within the information supplied to me, please let me know. I will of course readdress any consequent issues and advise you accordingly. If you disagree with the contents of this letter you should tell me by the date mentioned below why you think it is wrong and provide any further information and/or documentation that you think is relevant. I will consider what you tell me and advise you accordingly. If I do not hear from you by 19 July 2021, I will assume your agreement …"

(2) The Appellant's representative, Mr Leslie, disagreed with the opinion, setting out 23 disputed points in an email on 8 July 2021 commenting that the decision was unsafe and completely incorrect.

(3) Notwithstanding the final paragraph of HMRC's letter of 17 June 2021, HMRC did not respond to the detailed points raised by Mr Leslie in his email of 8 July 2021. Instead, by a letter which was dated 9 December 2021, but which was sent under cover of an email on 8 December 2021, HMRC provided its "view of the matter". So far as relevant, the letter stated:

> "Having reviewed the relationship between [Sky] and [the Appellant] … our view remains the same as set out in our opinion letter … that had there been a contract between Barry Cowan personally and [Sky] it would be considered a contract of service i.e. employment. As such, the engagement is subject to the "Intermediaries" Legislation (IR35).
>
> …
>
> To settle the appeal, you have the option to either accept HMRC's current view regarding the status, take up our offer of an internal review by an HMRC officer who has had no previous dealings with the case or refer the appeal to the Tribunal Service. If you take up the offer of an internal review you will have the opportunity to provide any further information or reasons in support of your case. The review officer will write and tell you the outcome of their review. If you opt for a review you can still appeal to the tribunal after the review has finished.
>
> If you disagree with HMRC's position, you have 30 days from the date of this letter within which to either accept my offer of an internal review by replying to this letter or notify the appeal to tribunal.
>
> If you neither accept the offer of a review nor notify the appeal to the tribunal, the appeal will be treated as settled by agreement under section 54(1) of the Taxes Management Act 1970 on the basis of my view of the matter as set out above."

(4) On 8 December 2021, within 23 minutes of receiving HMRC's email of 8 December 2021, the Appellant's representative sent an email which stated:

> "You say your view has not changed but you have failed to respond at all to any of the points we have raised in our email dated 9/7/21.
>
> So is this how you intend matters to progress, that is, you simply ignore the points we have raised and carry on regardless?
>
> No wonder we have raised a complaint in this case and if this is the best you can do, we are raising another complaint as this response is completely unacceptable.
>
> … please reply by 22 January 2022. If you can't reply by this date, then let us know."

(5) The Appellant lodged a complaint in respect of the non-disclosure of certain documents and material obtained by HMRC from Sky TV. That complaint was upheld in April 2022, but the relevant material was not disclosed until July 2022.

(6) On 17 January 2022, HMRC made a without prejudice approach to the Appellant to settle the dispute.

(7) By letter dated 26 January 2022 (but again sent the day before), HMRC informed the Appellant that the matter was now treated as settled by agreement in accordance with section 49C(4) Taxes Management Act 1970 ("TMA"), on the basis that the 30-day statutory time limit had elapsed and the Appellant had neither accepted the offer of an internal review nor notified an appeal to the FTT, and as explained in the "view of the matter letter". The Appellant's representative indicated he would not accept the settlement and would raise a third complaint:

> "There is no way the matter is going to be settled in this way.
>
> Your 'opinion' dated 18/6/21 was full of holes and errors, plus it also seemed to rely on information that you purport to have come from Sky, however, as explained, we have not seen this correspondence.
>
> You are well aware of our position and I sent you a very long e-mail on 8/7/21, so am still awaiting your detailed response, rather than your very short letter dated 9/12/21 which I received by e-mail on 8/12/21 and to which I responded the same day, but have received nothing further from you until today."

(8) HMRC explained, in an email dated 2 February 2022, that the Appellant had failed to meet the statutory deadlines and they were required by operation of section 49C(4) TMA to treat the appeal as settled.

(9) On 2 February 2022 HMRC confirmed that as there had been no request for review or notification of appeal the provisions of section 54(1) TMA bought the matter to a close. By an email response the same day the Appellant's representative continued to argue that the dispute would or should remain open until HMRC had fully responded to the points raised in the email of 9 July 2021 and pending disclosure of the Sky correspondence and documentation. It was also contended that December and January were busy months for the representative. At this point a request was made for a review.

(10) On 16 February 2022, the Appellant's representative indicated that an internal review should not be pursued unless a response was provided in respect of points raised in earlier correspondence. The representative did not explain why the offer of a review was not accepted in time.

(11) By way of a letter dated 17 February 2022 (although sent the day before), HMRC rejected the Appellant's late acceptance of the offer of a review on the basis the Appellant had not provided a reasonable excuse for the late request for a review.

(12) In the email response to that letter the Appellant's representative communicated his understanding that the dispute had, in fact, been referred for a review. However, he continued to contend that prior to such a review it was necessary for HMRC to provide a response to the points raised in his email of 9 July 2021 and for disclosure of the Sky documentation. Further reference was made to the without prejudice offer to settle. HMRC responded confirming that the offer of an internal review had not been accepted and indicating that the reasons provided for failure to request an in-time review did not represent a reasonable basis for granting a late review.

(13) Finally, on 10 March 2022 an appeal was notified to the Tribunal. The Notice of Appeal was dated 18 February 2022 but the Appellant accepted that it was not sent to the Tribunal until 9 March 2022 and was received one day later. The appeal was therefore, on HMRC's view, brought 61 days out of time.[1] The Appellant, before us, argued that the FTT had actually accepted that the deadline was 25 January 2022, and therefore the appeal was filed 42 days late.

THE RELEVANT LEGISLATION

7. Section 49A(2) TMA sets out the options open to a taxpayer or HMRC after notice of appeal has been given to HMRC, namely: (i) the appellant may request an internal review (under section 49B); (ii) HMRC may offer an internal review (under section 49C); or (iii) the appellant may notify an appeal to the FTT (under section 49D).

8. Where HMRC offers an internal review, section 49C TMA states, as far as relevant:

> "(3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with section 49E.
>
> (4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under section 54(1) for the settlement of the matter
>
> …
>
> (6) Subsection (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49H.
>
> …
>
> (8) In this section "acceptance period" means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question."

9. Section 49H TMA applies where a taxpayer seeks to notify an appeal to the FTT after an internal review has been offered by HMRC. It states, relevantly (emphasis added):

> "(2) The appellant may notify the appeal to the tribunal within the acceptance period.
>
> (3) But **if the acceptance period has ended**, the appellant may notify the appeal to the tribunal **only if the tribunal gives permission**.
>
> (4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.
>
> (5) In this section "acceptance period" has the same meaning as in section 49C."

10. Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides, relevantly, as follows:

[1] We were informed that, before the FTT, HMRC had submitted, and the FTT found, that the appeal was notified 60 days out of time. HMRC submitted that the period had been calculated incorrectly because the Appellant indicated that the appeal had been submitted on 9 March 2022, but was not in fact received by the FTT until the following day.

> "(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal-
>
> (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
>
> (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

MARTLAND V HMRC

11. In *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*") this Tribunal (having considered a number of authorities) gave guidance to the FTT as to how it should approach the balancing exercise involved in considering applications by taxpayers for permission to make late appeals. It was common ground that *Martland* contained the appropriate approach to adopt in the present case. In *Martland*, the Tribunal said:

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected…The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.
>
> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*[2], Moore-Bick LJ said this at [46]:
>
> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very

[2] *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472

> weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."
>
> …
>
> It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.
>
> 47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of MooreBick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

THE DECISION

12. References in square brackets are to the Decision unless the context otherwise requires.

13. At [19] the FTT made the following findings of fact based on the documents before it:

> "(1) HMRC's opinion as to the deemed employment status of the Applicant was reached using material available provided to them by Sky which was not made available to the Applicant. That material was not provided to the Applicant until July 2022.
>
> (2) The Applicant requested the Sky documentation and considered it important and relevant to the basis on which it intended to challenge HMRC's decision.
>
> (3) HMRC clearly and unambiguously notified the Applicant of his statutory rights to continue the dispute following the view of the matter letter.
>
> (4) Immediately upon receipt of the view of the matter letter the Applicant's representative took issue with HMRC's conclusion as stated but did not request a review of that decision.
>
> (5) HMRC sent a without prejudice offer to settle. That letter appears to have been a case of the right hand not knowing what the left hand was doing and may have been sent by mistake, but it was nevertheless sent and received.

> (6) The appeal was not notified until 10 March 2022 and was therefore 60 days late."

14. At [22]-[25] the FTT, after referring to the relevant statutory provisions, considered the decision of the Upper Tribunal in *Martland*. It was common ground before the FTT, and before us, that the principles (involving the application of a three-stage test) set out in *Martland* were the appropriate principles to apply in the present case.

15. At [25] the FTT referred to the decision of the Upper Tribunal in *Muhammed Hafeez Kantib v HMRC* [2019] UKUT 189 (TCC) to the effect that the acts and failures of a representative are to be assimilated to those of the appellant save in exceptional circumstances.

16. Before addressing the parties' submissions, the FTT said at [27]:

> "Somewhat curiously, in my view, the Applicant did not seek to contend that the email of 8 December 2021 was, in substance, a request for internal review. The Applicant accepted that no internal review was requested at any time prior to 2 February 2022. The Applicant accepted that to have not requested a review was an oversight or mistake but one rooted in a view that until HMRC had responded to the detailed points raised in the email of 9 July 2021 or provided the Sky documentation there had been no effective view of the matter communicated."

17. After setting out the parties' submissions, the FTT then applied the *Martland* principles in the present case.

18. As regards the length of the delay (the first stage of the *Martland* test), the FTT noted at [35] that the delay was 60 days in the context of a statutory time limit of 30 days and referred to the decision in *MPTL Ltd v HMRC* [2022] UKFTT 472 ("*MPTL*"). *MPTL* concerned a similar delay and in that case the FTT refused permission to appeal out of time, stating at [23]:

> "…whilst it does not rank amongst some of the longest delays that this Tribunal has had to consider it is long enough to be considered serious requiring time to be spent addressing the second and third stages of the *Martland* test."

19. The FTT at [35] agreed with this statement.

20. The FTT then considered the second stage of the *Martland* test, viz the reason for the delay. The FTT noted at [38] that the reasons for the delay in the present case were the same as those in *MPTL* i.e. a bona fide mistake. The FTT at [38]-[39] said:

> "…As here, MPTL were given instructions on how to file an appeal or request a review and were notified of the consequences of doing neither. Judge Aleksander confirmed his view in that case that HMRC were under no duty to tell a taxpayer, particularly a professionally represented one, that they needed to act within 30 days, but noted that in any event the view of the matter letter did make it clear what needed to be done by when.
>
> 39. It is my view that consistently with the requirements of section 49C TMA where HMRC notify a taxpayer of an offer of a review they must communicate the time limit in which to accept the offer. Whilst it might be debateable whether they must then inform a taxpayer of the alternative of notifying an appeal and the consequences of failing to do either, it is clearly good administration to do so. However, that point is entirely moot where standard

> procedure, which was followed in the present case, is for a full recitation of the taxpayer's statutory rights to be included in the view of the matter letter."

21. At [40] the FTT noted that there was no direct or oral evidence given by the representatives as to how the mistake arose. The FTT continued at [41]:

> 41. The representatives in this case were chartered accountants acting for the Applicant in connection with its tax affairs and should have been, and were in any event, were made aware of the statutory time limit in which to request a review or notify an appeal. As such there is no sensible basis to contend that they were unaware that it was running from the letter dated 9 December 2021. Acting prudently, a competent professional could have been expected to have protected the Applicant's position by formally asking for an internal review even were the view held that the view of the matter letter was inadequate. For this reason I find that no adequate reason for the delay has been provided with the consequences that I must proceed to the third stage of the *Martland* test."

22. Finally, the FTT considered the third stage of the *Martland* test stating at [42] that it must "consider all of the circumstances and determine the "just" outcome." The FTT at [43] rejected HMRC's submission that in the exercise of the statutory discretion the provisions of the overriding objective (Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) of dealing with matters fairly and justly did not apply.

23. In considering the third stage of the *Martland* test the FTT at [44] reminded itself that when undertaking the balancing exercise of considering all the circumstances particular importance should be given to the requirement to enforce compliance with statutory time limits and for litigation to be conducted efficiently.

24. At [45]-[48] the FTT said:

> 45. I note that the letter of 8 December 2021 notified the need to act within 30 days but also requested a response by 22 January 2022 with an indication that if that deadline could not be complied with then to contact HMRC. The Applicant did immediately communicate dissatisfaction with the decision and invited a full response to the points of dispute raised in July 2021. Following that email, and prior to 22 January 2022 (but after the 30 days from 9 December 2021 had passed) HMRC sent a communication inviting without prejudice settlement discussions. Albeit that the invitation was firmly rejected on behalf of the Applicant I consider that a reasonable conclusion to have drawn at that time was that the dispute remained live and that HMRC had, in some way, treated the email of 8 December 2021 as keeping the appeal alive. Certainly, I consider that until 25 January 2022 a failure to notify the appeal was not unreasonable conduct.
>
> 46. The reasonableness of a continued delay post 25 January 2022 diminishes. The Applicant did not immediately, upon receipt of that letter, request a review, it took a further week and when the request for review was rejected on 17 February 2022 it took a further 3 weeks to notify the appeal. In the period from 25 January 2022 the Applicant's representative simply expressed increased frustration and indignation at HMRC's conduct without considering what course of conduct would represent his client's best interests.
>
> 47. The representative's failure to appreciate and act in the circumstances is not a factor which militates in the Applicant's favour because, as submitted by HMRC, there is authority which is binding on me that the advisor's failures are to be treated as those of the Applicant (see *Katib* which references *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666).

25. Next, at [48] the FTT considered that the sum at stake and the loss of opportunity to challenge it was a factor to be taken into account but was not one which carried significant weight.

26. The FTT at [49]-[50] considered the relevance of the strengths and weaknesses of the Appellant's case:

> "49. In *Martland* the UT considered that the Tribunal could have regard to any obvious strength or weakness of the applicant's case in the context of the balance of prejudice with there being obviously greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. However the Upper Tribunal noted a word of caution that the Tribunal should not "descend into a detailed analysis of the underlying merits of the appeal". Quoting from the judgment of Moore-Bick LJ in *R (oao Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 the UT notes that in the majority of cases the merits of the appeal have little to do with whether it is appropriate to grant an extension of time and firmly discouraged any investigation into anything other than the identification of an obviously strong or weak case.
>
> 50. I note that Judge Aleksander did consider the merits of the appeal in MPTL concluding that they were "not good". HMRC invited me to conclude the same and give more weight to this factor as justifying refusal of the application. With respect to Judge Aleksander I consider it inappropriate in an IR35 case to conclude other than success is likely to be arguable. The cases are highly fact specific requiring a multifactual evaluation of the relationships between the parties. That there are cases which fall on both sides of the line (even for those contacting to provide services to Sky) would indicate that I should be discouraged from consideration of the merits. For that reason I have not considered them and express no view."

27. At [51] the FTT noted HMRC's submission that HMRC would be put to the inconvenience and expense of defending an appeal which they were entitled to conclude was settled as at 9 January 2022.

28. The FTT reached its conclusion at [52]:

> "52. Having weighed all of these factors I have concluded that I am, in the end, not persuaded to grant permission. I consider that had the appeal been notified within a reasonable period after 25 January 2022 I would have granted permission firstly because the period of delay would have been short and secondly because I consider that the conflict in the letter as to dates and the without prejudice correspondence could have created an impression to the representative and his client that the time limit was not running. However, by 25 January 2022 it was clear that HMRC considered the time limit to have expired. Rather than seek to remediate the position as soon as possible the representative continued to lock horns with what he considered to be the outrageous conduct of HMRC. He did not appeal but continued to make complaint to HMRC."

GROUNDS OF APPEAL

29. Permission to appeal was granted on the following four grounds.

Ground 1

30. The Decision was wrongly premised upon the reason for failure to appeal within time was solely a mistake on the part of the Appellant/his representative. The reasons were wider and were discussed and accepted between the FTT Judge and both counsel, yet no mention was made of them in deciding the correct decision in all the circumstances.

Ground 2

31. The Judge wrongly referred to the Appellant not stating the 8 December 2021 email was a request for a review. The stance of the Appellant was clearly that an objection had been raised but the format of the objection had not been finalised (further see Ground 3 for the reasons). Consequently, the Decision failed to take the Appellant's case on this point this into consideration in deciding the correct decision in all the circumstances.

Ground 3

32. The Decision failed to consider the inability of the Appellant being able to consider properly an appeal or review until all the information had been provided. The essential material from Sky upon which they relied heavily had wrongly not been disclosed to the Appellant (and was not disclosed until ordered in July 2022). This factor simply does not appear in the reasoning for deciding the correct decision in all the circumstances.

Ground 4

33. The Decision stated that the appeal would have been allowed if the Appellant had notified the HMRC within a reasonable period after 25 January 2022 without further stating what a reasonable period would have been. The judgment clearly allowed an extension given the conduct of the HMRC. Once that conduct is a live issue then all the conduct to [sic] the HMRC is relevant to deciding the correct decision in all the circumstances to be weighed against the conduct of the Appellant. The fact that the Appellant stated on 2nd February 2022 that an appeal would follow but first explored a review has not been weighed against the conduct of the HMRC, including their refusal of a review on 17th February 2022 and continued failure to disclose. The Decision failed to consider this is in fact a 21-day delay to 10th March 2022.

RELEVANT GENERAL PRINCIPLES

34. In *HMRC v Marlborough DP Ltd* [2024] UKUT 98 (TCC) ("*Marlborough*"), this Tribunal at [75] and [80] stated a number of general principles which we did not understand to be in dispute in the present appeal:

> "75. In our view, the FTT was faced with an evaluative judgment as to whether the payment by MDPL via the RT to Dr Thomas was from employment or in respect of his shareholding in MDPL. Essentially, this was an evaluative decision to be reached in the light of all the relevant evidence. It is well-established that this Tribunal should be reluctant to interfere with the decision of the FTT, which heard all the witness evidence and considered all the documentary evidence, in a decision where the underlying legal principles – in this case what constitutes a payment "from" employment – are not in dispute.
>
> …

> 80. Before examining the disputed passages of the Decision and the transcript of the hearing before the FTT, we should record that it was common ground that the authorities established a number of propositions. First, was the proposition that the Decision had to be read fairly and as a whole, not picking upon individual passages in isolation. Secondly, the FTT was under no obligation to deal with every submission or piece of evidence – to conclude otherwise would place an intolerable burden on the fact-finding tribunal. It was necessary only to deal with relevant evidence and submissions. Moreover, the mere fact that the FTT does not refer to a piece of evidence does not mean that the evidence was overlooked or ignored. Thirdly, there was a presumption that if the FTT correctly sets out the law it can be taken to have applied it correctly. Obviously, mistakes can be made and if it can be shown that the FTT did not apply the legal test correctly that presumption can be rebutted."

35. In addition, we consider it relevant to refer to the decision of the Court of Appeal in *DPP Law v Greenberg* [2021] IRLR 1016 at [57] and [58] ("*Greenberg*"), which this Tribunal clearly had in mind in the passage just quoted from *Marlborough*. Although this was an appeal from the Employment Appeals Tribunal the Court of Appeal's reasoning is clearly applicable generally and is worth quoting at length. Popplewell LJ said:

> "[57] The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:
>
> (1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller* [2011] ICR 806, Mummery LJ said at p. 813:
>
> > "The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid".
>
> This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE")* [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.
>
> (2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek* compliant (*Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In *Meek*, Bingham LJ quoted with approval what Donaldson LJ had said in *UCATT v Brain* [1981] I.C.R. 542 at 551:

> "Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law …their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."
>
> (3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in *RSPB v Croucher* [1984] ICR 604 at 609-610:
>
> > "We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in *Retarded Children's Aid Society Ltd. v. Day* [1978] I.C.R. 437 and in the recent decision in *Varndell v. Kearney & Trecker Marwin Ltd* [1983] I.C.R. 683."
>
> 58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

36. In our judgment, the FTT in the present case was making an evaluative decision when applying the *Martland* principles. That is particularly so at the third stage when the FTT was required to consider all the relevant circumstances. As the passage from *Marlborough* quoted at paragraph 34 above indicates, an appellate tribunal should be reluctant to interfere with the judgment of the FTT in carrying out its evaluative assessment unless it has plainly erred in law.

37. There is, relevant to this appeal, a circumstance in which this Tribunal may interfere with an evaluative judgment of the FTT. We may set aside a decision of the FTT if it took into account irrelevant considerations or failed to take into account relevant considerations. On this ground, it must further be shown that the considerations wrongly taken into or left out of

account must be material in the sense that they might (not would) have affected the outcome: see Henderson LJ in *Degorce v HMRC* [2017] EWCA Civ 1427 at [95].

GROUND 1 – SUBMISSIONS AND DISCUSSION

38. In relation to Ground 1, Mr Browne KC, appearing for the Appellant before us and before the FTT, essentially argued that the FTT had fallen into error by failing to take into account relevant considerations.

39. Mr Browne submitted that there were other factors beyond a simple mistake by the Appellant's representative which took this case "out of the normal". HMRC had withheld relevant material and documentation, particularly in relation to Sky, which was plainly, in Mr Browne's submission, a relevant factor. Furthermore, it was clear that the Appellant's representative was expecting an answer to his email of 8 December 2021 and that he was expecting that his complaint about the withholding of documentation would be addressed. Mr Browne, in support of his submission, took us to the transcript of the hearing before the FTT which recorded an exchange between the FTT judge and Mr Browne and also between the FTT judge and Ms Tutin, who appeared for HMRC before the FTT and before us. The relevant passages from the transcript of the hearing (which was held by video) were as follows:

> "Page 9/
>
> JUDGE BROWN: Can I just ask, so you have talked about one and you say it is not serious and significant in the context.
>
> MR BROWNE: Yes.
>
> JUDGE BROWN: You talk about the balance. But what do you say the reason for the default was?
>
> MR BROWNE: The reason was mistake. The reason was issue had been joined by that email of 8 December and the accountant was expecting - it is quite clear on the correspondence it went dead - one side expecting a reply and the other side waiting until the date has passed - although they acted contrary to that - and then writing a letter saying, "Well, they all expired on 9 January." So, bearing in mind, of course, December/January periods we all know what in the accountancy world how busy that is, but it was mistake. It was not a deliberate default, we say; it was not just putting the letter away and ignoring it. The response was immediate (within minutes). Now, the court can say one should chase ---
>
> JUDGE BROWN: But would Mr Leslie [the Appellant's representative] (inaudible) mistake or (inaudible) --MR BROWNE: It could well be that - oh, you have frozen.
>
> JUDGE BROWN: --- to ask for a ---
>
> MR BROWNE: Sorry, you froze there, ma'am.
>
> JUDGE BROWN: Can you hear me?
>
> MR BROWNE: I can. Can you repeat that question or statement?
>
> Page 10/
>
> JUDGE BROWN: I said would Mr. Leslie say that he was even in the position to ask for an internal review, because was his position not: "I could not ask for an internal review because I did not actually have a proper review of the matter letter"?

MR BROWNE: Correct, that is exactly his position."

40. Mr Browne also referred to the following exchange between the FTT judge and Ms Tutin (who had not heard the previous full exchange between Mr Browne and the Judge because of an interruption in the video link):

> "MS TUTIN: Madam, I am sorry; my connection dropped yet again. The last thing I heard Mr Browne saying was that he accepted it was a mistake. I think you then asked a question, but I am afraid I did not catch any of that.
>
> JUDGE BROWN: Oh. So, I asked a question about mistake versus whether Mr Leslie felt that he was in a position to actually ask for a review because he thought he was waiting for a full response (i.e., was the view of the matter letter a full view of the matter letter or was it a view of the matter letter by name?) and Mr Browne confirmed that it was as per the email. He was expecting a fuller response that addressed the technical points that had been raised in July ---
>
> MS TUTIN: Thank you."

41. Mr Browne submitted that the fact that the Appellant's representative was expecting a fuller reply and the fact that HMRC had withheld relevant documents were not matters that were taken into account in the third stage of the *Martland* test i.e. an evaluation of all the circumstances.

42. We reject Mr Browne's submission. In our view, the FTT plainly had in mind the fact that the Appellant's representative was expecting a reply to his email of 8 December 2021 and that HMRC had withheld relevant material and documentation. The FTT made this clear at [27] in the passage quoted above at paragraph 16. In addition, the FTT also referred to these matters at [40] when it said:

> "Mr Browne for the Applicant contended that the correspondence spoke for itself and that it was plain that pending a full and proper response to the details points of dispute provided on 9 July 2021 and without disclosure of the Sky documentation the dispute was live."

43. As we have already stated, a decision of the FTT, and indeed any judgment, must be read fairly and as a whole (*Marlborough* and *Greenberg*). The mere fact that the FTT did not expressly refer to these matters in its consideration of the third stage of the *Martland* test cannot fairly be taken to indicate that it had ignored these factors. The FTT was clearly aware of these matters – it referred to them twice – and it would be a hypercritical reading of the Decision to assume that it had failed to take them into consideration or somehow no longer had these matters in mind when applying the *Martland* test. These comments also apply to Grounds 3 and 4 which we shall consider below.

44. We consider that Ground 1 discloses no error of law.

GROUND 2 – SUBMISSIONS AND DISCUSSION

45. Essentially, in Ground 2 Mr Browne argued that the FTT had at [27] wrongly referred to the Appellant's representative not stating its 8 December 2021 email was a request for a review.

46. Mr Browne took us to an extract from the transcript of the FTT hearing:

> "JUDGE BROWN: Mr Leslie sent an email on the 8th. Do you say that was de facto a request for a review? Because clearly you had already appealed to

> HMRC, so we are beyond that point and it was not a notification of that appeal to the Tribunal, so how do you want me to interpret the email of the 8th? Do you accept that it is not a request for review, but I should be exercising my discretion, or do you say in fact that should be treated as a request for review?
>
> MR BROWNE: The first, because the actual request for review was made later in February and that was also a reason for the delay that when Mr Leslie realised the position he was in, that it was then the formal request was made, so I am not going to try and overegg my case saying, "Oh, it was definitely a request." But for the court it was clearly joinder of issues on this matter rather than accepting the ruling and we say that is something that should go into balancing the relevant factors. It is not somebody who missed a letter/wrote a letter but did not do anything about it. It is somebody who actually acted upon the letter joining issue with the determination."

47. Mr Browne contended that it was open to the FTT to interpret the email of 8 December 2021, but the position of the Appellant was that the issue was clearly joined with HMRC's decision, although the form of the challenge had not been clearly indicated.

48. At [27] the FTT said:

> "27. Somewhat curiously, in my view, the Applicant did not seek to contend that the email of 8 December 2021 was, in substance, a request for internal review. The Applicant accepted that no internal review was requested at any time prior to 2 February 2022. The Applicant accepted that to have not requested a review was an oversight or mistake but one rooted in a view that until HMRC had responded to the detailed points raised in the email of 9 July 2021 or provided the Sky documentation, there had been no effective view of the matter communicated."

49. Mr Browne contended that the FTT had erred in two respects. First, the Appellant did not abandon the contention that the 8 December 2021 email could be in substance a review request. The case was that it could not be over-egged. In substance, it could have been a request for a review as the issue was joined with HMRC. Secondly, the Appellant did not accept that it was an oversight or error not to have requested a review.

50. We reject Mr Browne's submissions. In fairness, at the hearing, Mr Browne accepted that Ground 2 was not his strongest ground of appeal. We agree.

51. As Ms Tutin observed, if the Appellant was contending that the email of 8 December 2021 was a request for a review, then it would have claimed that the statutory time limit had not expired and that the appeal was notified in time. The Appellant had abandoned its case that the email was an acceptance of the offer of a review.

52. In any event, the email of 8 December 2021 from the Appellant's representative could not, in our view, be regarded as the acceptance of HMRC's offer of a review. It was a somewhat belligerent reply (no doubt expressing the Appellant's representative's frustration with HMRC) to HMRC and seems impossible to interpret it as the acceptance of the offer of an internal review.

53. We also reject Mr Browne's submission that its representative simply failed to state the method of review to be chosen. There was no choice on offer – there are no different methods of review. If the Appellant had notified HMRC of acceptance of the offer of a review under section 49C(3) TMA, HMRC would have been under an obligation to review the matter in accordance with section 49E TMA. It did not do so.

54. In so far as Mr Browne submitted that the FTT failed to consider the reasons for the delay (i.e. that certain documentation relating to Sky had not been provided), the FTT found at [37] that the reason for the delay was a mistake made by the Appellant's representative in not realising that the 30 day period has started to run from 9 December 2021. The FTT, in our view, had this in mind throughout the Decision.

55. We consider that Ground 2 discloses no error of law.

GROUND 3 – SUBMISSIONS AND DISCUSSION

56. In pursuance of this ground of appeal, Mr Browne submitted that the FTT failed to consider the Appellant's inability to consider an appeal or a review until all the documentation relating to Sky had been provided.

57. Ms Tutin accepted that the Appellant's representative did not receive all of the Sky documentation until June 2022.

58. We reject Mr Browne's submission.

59. At [40] the FTT said:

> "Mr Browne for the Applicant contended that the correspondence spoke for itself and that it was plain that pending a full and proper response to the details points of dispute provided on 9 July 2021 and without disclosure of the Sky documentation the dispute was live."

60. It seems clear to us that the FTT had the fact that HMRC had not provided the Sky material to the Appellant firmly in mind. Again, reading the Decision fairly and as a whole we do not consider that the FTT failed to take into account this factor. The fact that the FTT did not refer expressly to the absence of the Sky documentation when considering the third stage of the *Martland* test does not, in our view, indicate that it did not have this in mind.

61. In any event, we agree with the FTT's overall conclusion– what clearly happened was that the Appellant's representative was focused on demanding answers to his emails and overlooked the need to take the relatively simple procedural step of either lodging an appeal with the Tribunal or accepting the offer of a review. The steps were clearly set out in HMRC's letter of 8 December 2021 which stated:

> "If you disagree with HMRC's position, you have 30 days from the date of this letter within which to either accept my offer of an internal review by replying to this letter or notify the appeal to tribunal.
>
> If you neither accept the offer of a review nor notify the appeal to the tribunal, the appeal will be treated as settled by agreement under section 54(1) of the Taxes Management Act 1970 on the basis of my view of the matter as set out above."

62. We consider that Ground 3 discloses no error of law.

GROUND 4 – SUBMISSIONS AND DISCUSSION

63. Mr Browne submitted that the FTT had failed to identify the length of a reasonable period, in circumstances where it stated that it would have been minded to grant permission had an appeal been notified within a reasonable period after 25 January 2022. The fact that the Appellant stated on 2nd February 2022 that an appeal would follow but first explored a review

had not been weighed against the conduct of the HMRC, including their refusal of a review on 17th February 2022 and continued failure to disclose. The FTT clearly allowed an extension given the conduct of the HMRC. The judgment failed to consider this was in fact a 21-day delay to 10th March 2022.

64. We reject Mr Browne's submissions.

65. At [52] the FTT referred to conflict as to dates (in the letter of 9 December 2021) and without prejudice correspondence from HMRC, sent shortly after the statutory time limit expired, which could have created an impression that time was not running. However, the FTT found (also at [52]) that it was clear by 25 January 2022 that HMRC considered the time limit had expired. The FTT also found at [46] that the reasonableness of a delay after 25 January 2022 was diminished. The Appellant took a further three weeks to notify an appeal after its request for a review was rejected by HMRC. In our view, the FTT was entitled to reach the conclusion that it did and that it did not fail to take account of any relevant considerations, including the conduct of HMRC.

66. Furthermore, we reject Mr Browne's submission that the FTT failed to identify or define the length of a reasonable period following HMRC's letter of 25 January 2022. There was no requirement for it to do so.

67. We also reject Mr Browne's submission that the FTT allowed an extension. The matter under consideration by the FTT was whether permission to bring a late appeal should be allowed. Its task was to consider the whole period of the delay. By finding that the conduct for the delay was reasonable up to 22 January 2022 does not alter the length of the delay which remained 60/61 days.

68. We consider that Ground 4 discloses no error of law.

DISPOSITION

69. For the reasons given above, we have concluded that the Decision discloses no error of law and, therefore, we dismiss this appeal.

COSTS

70. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

JUDGE PHYLLIS RAMSHAW
JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES
Release date:
01 August 2024