Neutral Citation Number **[2024] UKUT 00322 (TCC)**

Case Number: UT/2024/000037
UT/2024/000066

UPPER TRIBUNAL
(Tax and Chancery Chamber)

JUDICIAL REVIEW – PROCEDURE – Claimants' application for cross-examination of a witness – application allowed

Application determined on the papers
Judgment date: 9 October 2024

Before

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN

Between

THE KING (on the application of)

(1) FLUID SYSTEMS TECHNOLOGIES (SCOTLAND) LIMITED
(2) LONDON FLUID SYSTEM TECHNOLOGIES LIMITED
(3) AIREDALE CHEMICAL COMPANY LIMITED

Claimants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Defendants

Representation:

For the Claimants: Giles Goodfellow KC, Ben Elliott counsel, instructed by Levy & Levy

For the Defendants:	Christopher Stone KC and Ishaani Shrivastava, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

1. This decision on the papers concerns the application of the First and Second claimants ("the claimants") for cross-examination of an HMRC witness at the hearing of the claimants' judicial review proceedings, which are now listed to be heard at a substantive hearing in May 2025. I was grateful for counsels' clear and concise submissions contained in the claimants' application of 8 July, HMRC's response of 29 July 2024 and the claimants' reply of 5 August 2024.

2. While cross-examination of witnesses in judicial reviews is exceptional, I have decided, for the reasons explained below, to allow the application. The cross-examination is limited to a contested issue of material fact in respect of which there is a conflict between the decision letter recording the decision under challenge and the decision-maker's evidence as appears in her witness statement. I consider that in the circumstances of this case, limited cross-examination is necessary for the fair and just disposal of the claim.

3. The judicial review, in relation to which permission was granted by the Administrative Court and then transferred to the Upper Tribunal, is against the lawfulness of HMRC's decision refusing the claimants' requests for repayment under the Disguised Remuneration Repayment Scheme ("Repayment Scheme"). A more detailed summary of the background to that appears in *R (Sensor Solutions Ltd) v HMRC* [2024] EWHC 1119 (Admin) (at [4]) but in outline the repayments sought related to sums previously settled by agreement with HMRC to avoid the application of the Loan Charge legislation (Finance (No. 2) Act 2017).

4. The Repayment Scheme was established pursuant to s20 Finance Act 2020. One of the relevant criteria for repayment concerned whether there had been "reasonable disclosure" and in particular, under s20(5)(d), whether certain information had been provided:

> "…as was sufficient for it to be apparent that a reasonable case could have made that the amount concerned was payable to the Commissioners".

5. One of the challenges raised by the claimants is that that the relevant HMRC decision maker misapplied the above requirement requiring instead, as shown by the wording in her letter, that there was a "clear indication that an earnings charge should have been applied". It is argued this misapplication was an error of law. HMRC accept a test of "clear indication" is not the right test but they do not accept, that the decision maker applied such test. They refer to a witness statement of the decision maker in which the HMRC decision maker disagrees with the claimants' allegation that she "put the threshold of what is needed for reasonable disclosure too high, by using the phrasing [she] did". In the statement she explains "I was looking for a clear indication that an earnings charge should have been applied because the amount of tax concerned was an earnings charge, being the PAYE and NIC that had been included in the settlement agreement". She goes on to say "the reference to the "earning charge" [was] a comment from me rather than me considering it to be part of the test under section 20(5)".

6. The claimants argue that cross-examination is necessary to assist the tribunal in determining whether or not the decision maker applied the correct test in her decision pointing out that the documentary evidence contradicts the witness evidence relied on by HMRC.

7. HMRC emphasise the exceptionality of cross-examination in judicial review proceedings and argue that there is no relevant dispute of primary fact requiring resolution. As regards the issue of whether the test that was applied, HMRC point out the claim will only succeed if the Upper Tribunal can be persuaded by the claimants the disclosure provided at the time met the requirement for reasonable disclosure under the Repayment Scheme as properly interpreted.

That will require an objective assessment of the documents by the Upper Tribunal and is not dependent on the Upper Tribunal resolving what test was *in fact* applied. In other words the claim would fail irrespective of the approach the decision maker had actually taken. HMRC point out this follows from their reliance on s 31(2A) Senior Courts Act 1981[1] pursuant to which the court must refuse relief on an application for judicial review if it appears highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

DISCUSSION

8. As set out at 11.2.2 of the Administrative Court Judicial Review guide 2024 (which in agreement with HMRC I see no reason not to apply to the current tribunal proceedings):

> "…oral evidence is permitted at a judicial review hearing only exceptionally. Permission will be given only where oral evidence is necessary to dispose of the claim fairly and justly."

9. That statement reflects the principles applied in cases such as R (oao *Bancoult v Secretary of State for Foreign and Commonwealth Affairs*) [2012] EWHC 2115 (Admin) (Stanley Burnton LJ) which have explained cross-examination is exceptional in judicial review "…largely because the primary facts are often not in dispute…" but that the court retains a discretion to order or permit cross examination where that is necessary for fair and just determination of the claim.

10. In my judgment the circumstances here do mean that limited cross-examination is necessary to dispose of the claim fairly and justly:

(1) The fact in question (the test the decision maker applied) is clearly a material fact on which a finding needs to be reached in order to resolve the claim. The claimants say the misapplication of the test constituted an error of law; HMRC's defence disputes that. In agreement with the claimants, the fact that HMRC raise the defence that the outcome would not be substantially different if the decision maker had not applied the incorrect test does not mean the tribunal would not *first* have to decide whether the test was misapplied. If the claimants were unsuccessful in making out its allegations of unlawfulness, the need to consider the defence would not arise.

(2) I also agree with the claimants that there is an apparent conflict between the letter, insofar as it suggests an erroneous test of "clear indication" was applied and the witness statement which disagrees such test was applied. As well as the relevant fact (what test the decision maker applied) being disputed, the evidence on the fact relied on by the parties apparently points in different directions. I would not regard it as sufficient for the claimants only to be able to make submissions on the relevance and weight of the witness statement. Where, in line with their grounds, the claimants seek the finding from the tribunal that the test applied was one of "clear indication" (that finding being contrary to the evidence in the decision maker's statement that such test was not applied), and where such statement is relied on by HMRC, the claimants ought fairly to be able to test and challenge HMRC's evidence on the point.

11. I accordingly give permission for limited cross-examination. The claimants' application indicated the cross-examination was not expected to take more than 30 mins. I would have thought that the outer limit of what was required but the duration and timetabling of the cross-examination will best be determined by the panel dealing with the substantive hearing. For the

[1] It appears to me the equivalent provision in Upper Tribunal equivalent statutory provision would be s16(3C) onwards of the Tribunal Courts and Enforcement Act 2007).s16(3C) onwards of the Tribunal Courts and Enforcement Act 2007

avoidance of doubt, the scope of the cross-examination topic permitted by this decision is limited to the issue of what test the decision maker applied in relation to the "reasonable disclosure" issue when making her decision.

CONCLUSION

12. The claimants' application for limited cross-examination is granted as set out above.

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN

Release date: 10 October 2024