[2016] UKFTT 660 (TC)

TC05386

Appeal numbers: TC/2014/03148
TC/2014/06207
TC/2015/03679

PROCEDURE – application by a non-party to the proceedings to provide witness evidence – whether the Tribunal has the jurisdiction to allow the application – whether the Tribunal has an adversarial jurisdiction or an inquisitorial jurisdiction – whether analogous with Employment Tribunal – jurisdiction of Social Entitlement Chamber and Immigration and Asylum Chamber considered – if the Tribunal has the jurisdiction to allow an application by a non-party to provide evidence, whether the BBC's application should be allowed – whether a non-party has appeal rights

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAYA LIMITED **Appellants**

TIM WILLCOX LIMITED

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at the Royal Courts of Justice, Strand, London on 6 July 2016

Mr Jonathan Peacock QC, Ms Marika Lemos and Ms Georgia Hicks, instructed by David Kirk & Co, Chartered Accountants and Chartered Tax Advisers, for the Appellants

Mr Adam Tolley QC and Mr Christopher Stone, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Mr Michael Furness QC and Ms Hui Ling McCarthy, instructed by the BBC Litigation Department

DECISION

Introduction and summary

1. Paya Limited and Tim Willcox Limited ("the Appellants") are the personal service companies ("PSCs") of BBC presenters. The Appellants were assessed to income tax and National Insurance Contributions ("NICs") under Part 2, Chapter 8 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") and the Social Security (Intermediaries) Regulations 2000, together commonly known as the "IR35" provisions. By directions given on 8 May 2015, the Appellants' appeals were joined.

2. This hearing was listed to deal with three applications:

(1) an application by the BBC to submit witness evidence other than as a party to the proceedings ("the BBC Application");

(2) an application by the Appellants for the parties' exchange of witness evidence to be postponed until after the Tribunal had considered and determined the BBC Application. The parties had proceeded on the basis that this application would be allowed, and I gave consent; and

(3) an application by the Appellants for specific disclosure from HMRC. However, the evening before the hearing, HMRC offered to provide the Appellants with certain information and documents on a voluntary basis; the Appellants then withdrew their application.

3. The hearing therefore dealt only with the BBC Application.

The BBC Application

4. The substantive issue is whether IR35 applies to the engagements between the Appellants and the BBC. Both HMRC and the Appellants therefore anticipated calling witnesses who were current or former employees of the BBC ("BBC witnesses").

5. By direction 12 of the Tribunal's directions, as amended, the parties were to exchange witness statements on 27 January 2016. The BBC Application was made two days before that deadline.

6. The BBC Application asked the Tribunal to direct that evidence from BBC witnesses be prepared and submitted to the Tribunal by the BBC's legal team and not by the parties. The BBC would retain control over the evidence given by BBC witnesses, who might include individuals called by neither party.

7. The BBC Application attached the following draft directions, which I was invited to agree:

(1) that the parties should attempt to agree the identity of the BBC witnesses, the issues they should address and which documents should be made available to them. This process includes the BBC confirming whether or to what extent the BBC witnesses are willing to give the evidence requested;

(2) that the BBC's legal team should be provided with copies (at its cost) of all relevant documents (to include the Appellants' Grounds of Appeal, HMRC's Statement of Case, any witness statements exchanged by the parties and any other documents on which the BBC witnesses are likely to be cross-examined), together with either an agreed list of questions/issues or separate lists from each party;

(3) that the parties should be given an opportunity to comment on drafts of the BBC witness statements;

(4) that the BBC witness statements should be submitted by the BBC to the Tribunal rather than by either party; and

(5) the BBC witnesses should be available to be cross-examined by either party.

8. HMRC and the Appellants objected to the BBC Application.

Variations to the BBC Application

9. I was also asked to consider two variations to the BBC Application:

(1) The BBC Variation, under which witnesses would provide evidence in the form of "information" contained in "documents"; these would be filed with the Tribunal and served on the parties; the Tribunal or either party could then, if it chose to do so, call those witnesses to be cross-examined. Mr Furness asked me consider the BBC Variation only if I had first rejected the BBC Application. The Appellants and HMRC objected to the BBC Variation.

(2) The Appellants put forward a different variation to the BBC Application, ("the Appellants' Variation"), which is set out at §289. HMRC objected to the Appellants' Variation.

The issues

10. It was common ground that there were four issues to be decided:

(1) whether the Tribunal has the jurisdiction to allow an application to provide witness evidence, when that application is made by a non-party of its own motion, in other words, not at the request of the parties or at the initiative of the Tribunal; and

(2) if the answer to that question is yes, whether the Tribunal should allow the BBC Application as originally made; or, in the alternative

(3) whether the Tribunal should allow the BBC Variation or the Appellants' Variation; and

(4) what directions should be given by the Tribunal in the light of its decision(s) on the above Issues.

11. I had hoped to decide Issue 1 at the hearing, and if appropriate go on to consider Issues 2 and 3. Clearly, those Issues only arise if the BBC were to succeed on Issue 1. However, having heard submissions on Issue 1, I reserved my decision on that Issue and moved on to the other Issues.

12. My decision on Issue 1 is that the Tribunal does not have the jurisdiction to allow a person who is not a party to the proceedings to submit evidence to the Tribunal of its own motion. In summary, this is because:

(1) the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") contain no provision explicitly giving the Tribunal that jurisdiction;

(2) Rule 2(2)(b) of the Tribunal Rules requires the Tribunal to avoid unnecessary formality and seek flexibility in the proceedings, but does not allow the Tribunal to step outside the Rules altogether;

(3) although Rule 5(1) gives the Tribunal power to regulate its own procedure, that power is not unlimited; in particular, the Tribunal cannot act in a way which is inconsistent with its jurisdiction, which is adversarial in nature; and

(4) the Tribunal has no power to issue a costs order against a non-party, and has no sanctions at all against a person in the position of the BBC. That is consistent with the Tribunal having no jurisdiction to allow a non-party to intervene in the proceedings.

13. I gave my decision on Issue 2 orally at the end of the hearing. I said that, if the Tribunal had the relevant jurisdiction, the BBC Application was refused.

14. In this decision notice I set out my reasons for that decision. In summary, the procedure set out in the BBC Application would undermine the parties' freedom to put forward their cases to the Tribunal. This would be unfair and unjust, and a breach of the overriding objective. Furthermore, I did not agree with any of the BBC's reasons as to why such a radical change to the giving of evidence was required.

15. At the end of the hearing I also gave my decision refusing both Variations (Issue 3); my reasons are in this decision notice.

16. I subsequently gave directions for the future conduct of the appeal (Issue 4); those directions have been issued to the parties.

Standing

17. I record for completeness that neither HMRC nor the Appellants applied to the Tribunal for the BBC Application to be struck out on the basis that the BBC had no standing to make such an application. Instead, it was common ground that the BBC had an interest in the appeals, see §208ff. Issues of standing were therefore not considered.

The Tribunal Rules

18. So far as relevant to this decision the Tribunal Rules are set out in the Appendix. Any references in this decision to "Rule" or "Rules", without more, are to the Tribunal Rules.

ISSUE 1: THE TRIBUNAL'S JURISDICTION

The Issue

19. Issue 1 was whether the Tribunal has the jurisdiction to allow a non-party to make an application to submit witness evidence of its own motion, in other words, not at the request of the parties or at the initiative of the Tribunal.

20. Mr Furness confirmed that the BBC was not, in the alternative, making an application to be joined as a party; I have therefore not considered that possibility.

21. Mr Furness and Mr Tolley both made submissions on Issue 1. For the most part, they made these submissions during the first part of the hearing (which specifically related to that Issue). However, at various points during the second part of the hearing, they made further submissions about the Tribunal's jurisdiction; I have included those points in this part of my decision.

22. Mr Peacock restricted himself to making submissions on Issues 2-4, but in so doing occasionally made passing references to Issue 1. I have included those submissions in this part of my decision.

Mr Furness' submissions on behalf of the BBC

23. Mr Furness relied in particular on the following Rules:

(1) Rule 2, the overriding objective, which places an obligation on the Tribunal to avoid unnecessary formality and seek flexibility in the proceedings;

(2) Rule 5(1), which states that "subject to the provisions of the [Tribunals, Courts and Enforcement Act 2007 ("TCEA")] and any other enactment, the Tribunal may regulate its own procedure". He said that there was nothing in the TCEA or any other enactment which prevents the Tribunal allowing a non-party to give evidence to the Tribunal;

(3) Rule 5(3)(d), which provides that the Tribunal may (his emphasis) "permit or require a party *or another person* to provide documents, information or submissions to the Tribunal or a party"; and

(4) Rule 15, which is headed "evidence and submissions", and begins:

> "(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to–
>
> (a) issues on which it requires evidence or submissions;
>
> (b) the nature of the evidence or submissions it requires;…"

24. Mr Furness submitted that Rules 5(1), 5(3)(d) and 15(1), when read together, give the Tribunal the power to permit *any* person (whether or not a party) to provide "information" in the form of witness evidence in proceedings.

25. That this is right can, he said, be seen from Rule 9, which is entitled "Substitution and addition of parties". Rule 9(2)-(5) reads:

> "(2) The Tribunal may give a direction adding a person to the proceedings as a respondent.
>
> (3) A person who is not a party to proceedings may make an application to be added as a party under this rule.
>
> (4) If the Tribunal refuses an application under paragraph (3) it must consider whether to permit the person who made the application to provide submissions or evidence to the Tribunal.
>
> (5) If the Tribunal gives a direction under paragraph (1) or (2) it may give such consequential directions as it considers appropriate."

26. Mr Furness said that it was clear from Rule 9(4) that the Tribunal has the power to direct that non-party to give witness evidence.

27. He submitted that the difficulties identified by HMRC could be resolved as follows:

(1) although Rule 6(1) does not refer to directions being given as the result of an application by a non-party, but only "on the application of one or more of the parties or on its own initiative", this Rule was permissive. It should not be read as a prohibition on the Tribunal using the wide powers given by Rules 2 and 5, so as to allow an application by a non-party to provide evidence;

(2) he accepted that in conventional civil litigation the court has to rule on the evidence produced by the parties. However, Tribunal litigation "is not conventional civil litigation". Instead, the Tribunal has "broad powers", the purpose of which was to ensure, in the public interest and in appropriate cases, a full presentation of the evidence. This was consistent with the requirement in Rule 2 that the Tribunal's jurisdiction be exercised in a "flexible and informal way"; and

(3) he acknowledged that, if the Tribunal allowed the BBC Application, this risked opening the floodgates to "interfering busybodies" who would "pitch up at tax appeals and make applications willy-nilly to put in information and evidence and generally", and so interfere with the litigation process. However, this difficulty could be resolved by the Tribunal only exercising the jurisdiction in an exceptional case.

28. Mr Furness also relied on *Lobler v HMRC* [2015] UKUT 0152 (TCC) ("*Lobler*"). In advance of that hearing, Judge Sinfield had given the Chartered Institute of Taxation ("the CIOT") permission to make written submissions, under Rule 5(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules"). The CIOT provided the UT with those written submissions before the hearing. Proudman J's judgment explains what then happened:

> "5. Observing on the first day of the hearing that the CIOT was present in the person of (possibly among others) Ms McCarthy, its Counsel who had made those written submissions, and believing that I should have the benefit of hearing her submissions in detail and that both parties should have the opportunity to respond to them fully, I gave a direction that she be permitted also to address this Tribunal

> orally. The CIOT's interest is that further appeals, claims for judicial review and other disputes with HMRC, where taxpayers face similar consequences to those affecting Mr Lobler, have been stayed pending the outcome of this appeal. In its application under r.5 (3)(d) of the Rules the CIOT gave details of some of those other cases. The CIOT is in the process of gathering information from other interested parties and professional bodies in order to make a formal submission to HMRC and the Treasury with a view to obtaining a change in the law.
>
> 6. Both Judge Sinfield and I made (unopposed) orders under r.10 (4) of the Rules that each party to the appeal on the one hand and the CIOT on the other should bear their own costs in relation to the application and their respective submissions, written and oral."

29. Mr Furness said that, although the CIOT had not applied to give witness evidence but to make submissions, *Lobler* was nevertheless relevant because the UT had allowed a non-party to intervene in the proceedings.

Mr Tolley's submissions on behalf of HMRC

30. Mr Tolley's starting point was that the Tribunal had no inherent jurisdiction, but instead a statutory jurisdiction given by the Tribunal Rules. The only Rule which refers to a non-party being able to make an application to the Tribunal is Rule 9(3), which allows a person to apply to be joined as a party. If a non-party wished to make an application, it "must access the Tribunal through the gateway provided by Rule 9 and no other".

31. Mr Tolley accepted that Tribunal procedure is intended to be less formal and more flexible than that of the civil courts. But in his submission:

> "…that flexibility has limits and one of them is the elementary point that it should not be used to subvert the fundamental nature of the litigation being conducted."

32. He said that the fundamental nature of Tribunal proceedings is adversarial. A hearing was not an inquisitorial public enquiry, but instead a forum in which to settle *inter-partes* disputes.

33. The position was the same in civil litigation, where it was well-established that the jurisdiction was adversarial and witnesses cannot be called other than by the parties themselves. He relied on *Jones v National Coal Board* [1957] 2 QB 55 ("*Jones v NCB*"), where Denning LJ stated at p 64 (emphasis added):

> "Let the advocates one after the other put the weights into the scales - the 'nicely calculated less or more' - but the judge at the end decides which way the balance tilts, be it ever so slightly. <u>So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties</u>: see *In re Enoch & Zaretzky, Bock & Co*."

34. Mr Tolley went on to say that the Employment Tribunal also had an adversarial jurisdiction. He cited *East of England Ambulance Service NHS Trust v Sanders* [2015] ICR 293 ("*Sanders*"), a decision of the Employment Appeal Tribunal, and the judgment of Sir Hugh Griffiths in *Craig v British Railways* [1973] 8 ITR 636 ("*Craig*"), approved by Peter Gibson LJ in the Court of Appeal case of *Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531 at [18].

35. He also referred to *MN (Somalia) v SSHD* [2014] UKSC 40 ("*MN (Somalia)*"), where Lord Carnwarth had said at [25] that although the tribunal process when dealing with social security benefits was "inquisitorial rather than adversarial":

> "in a major case in the tax or lands tribunals the sums may be as great, and the issues as complex, as in any case in the High Court, and the procedure will be modelled accordingly."

36. Mr Tolley also submitted that the other Rules are consistent with his submission that the Tribunal does not have the claimed jurisdiction. Rule 16(1) gives the Tribunal power to summons any person to attend as a witness, but that power can only be exercised "on the application of a party" or on the Tribunal's own initiative. The other person cannot itself apply to provide witness evidence. Similarly, Rule 6(1) allows the Tribunal to give a direction, but only "on the application of one or more of the parties or on its own initiative".

37. Furthermore, only parties have the obligation to help the Tribunal further the overriding objective and co-operate with the Tribunal, see Rule 2(d); and the Tribunal's sanctions apply to parties and not to non-parties. In particular, Rule 10(1)(b) only allows the Tribunal to award costs against *parties* who have behaved unreasonably. Mr Tolley said:

> "A person who is not willing to become a party and subject itself to the control of the Tribunal in the appropriate way is, in my submission, not permitted to circumvent that requirement by making an application in some other way."

38. Mr Tolley also distinguished the CIOT application in *Lobler* from the BBC Application because:

(1) the CIOT application was to make submissions; the BBC Application was to provide evidence;

(2) the CIOT application was limited to written submissions; Ms McCarthy only provided oral submissions at the direction of the UT, not as the result of the application; and

(3) the CIOT had made an application to the UT. Rule 9.1 of the UT Rules allows that tribunal to "give a direction adding, substituting or removing a party as an appellant, a respondent or an interested party." In contrast, Rule 9.2 of the Tribunal Rules does not allow a person to be added as an interested party, but only as a respondent. Moreover, the UT Rules refer to an "interested *party*", so an intervener is also a party to the proceedings.

39. In relation to the last of those points, Mr Tolley submitted that in *Lobler* the CIOT should therefore have first applied to be joined as an interested party, and then made an application to provide submissions. Instead, the two steps appeared to have been elided, perhaps because neither HMRC nor Mr Lobler had any objection to the CIOT intervening.

40. Mr Tolley also said that he had not been able to identify any previous Tribunal case in which a non-party's free-standing application to provide witness evidence had been allowed by the Tribunal. Granting the BBC Application would therefore be a radical new departure, which would, he said, open the floodgates to others who might be affected by the outcome of a Tribunal appeal, allowing them to make applications to provide evidence. Even were the Tribunal to dismiss those applications, the appeal process would be significantly disrupted and delayed.

Mr Peacock's submissions

41. Mr Peacock made a small number of points relating to Issue 1. He agreed with Mr Tolley that this Tribunal had an adversarial jurisdiction, saying:

> "Of course it needs stating that these are, admittedly in an informal environment, adversarial proceedings. It is not a public inquiry. The Tribunal is invited by the rules to arrive at what it sees as the right answer on the basis of the evidence adduced by the parties. It is not invited to arrive at what it perceives to be the right answer on the basis of any evidence it could conceivably see."

42. He also agreed with HMRC's position on both floodgates and sanctions, saying:

> "If you were to take the step, an entirely novel step and we would say a radical one, of permitting a non-party to both control and influence the evidence to be adduced about a particular topic, you would open the floodgates to any party who could contend that they had an interest in tax litigation to adduce evidence…
>
> That will put the Tribunal in future in a very difficult position of having to address all such applications, form a view about whether it's appropriate, exercise its discretion and then possibly, if it accedes to it, end up with evidence being adduced by a non-party over whom it has no obvious sanction and against whom it can make no cost orders."

The structure of this part of the decision

43. In seeking to establish whether the Tribunal has the jurisdiction to allow an application to give evidence made by a non-party such as the BBC, I analysed the Rules under the following headings:

(1) the framework of the Rules generally in relation to parties;

(2) Rules which explicitly allow non-parties to make applications;

(3) other arguably relevant Rules which refer to non-parties;

(4) whether the Tribunal has sanctions over non-parties;

(5) whether Rule 2(2)(b) – avoiding unnecessary formality and seeking flexibility – provides the Tribunal with the necessary jurisdiction; and

(6) whether Rule 5(1) – the Tribunal's power to regulate its own procedure – provides the necessary jurisdiction.

The framework of the Rules generally in relation to parties

44. The Rules open by defining a party in Rule 1(3) as "a person who is…an appellant or respondent in proceedings before the Tribunal". So far as relevant to this case, the same Rule also defines "respondent" as HMRC or "a person substituted or added as a respondent under rule 9 (substitution and addition of parties)".

45. The other Rules are, for the most part, framed by reference to "parties":

(1) Rule 2(2)(c): the Tribunal must ensure that the parties are able to participate fully in the proceedings;

(2) Rule 2(4)(b): the parties must co-operate with the Tribunal;

(3) Rule 3: the Tribunal should seek, where appropriate, to bring ADR to the attention of the parties, and to facilitate ADR if the parties so wish;

(4) Rule 6(1): the parties may apply for a direction;

(5) Rule 11: the parties may appoint representatives;

(6) Rule 13 relates to or sending and delivering documents to or from parties and their representatives;

(7) Rule 15(1)(c) refers to the parties' provision of expert evidence;

(8) Rule 16(1) allows a party to apply for a witness summons;

(9) the procedural rules in Chapter 2 only apply to parties;

(10) the consent of the parties is required before a case can be considered for transfer to the Upper Tribunal, and before the making of a consent order, see Rules 28(1) and 34(1);

(11) Rule 29(1)(a) allows the parties to agree that an appeal can be decided without a hearing;

(12) only parties are required to be given notice of hearings under Rule 31; and

(13) decision notices are to be issued to the parties under Rule 35; there is no requirement in the Rules for any wider dissemination.

Rules which explicitly allow non-parties to make applications

46. There are three situations in which the Rules explicitly permit a non-party to make an application:

(1) Rule 9(3) allows a person who is not a party to apply to be added as a party. If that application is refused, Rule 9(4) provides that the Tribunal "must consider whether to permit the applicant to provide submissions or evidence to the Tribunal". However, the Rule has no relevance to a person, such as the BBC, who does not want to be joined as a party.

(2) Rule 16(1)(b) allows a person who has been issued with a witness summons, citation or order, but has not had the opportunity to object to the issuance, to make an application that the summons, citation or order be varied or set aside. Such an application is essentially defensive; it does not give a person the power to apply *to give* witness evidence or provide documents.

(3) Similarly, Rule 6(5) allows "a party or other person" affected by a Tribunal direction to apply for another direction "which amends, suspends or sets aside the first direction". The Rule does not allow a non-party to apply for directions *ab initio,* but only as a corrective measure to amend, suspend or remove a direction which has already been issued.

47. It follows that the Rules contain no explicit provision giving the Tribunal the jurisdiction to allow an application by a non-party to provide evidence.

The guidance in Eclipse

48. In *Eclipse Film Partners No 35 LLP v HMRC* [2016] UKSC 24 ("*Eclipse*") the Supreme Court considered whether the Tribunal could direct that a party pay the costs of preparing the bundles for the hearing. Lord Neuberger, with whom the other law lords agreed, gave four reasons for dismissing the taxpayer's appeal, two of which are relevant to this Issue:

(1) his second reason was that, if the taxpayer was right, "there would appear to be a *lacuna* in the Rules, because there are no such provisions governing the assessment and recovery of such costs"; and

(2) his fourth reason, albeit "of very slender force", concerned the reference in Rule 16(2)(b) to the Tribunal being required to direct that the parties pay the costs of a witness who have been served with a summons to give evidence. In reliance on this provision, Eclipse had submitted that Rule 10(1)(c) did not amount to "an absolute code". Lord Neuberger held that, on the contrary, it "shows that, where the Rules intend to enable or require the FTT to render a party liable for costs, they say so".

49. By analogy, if the Rules intended the Tribunal to allow non-parties to provide evidence, then provision would have been made for such applications; if the BBC was right, there would be a *lacuna* in the Rules.

Other arguably relevant Rules which refer to non-parties

50. I nevertheless accept that Rule 5(3)(d) and Rule 16(1) both refer to non-parties playing a role in the proceedings.

51. Mr Furness placed most reliance on Rule 5(3)(d), which provides that the Tribunal is empowered to issue a direction so as to "require…another person to provide documents, information or submissions to the Tribunal". However, it is Rule 6 which sets out the "procedure for applying for and giving directions". As already noted, Rule 6(1) specifies that directions may be made only "on the application of one or more of the parties or on its own initiative". The Tribunal therefore has jurisdiction

to direct that a non-party provide documents, information or submissions to the Tribunal, but only where:

(1) a *party* has applied for that direction; or

(2) the Tribunal has decided, on its own initiative, to issue that direction.

52. Rule 16(1) allows the Tribunal on its own initiative, to summon a person to give witness evidence, or provide documents. Again, however, this does not extend to granting an application made by a non-party to supply evidence or documents.

53. These Rules also do not provide the Tribunal with the claimed jurisdiction.

Whether the Tribunal has sanctions over non-parties

54. Both Mr Tolley and Mr Furness referred to the Tribunal's lack of power to sanction a non-party, and I turn to this next.

Costs

55. Rule 10(1) gives the Tribunal power to impose costs, but only in three specified circumstances. In *Eclipse* the Supreme Court has recently held that these cost-shifting provisions are to be construed strictly, and that they act as a "fetter" on the Tribunal's power to issue costs orders.

56. The first circumstance is that provided for by Rule 10(1)(a), which allows the Tribunal to make a costs order where TCEA s 29(4) applies. That subsection deals with wasted costs, and TCEA s 29(5) and (6) explain what is meant by that term:

> "(5) In subsection (4) 'wasted costs' means any costs incurred by a party-–
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.
>
> (6) In this section 'legal or other representative', in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf."

57. TCEA s 29(6) therefore limits the application of these provisions to representatives acting "in relation to a party to proceedings", so the Tribunal has no power to order payment of costs because of the behaviour of a legal or other representative of a non-party.

58. The second circumstance is that provided for by Rule 10(1)(b), which allows the Tribunal to issue a costs order to "parties or their representatives" who have "acted unreasonably in bringing, defending or conducting the proceedings". This Rule also has no application to non-parties.

59. The third circumstance is that in Rule 10(1)(c), which applies to appeals categorised as complex, but where the "taxpayer" has not opted out of costs. The "taxpayer" is defined in Rule 10(8) as "a party" who is liable to pay the tax in question, or whose liability to pay the tax is in dispute. This power, too, can thus be exercised only in relation to parties.

60. I therefore agree with Mr Tolley and Mr Peacock that the Tribunal has no power to impose a costs order on a non-party.

Other sanctions

61. Rule 8 gives the Tribunal other, stronger, powers. An "unless order" can be attached to a direction given to an appellant: failure to comply may result in the case being struck out; the Tribunal can also strike out the case under Rules 8(3)(b) if "the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly". Rule 8(7) provides for "barring orders" to be issued to a respondent for similar behaviour. None of these powers has any application to a non-party.

62. It is not, however, true that the Tribunal has no credible sanctions at all in relation to non-parties. When the Tribunal has directed that a non-party attend as a witness, or provide documents, and that person has failed to comply, Rule 7(3) allows the Tribunal to refer that non-compliance to the UT with a request that it exercise its powers under TCEA s 25. These include the power to impose a fine of up to £2,500 or up to two year's imprisonment, see the Contempt of Court Act 1981, ss 14 and 15. Fines have been imposed by the UT in relation to a person's behaviour in other Chambers of the First-tier Tribunal, see *MD v SSWP* [2010] UKUT 202 (AAC) and *CB v Suffolk County Council* [2010] UKUT 413 (AAC).

63. However, Rule 7(3) is drafted by reference to a failure by a *witness* to give evidence. It has no application where, as here, a non-party is asking to provide witness evidence which is to be given by its employees or former employees. Rule 7(3) could be used to sanction individual BBC witnesses if they failed to attend; it could not be used to impose sanctions on the BBC, if it acted in an unreasonable, improper or negligent manner.

64. Finally, Rule 15(2)(b) allows the Tribunal to exclude evidence if it was not provided "within the time allowed by a direction", or "in a manner that did not comply with a direction" or "it would otherwise be unfair to admit the evidence". The Tribunal could use this power to exclude evidence if, for example, the non-party had failed to comply with a direction setting a time limit for its provision. But in most cases, one or both parties will have planned to rely on that witness evidence, and so would be unfairly disadvantaged if the non-party's compliance failure caused the evidence to be excluded.

65. The Tribunal therefore has no power under the Tribunal Rules to impose sanctions on a non-party who is not a witness, other than by excluding the evidence under Rule 15(2)(b), and that power is unlikely to be of much practical use because of the collateral damage to the party or parties.

Comparators

66. The CPR provides a useful contrast. CPR 54.17 gives "any person" the right to apply for permission to file evidence or make representations in judicial review proceedings. CPR 52.12A makes similar provision for statutory appeals: these include appeals made under certain planning legislation and appeals from the decisions of tribunals referred to in s 11 and Schedule 1 of the Tribunals and Inquiries Act 1992 (appeals against decisions from tribunals established under the TCEA are not "statutory appeals"). If a person makes a successful application to file evidence or make representations under CPR 54.17 or 52.12A, the court has full power to award costs, subject to any protective costs order or costs capping order.

67. Moreover, from 8 August 2016, the Criminal Justice and Courts Act 2015, s 87 further provides that in judicial review proceedings:

> (1) the parties cannot be ordered to pay the costs of the other person, he is thus required to bear his own costs; and
>
> (2) if the other person has behaved unreasonably; or the points made have not been "of significant assistance to the court"; or if "a significant part" of the material "relates to matters which it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings", the court can order that other person to pay the parties' costs.

68. Even leaving those new provisions on one side, were the BBC to be correct, there would be a stark contrast between the court's powers under the CPR on the one hand, and the lack of any powers at all under the Tribunal Rules on the other.

69. The Tribunal's position can also be compared with that of the Upper Tribunal, which used its much wider powers under Rule 10 of the UT Rules to direct that the CIOT bear its own costs in *Lobler.*

Conclusion

70. In conclusion, it is would be very surprising if the Tribunal had the power to allow a non-party to provide evidence, but had no sanctions to ensure that person's compliance with directions, orders or Rules.

Whether Rule 2(2)(b) provides the necessary jurisdiction

71. Mr Furness said that the Tribunal has, however, been given "broad powers" to ensure, in the public interest, that there is a full presentation of the evidence. He relied in part on Rule 2(2)(b), which requires the Tribunal to avoid "unnecessary formality" and seek "flexibility in the proceedings".

72. The Rule, however, only enjoins the Tribunal to avoid "unnecessary" formality, and to seek flexibility in the proceedings governed by the Rules. The very existence of the Rules means that Tribunal proceedings have a formal structure. Rule 2(2)(b) is meant to provide guidance as to the manner in which the Rules are followed; it does not give the Tribunal permission to step outside the Rules altogether.

73. The recent guidance in *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121 is also relevant. The Senior President of Tribunals gave the judgment, with which Richards and Moore-Bick LJJ concurred. He said:

> "37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
>
> 38. …The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system…"

74. This reinforces my conclusion that it would be surprising if the Tribunal could, in purported compliance with the overriding objective, allow a non-party to intervene in the proceedings, despite the fact that it has no sanctions to ensure "proportionality, cost and timeliness" and cannot therefore safeguard "the wider system" against "the impact of the non-compliance".

Whether Rule 5(1) provides the necessary jurisdiction

75. In submitting that the Tribunal has "broad powers" to ensure a full presentation of the evidence, Mr Furness also sought to rely on Rule 5(1), which allows the Tribunal to regulate its own procedure. Mr Tolley countered by saying that the Rule could not be used to subvert the adversarial nature of Tribunal litigation, and Mr Peacock agreed with Mr Tolley.

76. I did not find this an easy question to resolve. My analysis is set out in the next following parts of this decision, and a summary of my conclusions is at §131.

Limitations on the freedom to regulate procedure

77. Although a court can regulate its own procedure, the authorities are clear that this has limitations. In *Al Rawi v the Security Service* [2011] UKSC 34, the Supreme Court considered the lawfulness of "closed material procedure" in cases involving national security. By way of preliminary, Lord Phillips said at [18] (his emphasis):

> "there is no doubt that the court's inherent power to regulate its own procedures is not unlimited. For example, the power may not be exercised in *contravention* of legislation or rules of court… In such a case, its power has been removed by statute and cannot be exercised."

78. The Tribunal is regulated by the Rules, which are contained in a statutory instrument made under TCEA s 22 and Sch 5. As Mr Furness said, neither the Rules nor the TCEA contain any prohibition explicitly preventing a non-party from making an application to give evidence. However, in *Al Rawi* Lord Phillips continued:

> "[19] In proceedings which are not regulated by statute or statutory rules, it might be thought that there are no limits to the inherent power of the court to regulate its own procedure and that it has an untrammelled power to manage litigation in whatever way it considers necessary or expedient in the interests of justice….
>
> [20] …
>
> [21] But even in an area which is not the subject of statute or statutory procedural rules, there are limits to the court's inherent jurisdiction to regulate how civil and criminal proceedings should be conducted…
>
> [22] For example, it is surely not in doubt that a court cannot conduct a trial inquisitorially rather than by means of an adversarial process (at any rate, not without the consent of the parties) or hold a hearing from which one of the parties is excluded. These (admittedly extreme) examples show that the court's power to regulate its own procedures is subject to certain limitations."

79. Although the Tribunal does not have the inherent powers of the High Court or the higher appeal courts, Rule 5(1) nevertheless allows it to regulate its own procedure. Given that the courts, with their inherent powers, are subject to certain limitations, the same must be true of the Tribunal.

80. Mr Tolley submitted that the fundamental nature of the Tribunal's jurisdiction was adversarial, and that as a result Rule 5(1) could not be used to allow a non-party to provide witness evidence. In deciding whether this is correct, the first step is to describe an adversarial and an inquisitorial jurisdiction.

Adversarial and inquisitorial jurisdictions

81. In *Air Canada v Secretary of State for Trade (No 2)* [1983] All 1 ER 910 ("*Air Canada*") Lord Wilberforce said at p 919:

> "In a contest purely between one litigant and another…the task of the court is to do, and be seen to be doing, justice between the parties... There is no higher or additional duty to ascertain some independent truth."

82. As a result, a judge sitting in the civil courts has no power to call a witness, but must instead "rest content with the witnesses called by the parties", as Lord Denning said in *Jones v NCB,* cited by Mr Tolley.

83. The position with regard to the production of documents is essentially the same: Lord Wilberforce's judgment in *Air Canada* continues:

> "It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is

> known not to be, the whole truth of the matter; yet, if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done. It is in aid of justice in this sense that discovery may be ordered, and it is so ordered on the application of one of the parties who must make out his case for it. If he is not able to do so, that is an end of the matter. There is no independent power in the court to say that, nevertheless, it would like to inspect the documents, with a view to possible production, for its own assistance."

84. In contrast, a coroner has the paradigm inquisitorial jurisdiction, derived from both statute and common law. Section 1 of the Coroner's and Justice Act 2009 provides that a coroner must "conduct an investigation" into certain deaths. Under common law, citizens have a duty to attend an inquest if they are in possession of any information or evidence as to how a person died.

85. Those tasked with conducting a public enquiry also have an inquisitorial jurisdiction. In *Bushell v Secretary of State for the Environment* [1980] 2 All ER 608, the House of Lords considered a public enquiry into a new road scheme and concluded that (as summarised in the headnote):

> "An inquiry was quite unlike civil litigation, its object being to ensure that citizens closely affected had the opportunity to be heard in support of their objections and to ensure that thereby the minister was better informed of the facts of the case when he came to make his decision."

86. Allowing non-parties to give evidence of their own motion is therefore characteristic of an inquisitorial jurisdiction, but not permitted in an adversarial jurisdiction.

Submissions as to the nature of the Tribunal's jurisdiction

87. I was not provided with any binding authority as to the nature of the Tribunal's jurisdiction. Mr Tolley invited me to rely by analogy on the position in the civil courts.

88. However, the Tribunal's position in relation to witnesses and documents is not the same as that in the civil courts. The Tribunal does not have to "rest content with the witnesses called by the parties", because Rule 16(1) allows it to issue witness summons "on its own initiative". And again, unlike the civil courts, the Tribunal is not blocked from asking for documents which might assist its determinations: under Rule 5(3)(c) it has an explicit power to "require a party or another person to provide documents, information or submissions".

89. Mr Tolley also submitted that the Tribunal's position was comparable with that of the Employment Tribunal. He cited *Sanders* and *Craig* in support of his submission that it has an adversarial jurisdiction. That he is right can be seen also from the more recent case of *Muschett v the Prison Service* [2010] EWCA Civ 25, where Rimer J said at [31] that it was not the role of employment judges:

> "…to engage in the sort of inquisitorial function that Mr Hopkin [representing the Appellant] suggests or, therefore, to engage in an

> investigation as to whether further evidence might be available to one of the parties which, if adduced, might enable him to make a better case. Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law…"

90. However, disputes determined by the Employment Tribunal are private law claims, usually between one or more individuals and their employer. They do not engage administrative law. It is therefore unsurprising that its jurisdiction has been found to be adversarial, because, like the civil courts, the cases which it resolves are contests "purely between one litigant and another".

91. In contrast, the Tax Chamber is not normally concerned with private law disputes, but with appeals against decisions taken by HMRC or other parts of government, such as the Border Force.

92. Furthermore, the Upper Tribunal and First-tier Tribunal, including of course the Tax Chamber, were established following Sir Andrew Leggatt's 2001 Report entitled *Review of Tribunals, Tribunals for Users, One System, One Service* ("the Tribunal Report"). The Employment Tribunal was not established under the TCEA, so it does not form one of the Chambers of the First-tier Tribunal. Instead, it has its own procedure rules, in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. This is because the Tribunal Report said that, as "party and party tribunals", Employment Tribunals were not "true administrative tribunals" and so should be distinguished from administrative tribunals which deal with appeals against government decisions.

93. I therefore did not find it possible to rely by analogy on the jurisdiction of the Employment Tribunal in order to decide the position of the Tax Chamber, as Mr Tolley invited me to do.

94. Mr Tolley also relied on *MN (Somalia)*, where Lord Carnwarth said at [25] that:

> "…there is no presumption that the procedure will necessarily follow the adversarial model which (for the time-being at least) is the hallmark of civil court procedures. In a specialist tribunal, particularly where parties are not represented, there is more scope, and often more need, for the judges to adopt an inquisitorial approach. This has long been accepted in respect of social security benefits (see *Kerr v Department for Social Development* [2004] UKHL 23, [2004] 4 All ER 385, [2004] 1 WLR 1372, paras 61 - 63, where Lady Hale spoke of the process of benefits adjudication as 'inquisitorial rather than adversarial…a co-operative process of investigation in which both the Claimant and the department play their part'). However, there is no single approach suitable for all tribunals. For example, in a major case in the tax or lands tribunals, the sums may be as great, and the issues as complex, as in any case in the High Court, and the procedure will be modelled accordingly."

95. Mr Tolley said the final sentence supported HMRC's case that the position in the Tribunal was the same as in the civil courts. But that is not how I read this passage. Lord Carnwarth refers to "a major case" in the Tribunal, one where the amounts at stake and the complexity of the issues are no different to those litigated before the High Court. And even in relation to those complicated high value cases, he does not say that the Tribunal's approach is identical to that in the civil courts, but rather that "the procedure will be modelled accordingly".

96. The nature of the Tribunal jurisdiction cannot therefore be found by analogy with either the civil courts or the Employment Tribunal, or by relying on the final sentence of paragraph 25 of *MN(Somalia).*

The Tribunal Report

97. In *MN(Somalia)* Lord Carnwarth (with whom all the other law Lords agreed) began his judgment by setting out some "general comments" about the "specialist tribunals" introduced following the Tribunal Report. At [22] he referred to his earlier decision in *R(oao Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19 at [42] and to Lady Hale's judgment in *Gillies v SSWP* [2006] UKHL at [36], both of which referred to the Tribunal Report as providing an explanation of the purpose and scope of the Upper and First-tier Tribunals. I respectfully agree that the Tribunal Report is a sensible place to start.

98. At paragraph 3.10, under the heading "disputes between the citizen and the state", the Tribunal Report stated:

> "Most tribunals are concerned with the resolution of disputes between the citizen (whether an individual or a corporation) and the state. Some are concerned with appeals against decisions within a statutory scheme: the oldest and the largest systems respectively deal with liability to deliver taxation, and entitlement to welfare benefits. Others consider such matters as the rights to immigration or asylum status, or detention under the Mental Health Act. Many other tribunals involve appeals against decisions of central or local regulatory bodies (often themselves independent of Government but an essential part in the delivery of overall Government policies). These disputes should form the heart of the Tribunals System. They include the areas where users stand to gain most from the more focussed approach to the provision of information, the training of members, and the development of consistent procedural approaches which we recommend. The detailed design of the System will, however, need to take account of the diverse origins of these bodies, the expert knowledge which lawyers and other members will have to have of often formidably complicated areas of the law, and wide varieties in the weight and complexity of cases."

99. The Tribunal Report therefore recommended that the Chambers should have "consistent procedural approaches". In consequence, each Chamber's Procedural Rules follow essentially the same structure, even though they are not identical. In *MN(Somalia)* Lord Carnwarth said at [26] that "an important objective" of the reforms which followed was "to promote consistency across the tribunal system".

100. *R (ex p Hubble) v Medical Appeal Tribunal* [1958] 2 QB 228 ("*Hubble*") and *Kerr v Dept of Social Development (Northern Ireland)* [2004] UKHL 23 ("*Kerr*"), both found that the jurisdiction of predecessor tribunals to the Social Entitlement Chamber was inquisitorial. That this remains the position in the Social Entitlement Chamber has recently been confirmed in *AS v SSWP* [2015] UKUT 592 (AAC) at [35] *per* Judge Wright.

101. Given (a) the lack of any identified authority on the nature of the Tax Chamber's jurisdiction; (b) the background and purpose of the new tribunal system, with its emphasis on consistency across tribunals; and (c) the inquisitorial jurisdiction of the Social Entitlement Chamber, I thought it right to consider whether the Tax Chamber also has an inquisitorial jurisdiction.

The jurisdiction of the Social Entitlement Chamber

102. I first sought to understand why the Social Entitlement Chamber has been found to have that jurisdiction.

103. In *Hubble* the Court considered whether appeals to the Medical Appeal Tribunal made under the National Insurance (Industrial Injuries) Act were to be conducted in the same way as ordinary civil litigation. Diplock J (as he then was) gave the Court's judgment. At page 240 he said that it was a "misapprehension of the purpose of the Act and the functions of medical boards and appeal tribunals" to treat such appeals as the same as civil litigation, and continued:

> "A claim by an insured person to benefit under the Act is not truly analogous to a *lis inter partes*. A claim to benefit is a claim to receive money out of the insurance funds fed by contributions from all employers, insured persons and the Exchequer."

104. In *Kerr,* an appeal about entitlement to payment of funeral expenses under the Social Security Contributions and Benefits (Northern Ireland) Act 1992, Lord Hope endorsed *Hubble*, saying at [14]:

> "But it can at least be said that a claimant under s 134(1)(a) of the Benefits Act is not in the same position as a litigant. His position is similar to that described by Diplock J in *R (on the application of Hubble) v Medical Appeal Tribunal (North Midland Region)* [1958] 2 QB 228, [1958] 2 All ER 374, 240. The claim to benefit in that case was a claim to receive money out of insurance funds fed by contributions from all employers, insured persons and the Exchequer."

105. The jurisdiction of the Social Entitlement Chamber has therefore been found to be inquisitorial because the appellants are appealing against the refusal of a claim to receive something from a common fund, into which they and others have contributed.

106. There is also a second reason. In *Hubble,* Diplock J continues by saying:

> "Any such claim requires investigation to determine whether any and if so what amount of benefit is payable out of the fund. In such an investigation the Minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it

> is to be found in an inquest rather than in an action. Where the claim is for disablement benefit, a necessary step in the investigation is the determination of one or more questions of medical fact and opinion, and accordingly, where such a claim is made section 39 (1) makes it mandatory upon the insurance officer to refer 'the case' of the claimant to a medical board for the determination, not of the claim, but of the disablement questions which require to be investigated. As an expert investigating body it is the right and duty of the medical board to use their own expertise in deciding the medical questions referred to them. They may, if they think fit, make their own examination of the claimant and consider any other facts and material to enable them to reach their expert conclusion as doctors do in diagnosis and prognosis of the case of an ordinary patient. Just as it is 'the case' of the claimant which is to be referred to the medical board by subsection (1) of section 39, so also it is 'the case' of the claimant which is to be referred to the medical appeal tribunal under subsections (2) and (3).
>
> The effect of these subsections is, in our view, to substitute in the cases to which they apply another and presumably more highly qualified expert investigating body for the medical board, and we see no grounds for holding that their function is any different from that of the medical board, namely, to use their own expertise to reach their own expert conclusions upon the matters of medical fact and opinion involved in 'the case' of the claimant."

107. Lady Hale makes the same point, more briefly, in *Kerr*:

> "[62] What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.
>
> [63] If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof..."

108. The second reason why the jurisdiction of the Social Entitlement Chamber is inquisitorial is therefore that the tribunal stands in the shoes of the departmental decision maker, who was tasked with investigating the claim. The Social Security Commissioners (the predecessor to the Upper Tribunal) set this out explicitly in *R(IB) 2/04* at [25]:

> "…the appeal tribunal has power to consider any issue and make any decision on the claim which the decision-maker could have considered and made. The appeal tribunal in effect stands in the shoes of the decision-maker for the purpose of making a decision on the claim."

109. The Commissioners in *R(IS) 17/04* reiterated the position:

> "It is not in our judgment open to doubt that, as an appeal tribunal under the Social Security Act 1998 hearing the claimant's appeal against the departmental determination revoking her entitlement to benefit, Mr Warren was sitting as an 'inquisitorial' tribunal. By that we mean his function was to carry out a complete reconsideration and redetermination for himself of the facts and merits of the decision under appeal, the purpose being to ascertain and determine the true amount of social security benefit to which the claimant was properly entitled: see *R v. Deputy Industrial Injuries Commissioner ex parte Moore* 1 QB 456 and *R v. Medical Appeal Tribunal ex parte Hubble* 2 QB 228 referred to above; the Commissioners' case *R(S) 4/82* (especially paragraph 25) and the recent decision of a Tribunal of Commissioners in CIB/4751/2002 [reported as R(IB) 2/04] (especially paragraph 32); and the further recent reaffirmation of the principle in *Kerr v. Department for Social Development (Northern Ireland)* UKHL 23 [R1/04 (SF) (especially at paragraph 14 per Lord Hope, and paragraph 61 per Lady Hale). In our judgment this is and remains a principle of general application to all proceedings in such tribunals."

110. Similar phraseology has been used in more recent cases before the Upper Tribunal; see for example *CF v CMEC* [2010] UKUT 39 at [39], where Judge Wikeley said, in relation to the First-tier Tribunal Judge who heard the appeal at first instance:

> "In broad terms this meant that Tribunal Judge McEldowney was standing in the shoes of the decision maker as at that date…"

111. It is therefore case law which provides the basis for the inquisitorial nature of that tribunal's jurisdiction. The statutory appeal provisions which apply in the Social Entitlement Chamber make no explicit reference to how the tribunal should operate, other than that the Social Security Act 1988 (under which many of the appeals are made) states, at s 12(8), that:

> "(8) In deciding an appeal under this section, the First-tier Tribunal–
>
> (a) need not consider any issue that is not raised by the appeal;…"

112. Those words have been taken as endorsing the inquisitorial nature of the jurisdiction: for example, in *R(IB) 2/04* at [31] the Commissioners said "it is implicit in this provision that an appeal tribunal is not limited to considering issues actually raised by the parties".

Is the jurisdiction of the Tax Chamber similarly inquisitorial?

113. As set out at §§103-105, the first reason why the jurisdiction of the Social Entitlement Chamber is inquisitorial is because the appeals brought before it concern the refusal of a claim to receive something from a common fund, into which individuals and others have contributed.

114. In direct tax, the normal position is that (a) HMRC makes an assessment (or amends a person's self-assessment) and the appellant seeks to resist that assessment; or (b) HMRC refuses a person's claim for a tax relief and he then appeals to the

Tribunal. The appellant has therefore either retained money which HMRC considers should have been paid in taxes, or has been refused a refund of tax already paid over.

115. Some indirect taxes are similar, in that a person liable to stamp duty land tax or landfill tax is required to pay over to HMRC a sum he would otherwise have retained. VAT and duties are collected by the trader and paid over to HMRC.

116. The Tax Chamber thus generally resolves disputes over payments *into* a common fund, rather than disputes about the right to receive money *from* a common fund.

117. NICs are an exception; they operate in the same way as the benefit model discussed in *Hubble* and *Kerr.* However, NICs have now become so closely integrated with the tax system that it would be artificial to hold that a different approach should apply (although arguments could no doubt be raised to the contrary).

118. The second reason why the jurisdiction of the Social Entitlement Chamber is inquisitorial is that it stands in the shoes of the departmental decision maker, see §109-110. The position in tax is different. The taxpayer or trader has a statutory obligation to pay the right amount of tax and must report his liabilities to HMRC on a regular basis. HMRC may enquire into his statutory returns. HMRC's enquiries are not "a co-operative process of investigation in which both the claimant and the department play their part". Instead, the onus is on the recipient of the HMRC enquiry letter to provide the requested information. There is no parallel with the sort of "investigation" or "inquest" carried out by a benefits officer into a welfare claim, to which reference was made in *Hubble.*

119. When a taxpayer appeals to the tribunal, this difference of approach is reflected in the role played by the burden of proof. In the Social Entitlement Chamber "it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof", as Lady Hale said in *Kerr* at [63]. In the Tax Chamber, the burden of proof is important. For example, in direct tax cases, it is well-established that the taxpayer has the burden of displacing an assessment, see Taxes Management Act 1970, s 50(6) considered in *Nicholson v Morris* [1976] STC 269. The same is true in VAT: see *Grunwick Processing Laboratories v C & E Commrs* [1987] STC 357.

120. Unlike the Social Entitlement Chamber, the Tax Chamber does not step into HMRC's shoes when it hears the appeal. It cannot, for example, exercise HMRC's care and management powers, and has no general supervisory jurisdiction over how HMRC has exercised those powers, see *HMRC v Noor* [2013] UKUT 071(TCC). Instead, its task is to decide the issues identified by the parties in accordance with the specific appeal provision in question.

121. The position of the Tax Tribunal is therefore different from that of the Social Entitlement Chamber in the ways set out above.

122. But is it possible for different tribunals, with almost identical rules, to have different jurisdictions? Although it is beyond the compass of this decision to examine

the jurisdiction of all other Chambers of the First-tier Tribunal, I have briefly considered the position in the Immigration and Asylum Chamber.

The Immigration and Asylum Chamber

123. In relation to the Immigration Appeal Tribunal, a predecessor of the Immigration and Asylum Chamber, Brooke LJ, delivering the judgment of the court in *GH (Afghanistan) v SSHD* [2005] EWCA Civ 1603 said at [15] that:

> "An obligation on a tribunal to pursue a point of law not raised by the party whom the point favours is a very unusual feature of an adversarial system, which is what the immigration appeal system is."

124. In *JK (Democratic Republic of Congo) v SSHD* [2007] EWCA Civ 831 at [38] Lord Toulson, giving the leading judgment with which Arden and Pill LJJ both agreed, confirmed that asylum proceedings before an immigration judge were adversarial, and endorsed *GH (Afghanistan).* That the position remains the same in the Immigration and Asylum Chamber can be seen from *NK v Entry Clearance Officer* [2014] OA/10167/2013, where Judge Gibb accepted the appellant's submission that *JK* applied, so that the proceedings were adversarial in nature, see [7] and [14] of that decision.

125. In *HK v SSHD* [2006] EWCA Civ 1037 at [27], Lord Neuberger said of the Asylum and Immigration Tribunal:

> "Relatively unusually for an English judge, an immigration judge has an almost inquisitorial function, although he has none of the evidence-gathering or other investigatory powers of an inquisitorial judge. That is a particularly acute problem in cases where the evidence is pretty unsatisfactory in extent, quality and presentation, which is particularly true of asylum cases."

126. The position remains the same in the Immigration and Asylum Chamber, see the Upper Tribunal's reliance on *HK v SSHD* in *AA v SSHD* [2012] UKUT 16 (IAC) at [112].

127. From those authorities it can be seen that the Immigration and Asylum Chamber has an adversarial jurisdiction, although that does not prevent it from taking an inquisitorial approach to finding the facts, see the next following paragraphs.

An inquisitorial approach is not the same as an inquisitorial jurisdiction

128. As can be seen from *HK v SSHD* cited above, there is a difference between an inquisitorial approach and an inquisitorial jurisdiction. The latter, as described at §§84-85, gives the court or tribunal the power to seek out its own evidence and to accept evidence tendered by persons who do not become parties to the case,.

129. An inquisitorial approach to the evidence means that the Tribunal can ask questions of witnesses based on the evidence put to it. For example in *Aleena Electronics v HMRC* [2011] UKFTT 608 (TC), Judge Mosedale said:

> "Where the Appellant is unrepresented the Tribunal panel will take on a more inquisitorial role and will ask witnesses questions which an unrepresented Appellant may not think to ask."

130. This inquisitorial approach has also recently been adopted in the civil courts, without changing the adversarial nature of those proceedings: Rule 3.1A was added to the CPR with effect from October 2015, and provides as follows:

> "(4) The court must adopt such procedure at any hearing as it considers appropriate to further the overriding objective.
>
> (5) At any hearing where the court is taking evidence this may include—
>
> (a) ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined; and
>
> (b) putting, or causing to be put, to the witness such questions as may appear to the court to be proper."

Conclusion on use of Rule 5(1)

131. The analysis set out in the above paragraphs can be summarised as follows:

(1) The power of a court or tribunal to regulate its own procedure is limited by the nature of its jurisdiction.

(2) If that jurisdiction is adversarial, the court or tribunal cannot allow a non-party to provide witness evidence of its own motion; in contrast, this is permitted if the jurisdiction is inquisitorial.

(3) The civil courts have an adversarial jurisdiction, with no power to call for witness evidence or documents. The Tribunal has wider powers in relation to witness evidence and documents, so the civil courts are not a reliable comparator.

(4) The Employment Tribunal also has an adversarial jurisdiction, but that tribunal, like the civil courts, deals with *inter-partes* disputes; it also stands outside the Tribunal system introduced in 2009.

(5) That system, of which the Tax Chamber is part, focuses on administrative law, such as tax, welfare benefits, and immigration, where one of the parties is the state. For that reason, too, the Employment Tribunal cannot be used as an analogy to establish the jurisdiction of the Tax Chamber.

(6) The Chambers of the First-tier Tribunal were designed to operate consistently with each other and have similar procedural rules. The Social Entitlement Chamber is part of that 2009 tribunal structure; it has an inquisitorial jurisdiction. However, analysis of the case law shows that this is because:

(a) appeals to that Chamber concern payments out of a common fund;

(b) tribunals in that Chamber stand in the shoes of the departmental decision maker; and

(c) for both those reasons, concepts like the burden of proof are rarely encountered.

(7) The Tax Chamber is different from the Social Entitlement Chamber: appeals are generally about payments into a common fund; the Tribunal does not step into the shoes of the HMRC decision maker; and the burden of proof is important in tax cases. The position of the Tax Chamber therefore has none of the characteristics of an inquisitorial jurisdiction seen in the Social Entitlement Chamber.

(8) the Immigration and Asylum Chamber is also part of the same tribunal structure, but has an adversarial jurisdiction. It is therefore possible for the Chambers of the First-tier Tribunal to have different jurisdictions.

(9) The fact that the Tax Chamber may adopt an inquisitorial approach when asking questions of the witnesses called by the parties does not mean that it has an inquisitorial jurisdiction.

132. Based on the above analysis, I find that the Tax Chamber has an adversarial jurisdiction. As a result, it is not possible to use Rule 5(1) as a gateway to allow a non-party to provide witness evidence.

Other points

133. I do not need to deal with the "floodgates" argument put by Mr Tolley and supported by Mr Peacock, and it formed no part of my reasoning. I do however agree that if the Tribunal had the jurisdiction to allow applications such as that now before me, the consequential delays and complications would hinder the efficient conduct of litigation at proportionate cost.

134. I have also not referred to *Lobler,* on which Mr Furness relied. For completeness I confirm that I agree with Mr Tolley's submissions, set out at §38, that the case can be easily distinguished from the BBC Application.

Decision on Issue 1

135. For the reasons set out above, I find that the Tribunal has no power to allow a non-party to provide witness evidence in proceedings, unless:

(1) that person has applied under Rule 9(3) to be a party to the proceedings as a respondent;

(2) the Tribunal has refused that application; and

(3) having considered the matter, has decided of its own motion that the person should nevertheless be allowed to provide evidence, see Rule 9(4).

136. I am aware that in coming to my conclusions I have referred to material – such as that relating to the jurisdiction of the Social Entitlement Chamber – which was additional to that provided by the parties and the BBC. Had my decision rested only on this Issue, I would have considered whether to ask for further submissions in relation to that new material.

137. However, as I had decided Issue 2 against the BBC, it was unnecessary to ask for such further submissions.

ISSUE 2: THE BBC APPLICATION

The Issue

138. Issue 2 was whether to allow the BBC Application.

The evidence

139. In making the findings of fact set out in the next part of this decision notice, I relied on the following evidence:

(1) the correspondence between the BBC and the parties, contained in the Bundle prepared for the hearing ("the Tribunal Bundle");

(2) the correspondence between the BBC and the Tribunal and that between the parties and the Tribunal, also contained in the Tribunal Bundle;

(3) the witness statement of Ms Jennifer Henderson, Head of Global Mobility and Employment Tax at the BBC since 5 May 2015;

(4) the witness statement of Ms Katherine Pleming, the solicitor in HMRC's Solicitor's Office with overall responsibility for the conduct of these appeals. Ms Pleming took over that role from Ms Deebah Liaquat in February 2016; and

(5) the Appellants' amended Grounds of Appeal and HMRC's Statement of Case in relation to the Appellants' appeals, so far as they contain facts relevant to this Issue, but not otherwise.

140. As explained at §188ff below, HMRC informed the Tribunal before the hearing that it was going to object to Ms Henderson's witness statement. As a result, I did not read that statement before the hearing. Ms Pleming's witness statement was provided on the morning of the hearing.

141. Mr Tolley said HMRC was now content for the evidence of both witnesses to be considered by the Tribunal. I adjourned the proceedings for a short time to read both witness statements.

142. Although the witness statements contained conflicting evidence, neither witness was called to give evidence or be cross-examined. I considered *Browne v Dunn* (1893) 6 R 67, which established the principle that:

> "Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence."

143. In *Markem Technologies Ltd v Buckby* [2005] EWCA Civ 267, Jacob LJ, giving the judgment of the Court of Appeal, first noted at [59] that the reports of *Browne v Dunn* are difficult to access, and then went on to rely on extracts from the case set out by Hunt J in *Allied Pastoral Holdings Pty Ltd v Commr of Taxation* [1983] 1 NSWLR 1 at [16]-[18]. Jacob LJ also approved Hunt J's "valuable comments" on *Browne v*

Dunn, including the following *dictum* taken from *Phipson on Evidence*, 12th ed (1976):

> "Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character."

144. Applying those principles, and noting that Ms Pleming's witness statement was filed after Ms Henderson's and that it contained explicit challenges to some of Ms Henderson's statements, I find that Ms Henderson was therefore on notice, before the hearing, that parts of her evidence had not been accepted by HMRC. Furthermore, Mr Tolley drew Mr Furness' attention to these challenges in the course of the hearing.

145. To the extent that Ms Henderson's witness statement is in conflict with the evidence given by Ms Pleming, I have preferred the latter, which was supported by contemporaneous documentation.

Findings of fact about the background to the BBC Application

146. The next following paragraphs set out findings of fact which are relevant to the BBC Application.

The Appellants

147. In 2002, Mr Willcox began working as a BBC presenter; from 2005 he provided his services via Tim Willcox Ltd. From June 2014, Mr Willcox was employed by the BBC.

148. At some point, HMRC opened enquiries into Tim Willcox Ltd, and subsequently decided that the services it had provided to the BBC in the years 2006-07 through to 2012-13 fell within IR35.

149. Mrs Joanna Oliver began working for the BBC as a presenter in 1999; from 2004 she provided her services via Paya Ltd. She entered into a contract of employment with the BBC on 6 October 2014.

150. At some point, HMRC opened enquiries into Paya Ltd, and subsequently decided that the services it had provided to the BBC in the years 2007-08 through to 2011-12 came within IR35.

151. The Appellants appealed against the extra tax and NICs which HMRC had decided was due, and their appeals were subsequently notified to the Tribunal.

HMRC's contact with the BBC, and witness evidence

152. Before making its decisions to assess the Appellants, HMRC contacted the BBC. I find, in reliance on Ms Henderson's witness statement, that:

> "HMRC caseworkers requested meeting(s) with relevant people at the BBC (primarily the programme executives or editors who engaged and worked with the presenters under review) in order to establish the nature of the services those whose PSCs were under investigation

> had provided to the BBC, the manner in which those services were provided and the details of the contracting process applied to the services. The BBC sought to ensure that the right people, at all levels, were made available to HMRC to assist them in establishing the factual situation."

153. At that time, Mr David Smith was head of employment tax at the BBC and Ms Mary Hockaday was Head of the BBC Newsroom. Ms Kathryn Richardson was (and remains) the Head of Legal (BBC Rights, Legal and Business Affairs) and Head of Legal & Business Affairs for BBC News.

154. Mr Smith and Ms Hockaday were identified as possible witnesses in the appeals. On 13 September 2014 they held a meeting with HMRC officers.

155. On 30 October 2014, Ms Liaquat emailed Ms Hockaday, copying Mr Smith, and attaching a list of the questions HMRC planned to work through during their next meeting. Ms Liaquat told Ms Hockaday and Mr Smith that the meeting would be tape recorded, and that HMRC's aim was to use the answers given to the questions to form the first draft of their witness statements. She also advised that:

> "It is important to remember that this will be your witness statement, and when you are called to give oral evidence in the Tax Tribunal, you will be asked to confirm under oath, to the best of your belief, of the accuracy of your witness statement."

156. By a separate email, Ms Liaquat sent Mr Smith and Ms Hockaday copies of the following documents:

(1) the Appellants' grounds of appeal dated June 2014;

(2) a 21 page letter from Mr Kirk to HMRC dated 24 February 2014, setting out the background to Paya Ltd's appeal, as well as the relevant legislation;

(3) a letter from another accountant, HW Fisher & Co dated 1 October 2013, containing Paya Ltd's preliminary grounds of appeal;

(4) notes of the 13 September 2014 meeting;

(5) a report entitled "Review of Freelance Engagement Model" prepared by Deloitte LLP ("Deloitte") for the BBC on 25 October 2012 ("the Deloitte Report"). The Deloitte Report was initiated following a Public Accounts Committee hearing on July 2012, and it set out the conclusions of Deloitte's review into the BBC's compliance with IR35; and

(6) the BBC's summary of the Deloitte Report, published on 7 November 2012.

157. On 26 November 2014, Ms Liaquat sent draft witness statements to Mr Smith and Ms Hockaday. The opening paragraph of her covering email reads:

> "Please find attached draft copies of your witness statements. As previously stated, although these have been drafted by us based on the information provided by you both earlier this month, these are your witness statements. Therefore, you need to ensure that everything in

> the witness statements is true and correct and if you are asked to appear at the Tribunal, you are happy to give evidence based on the information contained in the witness statement and be cross examined on the evidence too. If you have any concerns or are unsure about any of the information, please do not hesitate to let me know."

158. On 25 March 2015, Mr Smith sent Ms Liaquat an amended witness statement attached to an email which read: "I understand that this will be the basis of the witness statement I am able to sign. Could you please let me know how you want to deal with the inserts before I sign and submit anything?"

159. Ms Liaquat replied on 30 March 2015, saying:

> "I would just like to take this opportunity to remind you that this is your witness evidence, based on your knowledge and you should be happy with its contents. Furthermore, if you are asked to provide oral evidence, Paya Limited's Counsel can ask you questions regarding the information contained in your witness evidence and the surrounding circumstances. Therefore, it would be advisable to complete the witness statement with as much detail as possible to avoid any unexpected questions and answers."

160. An experienced lawyer proofed Mr Smith's and Ms Hockaday's witness statements. The drafts were then reviewed both by the individuals and by the BBC's legal department; HMRC subsequently amended the drafts to reflect their comments.

The number of HMRC enquiries

161. The BBC was initially aware that HMRC were enquiring into a small number of potential IR35 cases. In May 2015, when Ms Henderson took over from Mr Smith, she was told that HMRC were considering 23 cases; by the end of June 2015 she had been made aware of a further 6 cases.

162. On 29 July 2015, HMRC informed Ms Henderson that it was in the process of working through a list of 469 people who had been engaged by the BBC via PSCs, to establish whether further investigations should be initiated into those PSCs. So far, enquiries had been opened into 80 PSCs.

163. By the autumn of 2015, Ms Henderson became aware that the number of enquiries had increased to 100.

Research carried out by Ms Henderson and Ms Richardson

164. At this point, Ms Henderson and Ms Richardson decided that the BBC could no longer approach these HMRC reviews on a case by case basis. They began to research and consider:

(1) the IR35 statutory provisions and the related case law;

(2) the roles being investigated by HMRC; and

(3) how those investigations were being conducted.

165. In July 2015, Ms Henderson attended a witness proofing session with a BBC employee who was a possible witness in a third, unrelated, appeal.

Contact between the BBC and Mr Kirk

166. In mid-August 2015, Ms Henderson and Ms Richardson contacted the Appellants and Mr Kirk, and subsequently held meetings with them. In those meetings the BBC sought to ascertain "the nature and extent" of the Appellants' cases.

167. The BBC established, either before or during these meetings, that the Appellants had approached one or more BBC employees or former employees, and had asked them to provide witness evidence. With one exception (see §184) the names of those potential witnesses were not shared with the Tribunal or HMRC and remain privileged.

Directions for exchange of witness evidence and further developments

168. Following a case management hearing on 8 May 2015, the Tribunal (myself and Mr Nicholas Dee) issued directions for the future conduct of these appeals. By Direction 11, the parties were to serve lists of documents no later than 8 June 2015. By Direction 12, they were to file and serve witness statements no later than 20 July 2015.

169. The parties subsequently made a joint application to the Tribunal, asking that compliance with Direction 12 be delayed until 14 September 2015; that application was granted.

170. At some point before 8 September 2015, HMRC sent a new version of Ms Hockaday's witness statement to the BBC's legal team for its review. Mr Smith had already signed a final version of his witness statement.

171. On 8 September 2015, the BBC told HMRC that they needed a further extension until 31 October. They also asked for a copy of HMRC's Statement of Case, which was provided on 23 September.

172. On 15 September 2015, HMRC emailed the Tribunal, saying that the parties had been unable to exchange witness statements; that "the main cause of delay was due to third party evidence HMRC are trying to obtain" and asking for an extension to 31 October 2016. I granted that further extension.

173. At some point around 8 September 2015, the BBC instructed Counsel, seeking advice on how the BBC should approach HMRC's IR35 reviews.

174. On 20 October 2015, Ms Richardson informed HMRC that the BBC had decided to "suspend service of our [sic] witness evidence at this time". She stated that, subject to the outcome of Counsel's review, the witness statements would be delivered by "early January 2016". She also informed HMRC that the BBC had "taken the opportunity to speak to the Appellants' adviser, who has confirmed to us…that they have no objection to our making a request for an adjournment".

175. On 27 October 2015, HMRC wrote to the Tribunal, attaching the BBC letter of 20 October 2015 and asking for a further extension for compliance with Direction 12 until 27 January 2016. Mr Kirk had already written to the Tribunal, saying that the Appellants supported HMRC's application for a further extension. The Tribunal granted the application.

176. On 17 December 2015, the BBC's solicitors, Freshfields Bruckhaus Deringer ("Freshfields") wrote to HMRC, saying:

> "The BBC continues to be willing to participate in the proceedings, provided it can do so on an impartial basis, and in a way which appropriately protects its own interests and those of its staff and on-air talent."

177. Freshfields' letter also informed HMRC that:

(1) the BBC was going to contact "its witnesses" to ask them to hold off finalising their witness statements so that the BBC could "take a more active role in the preparation of its witness statements";

(2) the BBC intended that these witness statements would be "submitted independently rather than by either or both parties";

(3) these proposals had been discussed with Mr Kirk, who had no objection; and

(4) the BBC had seen the lists of documents exchanged between the parties, and " it is clear that many of these documents relate to the BBC".

178. A copy of that letter was sent to Mr Kirk.

179. On 19 January 2016, Ms Liaquat replied to Freshfields, also copying Mr Kirk. She said that HMRC was "surprised and dismayed" by the BBC's stance, and set out her objections to the BBC's proposal. In relation to the communications between the BBC and Mr Kirk, she said;

> "I note…that you saw fit to discuss the proposals contained in your letter first with the presenters' adviser, David Kirk, who was evidently given a opportunity to consider and respond to them before they were out to HMRC. This repeats the pattern of dealing in advance of the BBC's letter of 20 October 2015, where the BBC's then proposals were discussed by the BBC and agreed first with Mr Kirk, before being put to HMRC. It also appears that you have been provided with a list or lists of documents exchanged in this litigation, presumably by Mr Kirk. This pattern of dealing does not appear to be consistent with the BBC's stated interest in maintaining a position of impartiality."

180. On the same day, Ms Liaquat wrote a second letter to Freshfields, which was not copied to Mr Kirk. In emboldened, underlined, capital letters, it was headed "confidential and subject to legal professional privilege". Its opening paragraphs say:

> "I am writing this letter under separate cover as this letter concerns that identity of one of the witnesses with whom HMRC has been in

> discussion and the state of preparation of HMRC's proposed evidence. These matters are of course subject to legal professional privilege and must not be disclosed to the Appellants.
>
> Please confirm that to date neither Freshfields nor the BBC have revealed to the Appellants or their advisers the identity of any persons with whom HMRC have been in discussion as a potential witness, or as to the state of preparation of that witness evidence…
>
> HMRC formally seeks your permission to finalise and serve the witness evidence of Mary Hockaday on behalf of the BBC. As you will be aware, it was the BBC who proposed Ms Hockaday as an appropriate witness in September 2014. As you will also be aware, her statement is at the stage of a very advanced draft, with amendments having been made by both Ms Hockaday and the BBC legal team."

181. On 25 January 2016, Freshfields replied to that letter, saying:

> "We confirm as requested that neither Freshfields nor the BBC has shared copies of any of the statements prepared by HMRC for BBC witnesses with the Appellants or their advisers…we were surprised by the implication in your letter that witness lists have not been exchanged, and that the presenters are unaware of which witnesses HMRC intends to call against them or which issues those witnesses will be addressing…the BBC does not consent to HMRC finalising or serving Ms Hockaday's witness statement on 27 January 2016. Furthermore, we would kindly ask that you contact Ms Hockaday via the BBC's legal team going forward.
>
> The same applies to David Smith. He is no longer employed by the BBC but is giving his evidence in the capacity as a former BBC employee, and so the BBC is treating him in the same way as its current employees. Mr Smith has confirmed that he does not consent to his witness statement being served on 27 January 2016."

182. On the same day, Freshfields filed and served the BBC Application.

183. On 27 January 2016, Ms Liaquat wrote to Freshfields, saying that its letter of 25 January had not answered "the straightforward question" as to whether the BBC had revealed, to the Appellants or their advisers, the identity of the HMRC witnesses or the state of preparation of their evidence. She also asked for confirmation that the BBC accepted that this information was subject to legal professional privilege, and for copies of the communications between HMRC and Mr Smith, by which he confirmed he had withdrawn consent for the service of his witness statement. No copy of those communications was provided either to HMRC or to the Tribunal.

184. Ms Liaquat also told Freshfields that Ms Henderson had recently communicated the identity of one of the Appellants' witnesses, Mr Park, to another HMRC officer, the BBC's Customer Relationship Manager. With that exception, she said, HMRC was unaware of the BBC witnesses which the Appellants planned to call, as no lists setting out the identity of the witnesses had been exchanged. She told the BBC that Ms Henderson's disclosure "amounted to a breach of the Appellants' confidence and of their legal professional privilege".

185. On the same day, she informed Mr Kirk that HMRC were now aware of Mr Park's identity, but that "no information as to the content of [his] witness statement was disclosed". She also told Mr Kirk that her earlier references about contact between him and the BBC were not intended as a criticism of his behaviour, but to record HMRC's concern that the BBC had not acted in an even-handed way.

186. On 8 February 2016, the Tribunal called this hearing. It was originally listed for 18 May 2016, but subsequently relisted for 6 July 2016.

187. On 17 June 2016, the BBC Litigation Department informed HMRC that the BBC would be serving witness evidence at this hearing. HMRC responded by suggesting that, given the close proximity of the hearing date, the witness evidence should be served by 21 June 2016 and at the latest by 24 June 2016.

188. On 29 June 2016, HMRC emailed the BBC Litigation Department and copied the Tribunal, saying that no witness evidence had been received, and that if the BBC nevertheless sought to rely on witness evidence, HMRC would object to it being heard.

189. On 30 June 2016, the BBC filed and served Ms Henderson's witness statement. It included a list of the witnesses which the BBC considered "would be best placed to provide" evidence on "the matters which are required to be addressed in witness evidence". That list, slightly summarised for the purposes of this decision, is as follows:

Role	Name	Evidence	Rationale
Director, Editorial Policy & Standards	David Jordan	Operation of BBC Editorial Guidelines in terms of editorial control	The most appropriate person to address how the guidelines are intended to be operated
TBC/under consideration	TBC/under consideration	A witness who can speak to the day-to-day operation of the newsroom and role of presenters	A BBC representative who is better able to address how news presenters undertake their roles now that the head of the News Channel at the time of the HMRC's enquiries no longer works at the BBC
Former Controller of Rights & Business Affairs	Roger Leatham	The discussions with HMRC over employment status generally and the movement of news presenters to employment contracts from the end of 2013	RL was involved in HMRC discussions after the Deloitte Report [see §156(5)].

190. The covering letter to Ms Henderson's witness statement said that HMRC had no basis for its objections because (a) the BBC had never agreed to HMRC's deadline

of 24 June 2015 and (b) HMRC had not asked the Tribunal to make directions before the hearing.

191. Ms Pleming responded later the same day, saying:

> "We did not consider that it was necessary to request directions from the Tribunal to this effect, in circumstances where we had reasonably expected that the BBC, although not a party to the proceedings, might have regarded itself as bound to comply with the overriding objective. It appears, regrettably, that we were mistaken about this."

192. She continued by saying that, having reviewed Ms Henderson's witness statement:

> "[HMRC] are very surprised and, indeed, deeply disappointed to note that the identities of HMRC's proposed witnesses, as well as the state of preparation of their witness statements and significant details about the content of those statements, have been disclosed without HMRC's consent to both the Tribunal and the Appellants. This is the clearest and most flagrant possible breach of HMRC's legal professional privilege in respect of its unserved/draft witness statements."

193. She went on to inform the BBC that HMRC would also be providing its own witness evidence.

Structure of the following parts of this decision

194. I identified eight reasons why the BBC contend that there are problems with the traditional approach to the provision of witness evidence in the context of the Appellants' appeals. These are taken from the BBC Application, Mr Furness's skeleton argument, his oral submissions, Ms Henderson's witness statement, and the correspondence in the Tribunal Bundle, and are that:

(1) the Appellants' appeals are *de facto* test cases;

(2) the BBC is acting impartially in these proceedings;

(3) Mr Smith and Ms Hockaday were not properly briefed by HMRC;

(4) Mr Smith and Ms Hockaday are not the most appropriate witnesses;

(5) Mr Smith's and Ms Hockaday's evidence is not impartial;

(6) the BBC's replacement witnesses will provide "authoritative" evidence;

(7) the normal process for the provision of witness evidence means that BBC employees will be "pitted against each other"; and

(8) HMRC did not make Mr Smith and Ms Hockaday aware of the Tribunal process and its implications.

195. In the following parts of this decision, I first set out the BBC's position on each of those reasons, followed by:

(1) the Appellants' position, as put by Mr Peacock in his skeleton argument and oral submissions, noting that the Appellants made no submissions on some of the reasons;

(2) HMRC's response, taking into account Mr Tolley's skeleton argument, his oral submissions, Ms Pleming's witness statement, and the correspondence in the Tribunal Bundle; and

(3) my discussion and conclusion as to whether there are problems with the traditional approach to the provision of witness evidence in the context of the Appellants' appeals.

196. Against the background of those conclusions, I then considered whether it would be in the interests of justice to allow the BBC Application.

Whether the Appellants' appeals are *de facto* test cases

The BBC position

197. The BBC Application says:

> "HMRC have indicated to the BBC that there are around 100 additional cases under consideration involving current or former BBC presenters. The BBC also understands that HMRC has initiated or indicated their intention to initiate IR35 proceedings in relation to presenters who are engaged by other broadcasting organisations…The appeals are therefore extremely important not only to the individuals in question but also to the BBC and to the broadcasting industry as a whole. The appeals are likely to be the first cases to test the freelance model in the broadcasting industry against the IR35 legislation."

198. Ms Henderson's witness statement says:

> "the BBC has learned that HMRC is staying other appeals behind these ones, thereby giving the impression that these proceedings will effectively be treated as test cases (because they will provide an informal precedent by reference to which the later cases will be adjudicated or settled)."

199. Mr Furness' skeleton argument sets out, as its first reason for making the BBC Application, that:

> "the BBC has learnt that HMRC has opened enquires into more than 100 cases involving current or former BBC presenters. Accordingly, it has become clear to the BBC that notwithstanding that there are no 'lead case' directions under r.18 of the Tribunal [Rules], these…appeals are intended as *de facto* test cases in relation to a very significant number of BBC news presenters."

The Appellants' position

200. Mr Furness' skeleton argument states:

> "Although not formally joined there are other disputes between the Respondents and a considerable number of journalists/presenters, the outcome of which may well be determined by these appeals."

HMRC's position

201. In her letter of 27 January 2016, Ms Liaquat said:

> "We are not aware of any treatment by HMRC of the appeals as '*de facto* test cases' as you suggest…the number of other potential cases…[does] not appear to us to be relevant at all."

Discussion

202. There are three relevant points here. First, as both the BBC and the Appellants acknowledge, there has been no direction under Rule 18. Absent such a direction, a decision in the Appellants' case will not bind any other appellants. This Tribunal is not a court of record and its decisions do not create precedents.

203. Second, an IR35 appeal is primarily fact-based. The Tribunal is directed by the legislation to determine "the circumstances" under which the services are provided by the individuals; these include "the arrangements under which the services are provided". In *Synaptek v Young* [2003] EWHC 645 (Ch), Hunt J sets this out clearly:

> "The inquiry which [the legislation] directs is in the first instance an essentially factual one. It involves identifying, first, what are the 'arrangements involving an intermediary' under which the services are performed, and, secondly, what are the 'circumstances' in the context of which the arrangements have been made and the services performed. The legal hypothesis which then has to be made is that the arrangements had taken the form of a contract between the worker and the client. To the extent that 'the arrangements' are in the particular case to be found only in contractual documentation, it may be true to say that the interpretation of that documentation is a question of law. Even in that case, however, the findings of the fact-finding tribunal will be determinative of the factual matrix in which the interpretative process has to take place, and influential to a greater or lesser degree in enabling the essential character of the arrangements to be identified. Where, on the other hand, the arrangements cannot be located solely in contractual documentation, their identification and characterisation is properly to be described as a matter of fact for the fact-finding tribunal."

204. Third, it is well-established that findings of fact in one case are not binding on appellants in other appeals. Over a century ago, Viscount Haldane, giving the leading judgment in *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, said at page 40:

> "when a previous case has not laid down any new principle but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account."

205. Some three years later, Lord Dunedin said in *Lancashire and Yorkshire Rly Co v Highley* [1917] AC 352 at 364 that:

> "though a decision of a Court of higher or equal authority binds another Court as to propositions of law, it cannot bind them as to the findings in fact. No doubt if the facts of two cases are so similar as to be practically identical the second Court will hesitate long before it comes to a different conclusion. Nevertheless, the facts of two different cases cannot, *ex natura rei*, be actually identical, and it is never incumbent on a Court to import the finding of fact in one case into another."

206. In *Worsfold v Howe* [1980] 1 All ER 1028 at 1032, a decision of the Court of Appeal, Browne LJ said that:

> "There is, of course, ample high authority about the danger of elevating decisions on the facts in particular cases into principles of law."

207. It follows that the Appellants' appeals are not *de facto* test cases. The outcome of the Appellants' appeals will not be determinative of other appeals made by different BBC presenters, who will need to put forward evidence in relation to their own position.

Whether the BBC are "impartial"

The BBC's position

208. The BBC Application said that:

> "As a public organisation and public service broadcaster, the BBC wishes to remain impartial…[and] the BBC is concerned to ensure that witness evidence from current and former BBC employees is fairly and impartially presented."

209. The BBC Application also stated that the BBC has " no direct financial interest in the Appeals" as any tax payable would be the Appellants' liability".

210. However, it also acknowledged that the "the individuals in question are currently employed by the BBC" and that the BBC "needs to be mindful of its duties of care towards its employees and on-air talent."

211. Freshfields' letter to HMRC of 17 December 2015 said:

> "the BBC is mindful of the potential impact of the [Appellants'] appeals on its business and the industry as a whole, noting that there are up to 100 further cases under consideration involving current or former BBC presenters…given that (i) BBC presenters and employees are involved both as parties to the litigation and as witnesses; (ii) the appeals may carry consequences for other BBC presenters and (iii) the publicity which they are likely to attract, the BBC views itself as an interested third party."

212. Freshfields' letter went on to say that the BBC were willing to participate in the proceedings, "providing it can do so on an impartial basis, and in a way which appropriately protects its own interests and those of its staff and on-air talent".

213. Mr Furness accepted in his skeleton argument that:

> "HMRC's investigations and these proceedings will inevitably be a stressful and disruptive process for those involved, whether as appellants or as witnesses. That being the case, HMRC also has a legitimate interest to ensure so far as practicable that the investigations and proceedings have minimal impact on the professional lives of its workers."

214. During the hearing, he submitted that:

> "…the BBC has perhaps a selfish, but I would submit entirely legitimate, concern that a tribunal making findings in public litigation …gets it right when it comes down to the way that editorial guidelines are applied. It would be difficult and embarrassing, perhaps for all concerned if, due to a lack of complete evidence, the Tribunal formed a view, quite legitimately on the evidence before it, about the way that the BBC operated its editorial guidelines or other ways in which it operated which were at variance with the truth."

The Appellants' position

215. Mr Peacock said that:

> "The BBC, as you have heard, have their own interests in this application, these proceedings. Those interests, as my learned friend Mr Furness has made clear, may or may not be aligned with the interests of the Appellants."

216. He went on to say that:

> "…my learned friend [Mr Furness] was candid enough to admit and reiterate the BBC's has its own interests. Yet what [the Tribunal is] being invited to bless is that a party with its own interests shall decide whom amongst its workers, to use a neutral term, it will call to lead evidence. So the BBC presents itself both as neutral but wants to play as if it were a party."

HMRC's position

217. HMRC agreed with the Appellants that the BBC had its own interests to protect. Mr Tolley said in his skeleton argument that:

> "it is clear that the BBC is seeking to interfere in these appeals because it perceives the outcome of the appeals as impacting upon its own interests…The BBC's proposed intervention is not therefore disinterested and through its witness evidence it will be seeking an outcome for the appeals that suits its needs, whatever they may be considered by the BBC to be."

218. As is clear from the correspondence between the parties, HMRC was also concerned that the BBC were not dealing even-handedly as between them and the Appellants in relation to the BBC's discussions with Mr Kirk.

Discussion

219. Mr Furness did not dispute that the BBC has its own interests in relation to these appeals. These include:

(1) the BBC's duties as the Appellants' employer;

(2) the BBC's duties as employer of other employees whose PSCs are currently under HMRC enquiry, or those whose PSCs are being considered by HMRC as possible subjects for an enquiry;

(3) the BBC's wish to minimise the disruption to its business resulting from HMRC's enquiries and any consequential legal proceedings; and

(4) the protection of the BBC's own reputation and its public profile.

220. I have no hesitation in concluding that the BBC is not acting impartially in seeking to intervene in these proceedings, but had its own interests to protect. Having come to that conclusion, I do not need also to concern myself with whether the BBC acted even-handedly when it communicated with Mr Kirk.

221. By way of postscript, I observe that the BBC stated that it has no "direct" financial interest in these appeals, in that any income tax and NICs which are found to be due will be recovered by HMRC from Appellants. However, no information was sought, and none was given, as to whether the BBC has any *indirect* financial interest in the appeals, whether by way of claims by individuals relating to past promises or future salary levels, or otherwise. The possibility that the BBC might have an indirect financial interest in the appeals has, however, played no part in my conclusion; I simply note the BBC's use of language.

Whether the BBC witnesses had not been properly briefed by HMRC

The BBC's position

222. Ms Henderson's witness statement said:

> "We understood that those from whom witness statements had been sought had not been provided with the Statements of Case or any significant background at all as regards the subject matter of the cases, either legally or operationally. Accordingly, they were, in effect, providing statements in a vacuum, and solely in response to questions and propositions framed by HMRC, which (necessarily) was coming at the evidence from a particular perspective.
>
> In addition to not having sight of the Statements of Case, the witnesses and potential witnesses necessarily did not have an understanding of the IR35 legislation and its operation or the test set out in *Ready Mixed Concrete* [*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968) 2 QB 497]. In our view, and having familiarised ourselves with these matters, access to the Statements of Case, and at least a high-level understanding of the IR35 legislation and the test in *Ready Mixed Concrete*, would be crucial if witnesses were to be able to provide a complete picture to the FTT."

223. Mr Furness's skeleton argument echoed this:

> "Witnesses have not been properly briefed on the law or the issues. The BBC understands that those from whom witness statements have been sought by HMRC have not been provided with the Statements of Case in the appeals or any significant background to HMRC's investigations. Witnesses have also not been provided with an understanding of the IR35 legislation and its operation. Without that information, it is impossible for witnesses to know whether they are addressing all factual matters that might be relevant to the Tribunal's consideration of the central legal issues."

HMRC's position

224. Ms Pleming responded to Ms Henderson by saying:

> "It is suggested repeatedly in [Ms Henderson's] Statement…that the BBC witnesses are required to have an intricate knowledge of how the IR35 legislation works. This is a fundamental and pervasive misconception on the part of the BBC. The role and function of the proposed BBC witnesses in respect of the IR35 reviews/appeals was simply to set out the facts within their knowledge that are relevant to the issues in the appeals, such as the presenter's day-to-day working arrangements, the production of television and radio programmes, or the BBCs move to introduce employment contracts in 2012."

225. Ms Pleming also confirmed that HMRC had sent Mr Smith and Ms Hockaday the background information listed at §156.

Discussion

226. I agree with Ms Pleming that the witnesses' role is to "set out the facts within their knowledge that are relevant to the issues in the appeals". Although witnesses need some knowledge of the issues involved in order to give evidence, they do not have to be taken through the legislation and the case law. Their task is to give evidence of facts; it is for the parties' counsel to put forward the legal arguments.

227. In any event, I have already found that Mr Smith and Mr Hockaday were provided with a great deal of background information, including the IR35 legislation; the reasons why the Appellants' advisers' considered that IR35 did not apply, and the Deloitte report with its detailed analysis of how the BBC had complied with the IR35 legislation, see §156.

228. Far from giving evidence "in a vacuum", as Ms Henderson contends, Mr Smith and Mr Hockaday had more than enough material to understand the context in which their factual evidence was being provided.

Whether Mr Smith and Ms Hockaday were not the most appropriate witnesses

The BBC's position

229. Mr Furness said in his skeleton argument that one of the BBC's main concerns with the evidence so far gathered was that "the individuals identified by HMRC were not the most suitable witnesses." He continued:

> "Evidence is currently being taken from individuals who are not best placed to present a comprehensive and accurate picture to the Tribunal. For instance, Mr David Jordan is best placed to give evidence concerning the BBC's Editorial Guidelines as he is the Head of Editorial Policy. Yet evidence on the Guidelines is currently being given by others who are less well-placed to address the way in which the Guidelines are intended to operate."

230. Ms Henderson said:

> "An example of a failure to identify the most appropriate witness to address a particular issue relates to the operation of the BBC's Editorial Guidelines. At the moment, this is addressed in Mary Hockaday's witness statement. Mary Hockaday is not best placed to give this evidence because, although she (as a Head of the BBC Newsroom during the relevant period) would necessarily have borne in mind the Editorial Guidelines when undertaking her role, [she] would not have been involved in their formulation and application across the BBC. In our view, this topic would best be addressed by the Director of the Editorial Policy Department, which is responsible for the Editorial Guidelines."

231. Ms Henderson's witness statement appended a list of the witnesses which the BBC would provide to the Tribunal, if the BBC Application was allowed. That list does not include Ms Hockaday. Instead, another employee, not yet identified, is to provide evidence of "the day-to-day operation of the newsroom and role of presenters" on the basis that this person would be "better able to address how news presenters undertake their roles now that [Ms Hockaday] the head of the News Channel at the time of the HMRC's enquiries no longer works at the BBC".

The Appellants' position

232. Mr Peacock said in his skeleton argument, in a submission that addresses both this point and the following one, that:

> "The Appellants understand the BBC's concerns (set out in the witness statement of Jennifer Henderson…) that the evidence-gathering process thus far engaged in by the Respondents has sought evidence from the wrong people and has been both incomplete and (inadvertently, no doubt) partial."

HMRC's position

233. Ms Pleming said in her witness statement:

> "in all the time that HMRC has been carrying out its IR35 reviews, it has never directed the BBC as to which witnesses should be called by HMRC. HMRC may have suggested potential witnesses. in light of the BBC attendees at meetings that had taken place with the BBC generally and in relation to particular cases. However, HMRC were in the end reliant upon the BBC to put forward suitable individuals as potential witnesses. Further, HMRC were of course responsive if and when those witnesses personally identified that there were certain topics or issues that they did not feel able to deal with."

234. Mr Tolley's oral submissions echoed this. He said:

> "the identity of the [HMRC] witnesses [were] proposed by the BBC to HMRC, and with a view to the production of factually correct material that would assist the Tribunal, with the full involvement of the BBC's legal department."

Discussion

235. I have already found as a fact, based on Ms Henderson's witness statement, that "the BBC sought to ensure that the right people, at all levels, were made available to HMRC to assist them in establishing the factual situation". I agree with HMRC that it is therefore surprising that the BBC are now seeking to argue that Mr Smith and Ms Hockaday were not "appropriate" or "suitable" witnesses.

236. Mr Furness submits that the current witnesses are (my emphasis) "less well-placed to address the way in which the Guidelines *are intended to operate*". Ms Henderson is concerned that the witness statements "did not *fully explain*" the operation and role of the Guidelines, and she wanted to replace Ms Hockaday as a witness, because (a) she was not involved in the formulation and application of the Guidelines "across the BBC", and (b) she has moved on from her role as Head of News.

237. The main issue in the substantive appeals will be the nature of the engagements carried out by Mr Willcox and/or Mrs Oliver. Evidence about how the Editorial Guidelines were *intended* to operate is likely to be very much less valuable than evidence as to how the Guidelines were *in fact* applied to Mr Willcox and Mrs Oliver. Similarly, evidence about how the Guidelines were formulated and applied "across the BBC" is of little import compared to how the Guidelines were applied to Mr Willcox and Mrs Oliver.

238. It is also irrelevant that Ms Hockaday is no longer Head of News; what is needed is evidence about what happened at the time of the engagements under challenge.

239. For those reasons, I find the BBC's concerns to be misplaced.

240. As for Mr Peacock's submissions that HMRC has sought evidence "from the wrong people" and/or that the evidence contained in Mr Smith's and Ms Hockaday's witness statement is "incomplete" or "partial", I was unable to identify the basis for these submissions, given that the BBC had repeatedly stated that the Appellants had been provided with neither witness statement. I therefore reject these submissions as being without evidential foundation.

Whether Mr Smith's and Mr Hockaday's witness evidence is not impartial

The BBC position

241. Mr Furness' skeleton argument states the BBC has "serious concerns" that the evidence gathered to date "in particular by HMRC" was neither comprehensive nor accurate, and was also not fairly or impartially presented. He submitted that this

risked injustice to the Appellants and "will have a considerable impact on pending appeals".

242. Ms Henderson said:

> "In particular, we were worried that the statements provided an incomplete picture, to the extent that there was a real risk that they could inadvertently be misleading to the FTT in due course. For example, we were concerned that the BBC's Editorial Guidelines were being presented in the witnesses statements in a way that did not fully explain their operation and role, but instead provided a narrative that aligned more closely with HMRC's case theory."

243. Ms Henderson also said this about the witness proofing interview she had attended in relation to a third appeal, see §165:

> "I was particularly worried that the witness evidence did not seem to adequately draw out the distinctions between employees and freelancers in any great detail. For example, (i) freelancers could undertake work for third parties, whereas employees could not and (ii) employees cannot reasonably refuse to undertake particular assignments or postings, whereas freelancers are not bound by the same requirements."

HMRC's position

244. Ms Pleming said:

> "The exercise of proofing in each case was carried out on behalf of HMRC by an experienced solicitor or barrister. It would be surprising if there were in fact any legitimate grounds for complaint about the way in which the exercise was undertaken. It is also notable that it has taken so many months for the BBC's complaints about this process to emerge and that those complaints are lacking in factual accuracy."

Discussion

245. The following findings of fact are relevant here:

(1) the proofing was carried out by an experienced lawyer;

(2) the draft witness statements were reviewed both by the individuals and by the BBC's legal department; and

(3) HMRC amended the witness statements to reflect those comments.

246. Although Mr Furness criticised the evidence gathered to date "in particular by HMRC" he made no reference to any claimed inadequacies in the witness evidence being provided to the Appellants. I have therefore taken it that the BBC's concerns about accuracy, fairness and partiality relate only to Mr Smith's and Ms Hockaday's evidence.

247. Ms Henderson's witness statement sets out a number of particular concerns; these are identified in italics below, followed by my comments:

(1) *the BBC's Editorial Guidelines were being presented in the witnesses statements in a way that did not fully explain their operation and role*. This is, again, to misunderstand the role of witnesses in these appeals. Their task is to give evidence on how the Editorial Guidelines operated in the context of the engagements carried out by Mr Willcox and Mrs Oliver; there is no need fully to explain the operation and role of the Guidelines;

(2) *the evidence is being presented so as to fit with HMRC's "case theory"*. Witness statements do not stand in isolation; at the substantive hearing the Appellants' counsel will be able to cross-examine HMRC's witnesses, and the Tribunal will then consider the evidence of all the witnesses, together with any documentary and other material and the relevant law, before deciding the outcome of the appeals. It is for the Tribunal to assess whether the evidence of facts fits the "case theories" put forward by the parties' representatives; and

(3) *the witness evidence did not draw out the difference between employees and freelancers "in any great detail"*. This appears to be a reference to the various status tests, derived from case law, which provide guidance on how to distinguish between employees and the self-employed. However, I reiterate that the witnesses' role is to set out what happened; it is then for the parties' legal counsel to show how those facts fit with the case law, including any relevant status tests.

248. I have not seen Mr Smith's or Ms Hockaday's witness statements. However, from the evidence provided and the submissions made, I find no basis for the BBC's concerns about impartiality.

Whether the BBC's alternative witnesses will provide "authoritative" evidence

The BBC position

249. In his skeleton argument, Mr Furness said that the new witnesses:

> "would be giving evidence as quasi experts – speaking to matters (i.e. the BBC's operational practices) that in all likelihood will be unfamiliar territory to the Tribunal hearing the substantive appeals."

250. In oral evidence, he amended his position, saying:

> "This is an exceptional case: first of all, because the factual information which the Tribunal needs on issues like the way newsrooms operate and on questions such as how editorial guidelines operate is highly specialised. It's clearly not expert evidence. It will be evidence of fact. But it's evidence which is difficult for outsiders to access and to get an authoritative view, and it is something which the BBC's own senior staff are uniquely well placed to provide."

251. He went on to submit that the BBC's new witnesses would be able to provide "an authoritative and high level source of evidence", in particular about the way the Guidelines operate, and "the general principles of the way that newsrooms operate".

The position of the Appellants and of HMRC

252. The Appellants and HMRC were *ad idem* on this point. Mr Peacock submitted:

> "It is for the parties to adduce the evidence that they wish to adduce and it is not for a non-party…to decide who gives evidence and what evidence they shall give."

253. Mr Tolley said that:

> "…what is needed are people able to speak to the specific circumstances of the particular appellants and the particular times. It may be in the BBC's interests, perfectly legitimately, to want the relevant people who give evidence to be very senior in order to give apparently authoritative evidence about how things are done or ought to be done. What matters however, in the context of these kinds of cases, is how things were done. Where Mr Peacock and I may differ is as to what actually happened, but it's important to understand that the evidence needs to be specific about the particular cases."

Discussion

254. First, I agree with Mr Furness' revised position: these proposed new BBC witnesses are not "experts" or even "quasi-experts". In civil claims experts must have "no potential conflict of interest", see the "Guidance for the Instruction of Experts in Civil Claims" published by the Civil Justice Council in August 2014 at paragraph 16(e) and PD35 paragraph 9(b). Although that guidance, and the related CPR rules, do not apply directly to the FTT, in *Chandanmal v HMRC* [2012] UKFTT 188 (TC) at [10] Judge Mosedale said that there is no reason why the Tribunal would not follow the same approach, and I agree.

255. These potential new witnesses clearly have a potential conflict of interest: they are BBC employees, and the BBC is the client which engaged the Appellants.

256. Moving on, it is clear from my conclusions so far that I agree with Mr Tolley. In these appeals "what matters…is how things were done". The Tribunal is concerned with the Appellants' appeals against specific tax and NICs decisions. The outcome will not be decided based on a generic view of how newsrooms operate, or how the BBC's Editorial Guidelines are intended to be applied, but instead on the particular facts of the Appellants' cases. I therefore find against the BBC on this point too.

Whether the witnesses will be "pitted against each other"

The submissions

257. Ms Henderson said she was concerned about BBC employees being "pitted against each other" at the substantive hearing, and worried that this might affect the quality of their evidence. Mr Furness told the Tribunal that "any BBC staff member that we have talked to would much prefer to give evidence as the BBC's witnesses rather than be seen to be taking sides".

258. Mr Peacock rejected those submissions, on the basis that there is no property in a witness. He said: "witnesses are colloquially called the witness of X, but that is a useful label, but no more." Mr Tolley took a similar position, saying:

> "HMRC does not suggest…that any witnesses called by the appellants…would lack impartiality or objectivity because they were called by the appellants, any more than they would have done if they had been called by HMRC. The problem, if there is a problem, seems to be the BBC's perception that it's a bad idea for its witnesses to be seen to be lining up on one side or the other. But that has to be seen for what it is, a perception."

Discussion

259. Mr Peacock is of course correct that there is no property in a witness. The fact that a witness is being called by one party or the other does not of itself mean that the evidence he or she will give at the hearing necessarily assists the party calling that evidence. It follows that this reason too does not amount to a justification for the approach set out in the BBC Application

Whether HMRC had failed to advise the witnesses of Tribunal procedure etc

260. Ms Henderson states:

> "it does not appear that the implications of the issues in the case and how that might impact on the evidence were ever explained fully to the witnesses."

261. She also said:

> "we were also concerned that the witnesses did not seem to have been informed of the implications of their participation, namely that they may have to attend a hearing and be subjected to cross-examination, the prospect of which most people would find stressful and testing."

262. This is simply not supported by the facts. Ms Liaquat made the position crystal clear in her emails to Mr Smith and Ms Hockaday of 30 October 2014, 26 November 2014 and 30 March 2015, see §155, §157 and §159.

Conclusion on the BBC's stated reasons for its concerns

263. For the reasons set out above, I find the BBC's concerns about the operation of the traditional approach to providing witness evidence in these appeals to be without foundation.

Whether it is in the interests of justice to allow the BBC Application

264. However, I also considered whether it was nevertheless in the interests of justice to allow the BBC Application, on the basis that it would be an improvement on the traditional approach. I set out below the submissions made by the BBC as to the advantages of their proposal, together with parties' counter-arguments, and my discussion and conclusion.

The BBC's position

265. Mr Furness summarised the purpose of the BBC Application as being to "ensure consistency", saying that the BBC would :

> "organise and present BBC staff evidence which other parties also wanted to put in; so that there would be a process whereby the BBC would be a clearing house for all of that evidence."

266. However, he also explained that the evidence given by the BBC's new witnesses might not be favourable to either party, but instead be positioned "somewhere down the middle". As a result neither party might wish to call the new witnesses. Nevertheless, it was, he said, in the public interest that the evidence should be made available to the Tribunal, and it would help ensure that the Tribunal reached "the right answer" in the Appellants' appeals.

267. In terms of the process which would be followed if the BBC Application were allowed, he said that:

> (1) the BBC will identify the BBC witnesses from whom it intends to lead evidence, and inform the parties;
>
> (2) the BBC will also identify the issues the BBC witnesses would address and the documents with which they should be provided. The BBC will seek to agree both the issues and the documents with the parties, "so far as is possible";
>
> (3) if a party wants to call one or more additional BBC witnesses in addition to those identified by the BBC, the BBC will confirm "whether or to what extent" those witnesses "are willing to give the evidence requested";
>
> (4) once the identity of the BBC witnesses has been finalised, a witness who prefers to give evidence on behalf of one of the parties rather than on behalf of the BBC will be free to do so;
>
> (5) a party may meet with a BBC witness, but only in the presence of a member of the BBC's legal team, and only if the witness is willing to attend the meeting; and
>
> (6) after the BBC have prepared draft witness statements, the parties will be able to comment on those drafts and to submit further questions in writing, but the final version of the witness statements will be a matter for the BBC and the BBC witnesses, not the parties.

The Appellants' position

268. Mr Peacock opened his submissions by saying:

> "I would like to begin, if I may, by stating or restating…the blindingly obvious: that these are the appeals of these Appellants. If there is tax to pay, we will have to foot that bill. Now in principle at least it is the Appellants who should be able to control their own destiny. It is not for another party, or indeed another non-party, to constrain or control the appeal that the Appellants want to run."

269. In his skeleton argument, he said that "the BBC wishes to have some measure of influence over the evidence given in these proceedings by those working at the BBC (and possibly even former workers)" and that this was not acceptable to the Appellants.

270. He also criticised the process being put forward by the BBC, saying that it would lead to "endless submissions backwards and forwards as to what should be in the evidence" and that, at the end of the day, "the evidence that ultimately will be adduced is the evidence that the BBC and the witness decide is appropriate". He added that the Appellants:

> "have faced these proceedings for between two and three years now. We are realistically almost no further forward. [The Appellants] are keen that these proceedings should be brought to a hearing before this Tribunal within a reasonable period."

HMRC's position

271. Mr Tolley submitted that the BBC's proposal amounted to "a very serious interference with the parties' ability to present their evidence".

272. In terms of process, significant delay would be created by the BBC's proposal that it should first receive all documents in the appeals, and would prepare its witness evidence only after it had had sight of the all other witness statements.

273. Moreover, the BBC's behaviour so far had shown that, if it was allowed to participate in the proceedings, there was a high risk it would not comply with the overriding objective. The BBC had caused HMRC to make multiple applications to the Tribunal to extend the deadline for exchange of witness statements, from the original date of 20 July 2015 to 27 January 2016. The BBC Application was then submitted only two days before that extended deadline. The BBC had also filed and served Ms Henderson's witness evidence at the very last moment, even though it had known for over six months that there was to be a case management hearing, and despite HMRC making sensible suggestions for a more reasonable approach.

Discussion

274. It is clear that the BBC Application involves:

(1) the BBC filing and serving witness evidence in the Appellants' appeals, even if neither party wishes to call that or those witnesses;

(2) the parties having only conditional access to the BBC witnesses: meetings are to happen only in the presence of the BBC's legal team, and even then, only if the witness is willing to attend; and

(3) the BBC retaining control over the evidence given by the BBC witnesses. This can be seen from the fact that it will (a) confirm "whether or to what extent" the witnesses are willing to give the evidence requested by the parties, and (b) seek to agree with the parties "so far as is possible", the evidence which they will give to the Tribunal.

275. As Mr Peacock says, it follows that the "evidence that ultimately will be adduced is the evidence that the BBC and the witness decide is appropriate".

276. These are the Appellants' appeals, and it is for the parties to decide what evidence to call. The BBC Application would undermine their right to put forward

their case. I agree with the parties that this would be unfair and unjust, and a departure from the overriding objective.

277. The Appellants and HMRC both referred to the delays caused to the appeals by the BBC's approach to the evidence. I agree that it would have been helpful, and in accordance with Rule 2, had the BBC crystallised its concerns earlier, instead of requesting a succession of extensions to directions. I also agree with Mr Tolley that the BBC's late filing and service of its witness evidence for this hearing, and its related failure to co-operate with HMRC, indicated a lack of regard for the obligations imposed on parties by Rule 2. However, the BBC's behaviour did not form part of my reasoning when deciding Issue 2; instead, I came to my conclusion on that Issue entirely on the bases set out in the earlier paragraphs of this part of my decision.

Conclusion on Issue 2

278. Issue 2 only arises if I am wrong in my finding that the Tribunal has no jurisdiction to allow a non-party to give evidence of its own motion. Were I to be wrong, the BBC Application is refused, for the reasons given.

ISSUE 3: THE VARIATIONS

279. Issue 3 was whether the Tribunal should allow either the BBC Variation or the Appellants' Variation.

The BBC Variation

280. Mr Furness asked me to consider the BBC Variation only if I had first rejected the BBC Application.

281. Under the BBC Variation, the BBC witnesses would provide evidence in the form of "documents" containing "information". These would be filed with the Tribunal and served on the parties; the Tribunal or any party could call those witnesses to be cross-examined.

The submissions

282. Mr Furness submitted that Rule 5(3)(d) gave the Tribunal the jurisdiction to receive both information and documents. On the assumption that he was right, he went on to say that the BBC Variation should be allowed, because it would be a way of getting "the core witnesses", namely those whose evidence the BBC were most concerned about, before the Tribunal.

283. He said that the parties and the Tribunal would be under no obligation to call the witnesses; if they did not, the information would simply "be there in front of the court".

284. Mr Tolley countered by saying that, once the witness statements had been filed with the Tribunal, the evidence could only be challenged on cross-examination. As a result, the parties would have to call the witnesses. The BBC Variation therefore arrived at the same outcome as the BBC Application, albeit by a different route, and should be rejected for essentially the same reasons.

285. Mr Peacock said it was "unacceptable" to the Appellants that evidence would be filed in the manner suggested, because:

> "it leaves the Tribunal holding written evidence that it has not heard given by a live witness, it has not had the benefit of that evidence being tested by way of cross-examination, and it is almost useless to the Tribunal because the tribunal is unsure as to the weight to be given to such evidence."

Discussion and decision

286. I refused the BBC Variation at the hearing. This was because I agreed with the parties that:

(1) if the witnesses were called for cross-examination, the BBC Variation would arrive at the same outcome as the BBC Application by a different route, and should be refused for the same reasons; and

(2) if the witnesses were not called, the parties would be unable to challenge their evidence in cross-examination, and this would not be in the interests of justice. Moreover, the Tribunal would be in the difficult position of trying to weigh evidence which had not been tested or relied upon, and so would be likely to find that it had little if any weight.

287. I further find that the Tribunal does not, in any event, have the jurisdiction to allow the BBC Variation. This is because, as already set out in relation to Issue 1, the Tribunal has no jurisdiction to allow an application from a non-party to provide witness evidence of its own motion. Re-labelling witness statements as "documents" or "information" is a circumlocution which is inconsistent with the straightforward approach which should be taken to the Rules.

288. Even if the witness statements could be categorised as "information" or "documents", Rule 5(3)(d) must be read with Rule 6(1), which specifies that directions may be made only "on the application of one or more of the parties or on its own initiative", see my findings at §51. That Rule therefore does not permit the Tribunal to allow an application by a non-party to provide documents or information.

The Appellants' Variation

289. Mr Furness submitted that, in place of the BBC Application, the Tribunal should direct that:

(1) the BBC be provided with all relevant pleadings and other documents;

(2) the Appellants produce draft witness statements in relation to all BBC witnesses who they wish to call, and ask the BBC to comment on those draft statements;

(3) each party identify other BBC witnesses that it would like to call and send their lists to the BBC;

(4) if both HMRC and the Appellants identify the same "other BBC witness", that other witness can chose the party for which it will provide evidence;

(5) the BBC then produce a first draft of the witness statements for these other BBC witnesses;

(6) both parties are to be allowed to comment on those draft witness statement;

(7) each party is to have the final say as to the form and content of the evidence to be adduced by the "other BBC witnesses" who they propose to call; and

(8) all "other BBC witnesses" would be available for cross-examination by both sides.

290. Mr Tolley said that this Variation was unnecessary. If the Appellants wished to work with the BBC in producing witness statements, they were free to do so; this was not a matter for directions.

291. In relation to the witnesses who the Appellants wish to call, I agree with Mr Tolley. That is a matter between them and the BBC; there is no need for directions.

292. In relation to the BBC witnesses who HMRC wish to call, the directions appear to put HMRC at a significant disadvantage. Although the Appellants can produce their own draft witness statements for their BBC witnesses, there is no equivalent draft direction in relation to the BBC witnesses HMRC wished to call. As a result, these become "other witnesses", with the BBC preparing the witness statements and the Appellants having the right of review. That is clearly unfair and in breach of the overriding objective.

293. If the draft directions simply overlooked the position of the HMRC witnesses, it follows that directions (4) to (8) apply only to witnesses who *both* parties wish to call. But draft direction (4) allows any such potential witness to decide for himself the party for whom he will give evidence. Once he has done so, I see no reason why his draft witness statements should be produced by the BBC or provided to the other party for comment in advance of finalisation; I also see no reason why that witness should be available for cross-examination by both sides, including the party for whom he has provided his witness evidence. He is giving evidence for one party and the normal rules should apply.

294. It follows that I decline to make the directions contained in the Appellants' Variation.

OTHER MATTERS

Duty of confidentiality and legal and professional privilege

295. As can be seen from the correspondence set out earlier in this decision, HMRC strongly asserted that the BBC had breached its duty of confidentiality to HMRC, and had failed to respect HMRC's legal professional privilege by releasing Mr Smith's and Ms Hockaday's names to the Appellants. Mr Tolley repeated many of these points during the hearing.

296. Mr Furness said that the BBC did not accept they were under any duty of confidentiality; it understood there to have been an informal exchange of information between the witnesses and either Mrs Oliver or Mr Willcox at an early stage of the proceedings.

297. However, it was common ground that questions as to confidentiality and legal professional privilege were not relevant to the issues I had to decide at this hearing, and I say no more about them.

Mr Smith's and Ms Hockaday's witness statements

298. As already noted, on 25 January 2016, the BBC informed HMRC that "Mr Smith has confirmed that he does not consent to his witness statement being served on 27 January", but the BBC subsequently failed to provide HMRC with the correspondence between the BBC and Mr Smith relating to that refusal of consent. However, Mr Furness said in oral submissions that:

> "Mr Smith is a former employee, so he can anyway do what he likes. If he wishes to give his statement in the form he signed it or he wishes to give a different statement, or make an additional statement or whatever he wants to do, that's entirely up to him."

299. Mr Tolley asked me, in giving my decision, to confirm the position *vis à vis* Mr Smith's signed witness statement.

300. The parties and the BBC will be aware of the guidance given by Clarke J in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] EWHC 581 (Comm) at [22]:

> "What a solicitor is not entitled to do, or indeed a party, is to order or instruct a witness or a potential witness not to attend an interview with the opposing solicitor or to tell him that he has no real choice in the matter, or to put pressure on him not to comply. Nor must he make it appear that the witness can only be interviewed if the solicitor or his principal consents. Mr Jacobs accepted in the course of argument that any form of, as he put it, 'strong persuasion' should be avoided, and in my judgment rightly so, for it is liable to be indistinguishable from improper pressure. Indeed, in determining whether or not there has been improper interference with a witness, the court will look at the reality of what has occurred."

301. Mr Furness has, in terms, denied that there is any such improper pressure on Mr Smith. I have heard no evidence from Mr Smith or the BBC on this point and I make no findings.

302. In response to Mr Tolley's request, I merely note that HMRC can of course apply to the Tribunal under Rule 16(1) for a summons requiring Mr Smith (and/or Ms Hockaday) to appear. Should HMRC decide to make any such applications, the Tribunal will then decide whether to allow them or otherwise, on the basis of the submissions made at that time. That too is not a matter for this hearing.

Concluding remarks

303. I am grateful to all three leading Counsel and their juniors for their helpful written and oral submissions.

Full decision and appeal rights

304. This document contains full findings of fact and reasons for the decision.

305. In relation to appeal rights, I first set out the position of the parties and then the BBC.

The parties

306. Both parties opposed the BBC Application and the BBC Variation, so have no right of appeal against my decision to refuse them, see ***Lake v Lake*** [1955] P336, helpfully discussed in ***Price v HMRC*** [2015] UKUT 0164 (TCC) (Nugee J and Judge Nowlan) at [31] to [37].

307. If the Appellants are dissatisfied with my decision to refuse the Appellant's Variation, they have a right to apply for permission to appeal against that decision, pursuant to Rule 39 of the Tribunal Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to the Appellants.

308. The parties are referred to the "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

The BBC

309. Rule 39(1) states (my emphasis) that "a *person* seeking permission to appeal must make a written application to the Tribunal for permission to appeal"; Rule 39(2) refers to "the *person* making the application" and Rule 39(4) also refers to "the *person* seeking permission to appeal". Rule 21(2) of the UT Rules similarly provides that "A *person* may apply to the Upper Tribunal for permission to appeal to the Upper Tribunal against a decision of another tribunal only if…"

310. However, Rule 39(2A) of the Tribunal Rules states that "the Tribunal may direct that the 56 days within which a *party* may send or deliver an application for permission to appeal…" and Rule 39(5)(c) provides that the permission to appeal application must "state the result the *party* making the application is seeking". Rule 22(2)(a) of the UT Rules provides that, if permission is given, the UT must send written notice of the permission…to each *party*".

311. Taken alone, the Tribunal Rules and the UT Rules are unclear: some provisions refer to "person", suggesting that a non-party such as the BBC has a right of appeal against my decisions to refuse the BBC Application and the BBC Variation, but other provisions refer to the "party" making the permission to appeal application.

312. The question is, however, resolved by TCEA s 11(4), which provides that permission to appeal to the Upper Tribunal may be given by the Tribunal, or by the UT, "on the application of a party".

313. It follows that the Rules, which are made under powers given by the TCEA, cannot give a non-party the right to appeal a decision, because that would be counter to the express provision in the enabling Act. I therefore find that the BBC do not have a right to appeal this decision.

ANNE REDSTON

TRIBUNAL JUDGE
RELEASE DATE: 29 SEPTEMBER 2016

On 5 October 2016 this decision was amended pursuant to rule 37 of the Tribunal Rules.

APPENDIX

Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

1 Citation, commencement, application and interpretation

(1) These Rules may be cited as the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and come into force on 1st April 2009.

(2) These Rules apply to proceedings before the Tax Chamber of the First-tier Tribunal.

(3) In these Rules–

"the 2007 Act" means the Tribunals, Courts and Enforcement Act 2007;…

"document" means anything in which information is recorded in any form, and an obligation under these Rules to provide or allow access to a document or a copy of a document for any purpose means, unless the Tribunal directs otherwise, an obligation to provide or allow access to such document or copy in a legible form or in a form which can be readily made into a legible form;…

"party" means a person who is (or was at the time that the Tribunal disposed of the proceedings) an appellant or respondent in proceedings before the Tribunal;

"respondent" means–

(a) in a case other than an MP expenses case–

(i) HMRC, where HMRC is not an appellant;…

(b) …; and

(c) in any case, a person substituted or added as a respondent under rule 9 (substitution and addition of parties);

2 Overriding objective and parties' obligation to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) 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.

(3) The Tribunal must seek to give effect to the overriding objective when it–

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must–

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

5 Case management powers

(1) Subject to the provisions of the 2007 Act 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–

…

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;…

…

(i) require a party to produce a bundle for a hearing;…

6 Procedure for applying for and giving directions

(1) The Tribunal may give a direction on the application of one or more of the parties or on its own initiative.

(2) An application for a direction may be made–

(a) by sending or delivering a written application to the Tribunal; or

(b) orally during the course of a hearing.

(3) An application for a direction must include the reasons for making that application.

(4) Unless the Tribunal considers that there is good reason not to do so, the Tribunal must send written notice of any direction to every party and to any other person affected by the direction.

(5) If a party or other person sent notice of the direction under paragraph (4) wishes to challenge a direction which the Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction.

7 Failure to comply with rules etc

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include–

(a) waiving the requirement;

(b) requiring the failure to be remedied;

(c) exercising its power under rule 8 (striking out a party's case);

(d) restricting a party's participation in proceedings; or

(e) exercising its power under paragraph (3)….

8 Striking out a party's case

(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal–

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if–

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

(7) This rule applies to a respondent as it applies to an appellant except that–

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent.

9 Substitution and addition of parties

(1) The Tribunal may give a direction substituting a party if–

(a) the wrong person has been named as a party; or

(b) the substitution has become necessary because of a change in circumstances since the start of proceedings.

(2) The Tribunal may give a direction adding a person to the proceedings as a respondent.

(3) A person who is not a party to proceedings may make an application to be added as a party under this rule.

(4) If the Tribunal refuses an application under paragraph (3) it must consider whether to permit the person who made the application to provide submissions or evidence to the Tribunal.

(5) If the Tribunal gives a direction under paragraph (1) or (2) it may give such consequential directions as it considers appropriate.

10 Orders for costs

(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)–

(a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings

(c) if–

(i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and

(ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph; or…

…

(8) In this rule "taxpayer" means a party who is liable to pay, or has paid, the tax, duty, levy or penalty to which the proceedings relate or part of such tax, duty, levy or penalty, or whose liability to do so is in issue in the proceedings.

11 Representatives

(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings…

15 Evidence and submissions

(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to–

(a) issues on which it requires evidence or submissions;

(b) the nature of the evidence or submissions it requires;

(c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;

(d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;

(e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given–

(i) orally at a hearing; or

(ii) by written submissions or witness statement; and

(f) the time at which any evidence or submissions are to be provided.

(2) The Tribunal may–

(a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or

(b) exclude evidence that would otherwise be admissible where–

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or

(iii) it would otherwise be unfair to admit the evidence.

16 Summoning or citation of witnesses and orders to answer questions or produce documents

(1) On the application of a party or on its own initiative, the Tribunal may–

(a) by summons (or, in Scotland, citation) require any person to attend as a witness at a hearing at the time and place specified in the summons or citation;

(b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.

(2) A summons or citation under paragraph (1)(a) must–

(a) give the person required to attend at least 14 days' notice of the hearing, or such shorter period as the Tribunal may direct; and

(b) where the person is not a party, make provision for the person's necessary expenses of attendance to be paid, and state who is to pay them.

(3) No person may be compelled to give any evidence or produce any document that the person could not be compelled to give or produce on a trial of an action in a court of law in the part of the United Kingdom where the proceedings are due to be determined.

(4) A person who receives a summons, citation or order may apply to the Tribunal for it to be varied or set aside if they did not have an opportunity to object to it before it was made or issued.

(5) A person making an application under paragraph (4) must do so as soon as reasonably practicable after receiving notice of the summons, citation or order.

(6) A summons, citation or order under this rule must–

(a) state that the person on whom the requirement is imposed may apply to the Tribunal to vary or set aside the summons, citation or order, if they did not have an opportunity to object to it before it was made or issued; and

(b) state the consequences of failure to comply with the summons, citation or order

18 Lead cases

(1) This rule applies if–

(a) two or more cases have been started before the Tribunal;

(b) in each such case the Tribunal has not made a decision disposing of the proceedings; and

(c) the cases give rise to common or related issues of fact or law.

(2) The Tribunal may give a direction–

(a) specifying one or more cases falling under paragraph (1) as a lead case or lead cases; and

(b) staying (or, in Scotland, sisting) the other cases falling under paragraph (1) ("the related cases").

(3) When the Tribunal makes a decision in respect of the common or related issues–

(a) the Tribunal must send a copy of that decision to each party in each of the related cases; and

(b) subject to paragraph (4), that decision shall be binding on each of those parties.

(4) Within 28 days after the date that the Tribunal sent a copy of the decision to a party under paragraph (3)(a), that party may apply in writing for a direction that the decision does not apply to, and is not binding on the parties to, that case.

(5) The Tribunal must give directions in respect of cases which are stayed or sisted under paragraph (2)(b), providing for the disposal of or further steps in those cases.

(6) If the lead case or cases are withdrawn or disposed of before the Tribunal makes a decision in respect of the common or related issues, the Tribunal must give directions as to–

(a) whether another case or other cases are to be heard as a lead case or lead cases; and

(b) whether any direction affecting the related cases should be set aside or amended.

39 Application for permission to appeal

(1) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.

(2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 56 days after the latest of the dates that the Tribunal sends to the person making the application–

(za) the relevant decision notice;

(a) where--

(i) the decision disposes of all issues in the proceedings; or

(iii) subject to paragraph (2A), the decision disposes of a preliminary issue dealt with following a direction under rule 5(3)(e),

full written reasons for the decision;

(b) notification of amended reasons for, or correction of, the decision following a review; or

(c) notification that an application for the decision to be set aside has been unsuccessful.

(2A) The Tribunal may direct that the 56 days within which a party may send or deliver an application for permission to appeal against a decision that disposes of a preliminary issue shall run from the date of the decision that disposes of all issues in the proceedings.

(3) The date in paragraph (2)(c) applies only if the application for the decision to be set aside was made within the time stipulated in rule 38 (setting aside a decision which disposes of proceedings), or any extension of that time granted by the Tribunal.

(4) If the person seeking permission to appeal sends or delivers the application to the Tribunal later than the time required by paragraph (2) or by any extension of time under rule 5(3)(a) (power to extend time)–

(a) the application must include a request for an extension of time and the reason why the application notice was not provided in time; and

(b) unless the Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Tribunal must not admit the application.

(5) An application under paragraph (1) must–

(a) identify the decision of the Tribunal to which it relates;

(b) identify the alleged error or errors in the decision; and

(c) state the result the party making the application is seeking.