[2017] UKFTT 481 (TC)

TC05933

Appeal number: TC/2016/00938

Procedure – application for permission to appear as advocate by telephone on substantive two day hearing – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

DARREN CRESSWELL **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**

Sitting in Chambers on 9 June 2017

DECISION

Introduction

1. This decision relates to an application from the Appellant's representative Martyn F. Arthur Limited ("MFA") for permission to attend the substantive hearing, acting as advocate, by telephone on medical grounds.

2. In view of the history of the matter, I have taken the unusual step of providing a full decision on the application straightaway for reasons which will be apparent upon reading this decision in full.

The facts

3. The appellant is appealing against a personal liability notice, whereby HMRC are seeking to make him personally liable for 50% of the penalties imposed by them on a company called We Are Electricals Limited. The amount for which HMRC assessed the appellant was £208,207.02, and the personal liability notice was issued to him on 19 August 2014. The penalty arises in part from an allegation of deliberate inaccuracy in a return.

4. HMRC, in their statement of case, recount that there were some discussions with the appellant about the notice, in the course of which HMRC told him that "although the raising of the notice was valid, it may not have been properly served." They accordingly re-sent it to him at his then current address under cover of a letter dated 18 November 2015. On 27 January 2016 the Tribunal received a notice of appeal dated 24 January 2016 from the appellant by email. In it, he requested that his appeal be heard in Manchester (though his personal home address was in the West Midlands). HMRC were informed that if they wished to object to the appeal being notified late, they should inform the Tribunal of that fact no later than when serving their statement of case. They did not raise any objection.

5. Following receipt of the statement of case (on 15 April 2016), the Tribunal issued standard case management directions to the appellant and HMRC on 6 May 2016. The appellant engaged MFA to represent him and MFA wrote to the Tribunal by email on 20 May 2016, attaching a signed authority from the appellant. They requested a 30 day extension of time (from 3 June 2016) to deliver the appellant's list of documents, an extension which was belatedly granted by the Tribunal absent any objection from HMRC (who did not object).

6. On 13 June 2016 MFA delivered a list of documents and also copies of the documents on the list. This was followed up on 22 June 2016 by a witness statement of the appellant, and on 30 June 2016 by "dates to avoid" from MFA, for what they estimated to be a two day hearing. Following the provision of similar material from HMRC, the Tribunal issued letters dated 18 August 2016, notifying the parties that the hearing would take place in Manchester on 28 and 29 September 2016.

7. On 8 September 2016, MFA sent a letter by email to the Tribunal, asking the Tribunal to "reconsider your decision regarding the location of the Tribunal hearing",

on the basis of Mr Martyn Arthur's age (over 65) and medical condition. The inference was that Mr Arthur intended to act as the appellant's advocate at the hearing, and included with his letter was a letter from his GP referring to his "cervical disc degeneration" and other matters; in the GP's letter it was stated that:

> "[h]is symptoms are exacerbated by sitting in the same position for a long period of time, and was advised back then *[i.e. 2014]* that he should not be travelling long distances in the car. He was advised to arrange for his meetings to be in Cardiff, rather than him travelling all over the country.
>
> Apparently recently it has been suggested that he should now be able to drive long distances, but unfortunately this is not the case. The condition he has is permanent and the advice was for him not to travel long distances like this for the foreseeable future.
>
> I would therefore be grateful if you could arrange for him to continue to do his work in Cardiff, rather than him having to travel…."

8. In MFA's letter, it was said that Mr Arthur's neurological surgeon had "warned him that a whiplash injury could cause total paralysis and he thus no longer travels long distances. This has already had a devastating effect on his ability to travel to see clients and attend Tribunal. From the taxpayer's perspective if Mr Arthur is unable to represent him then he will be denied the ability to be able to use his chosen representative.".

9. MFA had requested a change of venue for the hearing of another client, and the Tribunal had written explaining its "general position on choice of venue" in a letter concerning that case, a copy of which was sent, on the instructions of Judge Kempster, in a letter from the Tribunal to MFA dated 19 September 2016. That letter pointed out that the appellant himself had nominated Manchester as his preferred hearing venue, the only witness notified was the appellant himself and the hearing would continue as originally listed.

10. Both the appellant and MFA objected by email to the Tribunal dated 20 September 2016. MFA requested a postponement of the 28-29 September hearing "so that the issue can be fully and properly explored", and the Tribunal granted the postponement on 21 September 2016. The 20 September letter from MFA was taken as an application for permission to appeal the decision in the Tribunal's letter dated 19 September 2016.

11. A parallel sequence events had been occurring in relation to a different appeal (where MFA wished to have a hearing moved from Nottingham to Cardiff). Judge Kempster issued a combined decision on the two applications for permission to appeal on 21 October 2015, and refused them. After a brief review of the Tribunal's published statements on the selection of venues, he said this:

> "20 The considerations that I took into account were:
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> (1) The Tribunal's stated policy on venue location, as described above.

(2) Prior to Mr Arthur's appointments under Rule 11, each appellant had requested their respective hearing to be at the venue subsequently nominated by the Tribunal.

(3) In both cases the locations of the respective appellants and witnesses clearly pointed to the venues nominated by the Tribunal. Also, I understood (from the addresses of the respective HMRC presenting officers) that those venues were convenient for the Respondents.

(4) Mr Arthur's explanation of his medical condition.

(5) The appellants' requests that the hearing location should be changed to Cardiff to accommodate Mr Arthur.

21 In balancing those considerations, I was satisfied that the venues nominated by the Tribunal were in accordance with the Tribunal's stated policy, and were convenient for the appellants, the witnesses and the Respondents. I noted that the Respondents objected to the requested change of venue. The only factor to be counterbalanced was Mr Arthur's wish (endorsed by his clients) for the hearings to be held instead in Cardiff, because of his medical condition. As stated on more than one occasion, the Tribunal is sympathetic to Mr Arthur's health problems but I am firmly of the opinion that the Tribunal cannot be expected to be required to list a hearing only at a venue local to him simply because he has accepted instructions on a matter which would necessitate him travelling further afield than Cardiff. It is, of course, entirely a matter for Mr Arthur as to what professional instructions he feels able to accept from potential clients but I think it is reasonable to state that if advocacy is required and he is not able to attend to that in person then one would expect him to have made arrangements for counsel to be briefed to appear, or for representation by a local agent.

22 Turning to the specific grounds of appeal:

(1) As stated above, the appellant's preference of venue is only one factor to be considered by the Tribunal.

(2) For the reasons stated above, it is not correct that "the Tribunal will endeavour to hold the hearing wherever the taxpayer wishes. HMRC have objected to a change of venue to Cardiff.

(3) The appellants' choice of a representative who is based in a different part of the country from the appellant may indeed involve travel and accommodation costs. That is a matter of choice for the appellant.

(4) Similarly, in choosing a representative an appellant must bear in mind the ability of the representative to attend hearings in person or be able to appoint local agents (or counsel) to do so.

> (5) Mr Arthur's medical condition has been present since 2014 and is permanent. While I am sympathetic to the problems this must cause him, it would clearly not be fair and just to seek to accommodate those problems by giving his clients some form of unilateral choice of hearing venue.
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> (6) I do not consider Mr Arthur's preference for travel by light aircraft to be relevant to the disputed case management decisions."

12. The appellant applied to the Upper Tribunal for permission to appeal against the Tribunal's decision. The Upper Tribunal initially refused permission "on the papers", and the appellant renewed the application by requesting an oral hearing. This took place on 22 November 2016 (Mr Arthur attending by telephone). The Upper Tribunal (Judge Berner) issued a decision on the same date refusing permission to appeal. Essentially the Upper Tribunal decided that although Article 6 of the European Convention on Human Rights was engaged, it was not infringed by the Tribunal's refusal to accommodate the request to move the hearing venue; nor did that decision disclose any disclose any other "error of principle". Judge Berner went on to say this:

> "If Mr Arthur is unable to represent the Applicants at the hearing locations that have been directed, they remain free to choose other representatives who can. They will not be precluded from being represented, nor will any representative not of their own choosing be appointed by the tribunal or anyone else."

13. The Tribunal then wrote to the parties on 4 January 2017, seeking their "dates to avoid" for the re-listing of the hearing. On 24 January 2017, MFA responded by providing "dates to avoid" on 24 January 2017, indicating that "there will be five of us attending, and we expect the hearing to last two days."

14. On 11 February 2017 the Tribunal wrote to the parties, informing them that the hearing had been listed for 30 and 31 March 2017 in Manchester.

15. On 24 March 2017, MFA wrote to the Tribunal by email, requesting a postponement of the hearing, on the grounds that Mr Arthur was "the only person in the company competent to attend" and had suffered "a series of domestic events that have given rise to a very difficult situation." These included an illness of his wife and an accident to a grandchild living with them.

16. HMRC did not object to the postponement application and it was granted on 27 March 2017. Further "dates to avoid" were sought from the parties within one week. MFA did not respond, and on 15 April 2017 the Tribunal issued a further notice of hearing to the parties, notifying them that the hearing would take place on 26-27 June 2017 in Manchester.

17. Unfortunately, the Tribunal had failed to take account of the "dates to avoid" notified by HMRC and accordingly the hearing had to be postponed again, this time to 4 and 5 July in Manchester. Notice of this hearing was sent to the parties on 20 May 2017.

18. On 25 May 2017, the Tribunal received an email from MFA, asking that permission be given for Mr Arthur to attend the hearing by telephone, "as this will allow for the attendance of the appellants chosen representative."

19. This application was referred to me, and I saw it on 8 June 2017.

The law

20. Rule 5 of the Tribunal's procedure rules provides as follows:

> "**Overriding objective and parties' obligation to co-operate with the Tribunal**
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> 2.— (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
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> (2) Dealing with a case fairly and justly includes—
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> (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;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
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> (d) using any special expertise of the Tribunal effectively; and
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> (e) avoiding delay, so far as compatible with proper consideration of the issues.
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> (3) The Tribunal must seek to give effect to the overriding objective when it—
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> (a) exercises any power under these Rules; or
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> (b) interprets any rule or practice direction.
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> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
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> (b) co-operate with the Tribunal generally."

21. Rule 5(1) of the Tribunal's procedure rules states that "Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure."

22. Rule 11 of the Tribunal's procedure rules provides as follows:

"**Representatives**

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

(2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party to the proceedings written notice of the representative's name and address.

(3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement.

(4) A person who receives due notice of the appointment of a representative—

(a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party; and

(b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.

(5) At a hearing a party may be accompanied by another person who, with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.

(6) Paragraphs (2) to (4) do not apply to a person (other than an appointed representative) who accompanies a party in accordance with paragraph (5).

(7) In this rule "legal representative" means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act, an advocate or solicitor in Scotland, or a barrister or solicitor in Northern Ireland."

23. Pursuant to the above provisions, the Tribunal does on occasion permit telephone attendance at a hearing, but that is dependent on the circumstances of the case, including the nature of the hearing itself; there is nothing in the procedure rules to suggest there is a general right for a party, a witness or an advocate to attend by telephone (or indeed by any other form of remote communication); indeed Rule 11(5) is drafted on the tacit assumption that any representative or assistant who assists in presenting a party's case at a hearing will accompany that party.

24. Again, therefore, it seems to me that in deciding whether to permit telephone attendance in any particular case, a Tribunal must carry out a balancing exercise. It is necessary to assess the suitability of the particular hearing for the proposed attendance

as well as taking account of the wishes of the parties and the overall circumstances of the request.

Discussion and decision

25. In view of the time scale, I have decided to make this decision without seeking any submissions from HMRC; whilst such submissions might have provided some assistance, I consider the issues to be sufficiently clear to enable me to make a decision without that assistance.

26. The present case is a penalty appeal in respect of a large amount, partly involving allegations of deliberate inaccuracy, listed to last for two days. It is to be expected that there will be significant cross examination, both of the appellant and of the relevant HMRC witness(es). The hearing will not be straightforward.

27. It is clear from the application and the prior course of communication that Mr Arthur envisages attempting to conduct the hearing as advocate by telephone from a remote location, presumably his home or office.

28. The Upper Tribunal said as long ago as November 2016 that "if Mr Arthur is unable to represent the Applicants at the hearing locations that have been directed, they remain free to choose other representatives who can." Judge Kempster, in his decision refusing permission to appeal on 21 October 2016 said "It is, of course, entirely a matter for Mr Arthur as to what professional instructions he feels able to accept from potential clients but I think it is reasonable to state that if advocacy is required and he is not able to attend to that in person then one would expect him to have made arrangements for counsel to be briefed to appear, or for representation by a local agent."

29. In context, it seems to me that both these passages gave a very clear message to the appellant and MFA that if Mr Arthur was unable to attend the hearing in person, they needed to instruct a different advocate. It is true that the question of telephone attendance was not specifically mentioned, but if that had been in contemplation by MFA, I would have expected it to be raised at a much earlier stage.

30. It is conceivable there might be substantive appeal hearings which could be conducted effectively with the advocate for one party or another attending by telephone, but it seems to me that such cases would be very few and far between. A hearing such as the present is not one of them, in my view.

31. The Tribunal has power to "regulate its own procedure" and in doing so must "deal with cases fairly and justly". This includes a responsibility to ensure, so far as possible, that hearings are arranged in a way which is likely to make them as effective as possible in disposing of the appeal fairly and efficiently. I do not consider this responsibility would be discharged in the present case by permitting the hearing to be conducted on behalf of the appellant by an advocate who only participates by telephone.

32. The application is therefore REFUSED.

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

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 09 JUNE 2017