[2021] UKFTT 0462 (TC)

TC 08346/V

PAYE and NIC – NHS Widening Access Training Scheme ('WATS') – whether payments received from an NHS Trust coterminous with attendance of a training course at university "earnings" subject to income tax and national insurance contributions; yes – whether section 776 of ITTOIA 2005 to exempt scholarship income applies; no – whether legality and fairness in the administration of the refunds under WATS in point – Tribunal's lack of jurisdiction – ***appeal dismissed***

Appeal number: TC/2020/02156

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

DOROTHY JOHNSON **Appellant**

-and-

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

TRIBUNAL: JUDGE HEIDI POON
MOHAMMED FAROOQ

The hearing took place on 25 October 2021 by video.

A face-to-face hearing was not held because of the coronavirus pandemic. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.

Ms Dorothy Johnson in person for the Appellant

Ms Elizabeth Edley, Litigator, Solicitor's Office and Legal Services of HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. Ms Dorothy Johnson ('the appellant') lodged a Notice of Appeal on 2 July 2020 against a decision by the respondents ('HMRC') which refused her application for a refund of income tax through PAYE in the sum of £3,295.70 and National Insurance Contributions ('NICs') in the sum of £1,572.84.

2. The total tax repayment claim is therefore £4,868.64, and related to the period from 17 September 2001 to 24 March 2003 when the appellant was on the payroll of Barts Health NHS Trust ('Barts NHS') while undertaking training to qualify as a midwife.

3. The principal issue for determination in this appeal is whether the income received by the appellant from Barts NHS during the training period qualified as 'Scholarship Income' for the purposes of s 776 of the Income Tax (Trading and Other Income) Act 2005 ('ITTOIA'). Separately, a secondary issue arises as to whether it is a foregone conclusion that if s 776 ITTOIA applied to the income during the relevant period, then the income was automatically exempt from NICs, since the 'NIC disregard' referable to a threshold only became operative in 2005, and after the relevant period.

4. The appealable decision is HMRC's 'View of Matter' letter dated 16 March 2020, wherein the quantum of claim was stated as £786.42 (17 September 2001 to 5 April 2002) and £1,647.85 (6 April 2002 to 5 April 2003), and would appear to be concerned with Class 1 NICs only. We note the discrepancy between the amount of refund sought by the appellant, and the amount stated in the appealable decision. Neither party has led evidence on the quantum issue, and this decision is a decision in principle.

RELEVANT LEGISLATION

5. Section 776 of ITTOIA, (formerly under s 331 of the Income and Corporation Tax Act 1988), provides as follows:

> '**776 Scholarship income**
>
> (1) No liability to income tax arises in respect of income from a scholarship held by an individual in full-time education at a university, college, school or other educational establishment.
>
> […]
>
> (3) In this section "scholarship" includes a bursary, exhibition or other similar educational endowment.'

6. Section 62 of Income Tax Earnings and Pensions Act 2003 defines 'Earnings' as:

> '(2) … 'earnings', in relation to employment, means –
>
> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth …'

7. The relevant provisions from the Social Security Contributions and Benefits Act 1992 ('SCCBA') include the following:

(1) Section 2(1)(a) defines 'employed earner' as 'a person who is gainfully employed in Great Britain under a contract of service'.

(2) Section 6(1)(a) provides as follows:

> 'Where in any tax week earnings are paid to or for the benefit of an earner over the age of 16 in respect of any one employment of his which is employed earner's employment –

> (a) a primary Class 1 contribution shall be payable in accordance with this section and section 8 below if the amount paid exceeds the current primary threshold (or the prescribed equivalent); …'

8. Section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 is headed 'Decisions by officers of Board' and provides for an officer of the Board to decide whether a person was liable to pay National Insurance contributions of any particular class and, if so, the amount that he is or was liable to pay.

EVIDENCE

9. Ms Johnson gave evidence at the hearing. We limit our findings of fact from her evidence to the obtainable facts that are corroborated by documentary evidence. We have set aside Ms Johnson's opinion statements, such as the one which touched on the legal analysis of the contractual relationship between her and Barts NHS when she stated in evidence: 'I terminated my contract with the hospital as a Band E nurse.' This was a statement in relation to which she later responded in her reply to HMRC's submissions as follows: 'I stand corrected that it was continuous in that respect'. For the avoidance of doubt, we have no issue with Ms Johnson's credibility as a witness, and we accept her evidence to the extent as limited to matters of fact.

THE FACTS

Career history

10. The appellant was living in the Caribbean when she applied to come to Britain to start working as a trainee nurse with the NHS in September 1990. She qualified as a Registered General Nurse ('RGN') in May 1994. During this period as a trainee nurse, the appellant worked at Joyce Green Hospital in Dartford, Kent, (a training hospital until its closure in 2000), and attended classes run by Greenwich University, which had its nursing department near to the hospital. She was accommodated on site the hospital during her training period.

11. On qualifying as an RGN, the appellant worked in a private nursing home, before taking up a full-time post in geriatric ward at Joyce Green Hospital from 1995 until 1997 when she moved to a more senior post in geriatric ward at Whipps Cross University Hospital in London, (part of Barts NHS). She was a Band E nurse in 2001 when she changed into midwifery.

12. The appellant said that the choice of geriatric nursing was a matter of job availability at the time, while her 'passion for women and children' made her take up midwifery. There was initiative within the hospital trust to incentivise NHS workers and registered nurses to specialise, and the appellant applied in early 2001 to South Bank University to enrol for the midwifery course to start in September 2001.

13. The placement during the midwifery course was with the Whipps Cross University Hospital Maternity Unit. She described that as a 'special bond' between the South Bank University and Whipps Cross, and that the theoretical aspect of the course was delivered at South Bank, while the procedural aspect was imparted during the 18-month placement with Whipps Cross. She confirmed that she spent 'more time in the ward' than in the classroom, and that the course was structured with set blocks of time (each of 10 to 20 weeks duration) alternating between university and placement. South Bank arranged all the placements, for example, ante-natal, post-natal, and assigned a tutor to each student. It was from the tutor that the appellant went to find out 'which shift [she] was to come in'.

14. The appellant confirmed that during the midwifery course, she received payments from Barts NHS for what she called 'living expenses' on payment advice slips, and that she 'did not take home less' during the midwifery course. The incentive, she said, gave the undertaking that: 'when you enter into training, you would not be paid less than you were paid as a registered nurse'. While she could not recall exactly what was stated on the slips, she confirmed

that she was not paid any less than before she started the training. She did not pay any of the course fees to South Bank University.

15. At the end of the course in March 2003, there were examinations to pass, and during the course, each student would need to have delivered 40 babies. On meeting the qualification requirements, the appellant received a certificate as a Registered Midwife Nurse ('RMN'). She applied to a vacancy as a RMN with Whipps Cross and became a Band F midwife in May 2003.

16. Between March and May 2003, a period of about 6 weeks, the appellant said she worked as a nurse via the agency which arranged for nurses to do 'extra shifts'. This agency was specifically attached to Barts NHS and would place nurses for shifts outwith the allocated shifts they were already assigned to when being notified by a nurse of availability to do extra shifts.

17. In March 2016, the appellant retired from her post with Barts NHS at the earliest pensionable age under the NHS superannuation scheme. She said that she 'opted in' to join the superannuation scheme, and that she 'did not have to do anything to make that contribution with the scheme', and was not aware that there had been any 'pension holiday' during the training period to qualify as an RMN.

The WAT Scheme and refund application

18. Less than a year after her retirement, in late January or early February 2017, Ms Johnson returned from holiday to find sitting in her email inbox a communication from a friend (a Ms B Julian) who was in the South Bank /Whipps Cross training scheme. The friend notified Ms Johnson of the Widening Access Training Scheme ('WAT Scheme'/ 'WATS') and attached an application form for Ms Johnson's information. The headnote to the Form states as follows:

> 'Please complete and sign this form so that your claim for Tax and NI refunds can be assessed. Once completed please return to your HR Directorate: [email address at Barts NHS]. …If your training took place pre-April 2013, it will be sent to HMRC for review and processing. …'

19. Ms Johnson said the first time she heard of WAT schemes was from her friend's email. She understood the scheme to apply to those who had undergone post-registration training, and when she looked at the criteria, she 'believed that they were exactly what [she] had achieved during that time' when she was training to become an RMN. It took her until April 2017 to collect the required information to make an application for the refund.

20. The copy of P60 included in the bundle relates to the year ended 5 April 2002, with the name of Ms Johnson as the employee, and the description of her position as 'Student midwife', and her '*Gross pay from the employment*' was £23,411.20, of which £1,400.54 was deducted as '*Employee's Pension* contribution', leaving taxable gross pay at £22,010.86, of which PAYE of £3,497.02 was deducted. The employee's NI contribution paid in the year was £1,525.50. (Ms Johnson started her midwifery training mid-way through 2001-02 from September 2001.)

21. Apart from the P60, a certifying letter from the HR Administrator of Barts NHS dated 10 April 2017 was submitted with the application. The letter provides the employment history of the appellant as follows:

(1) Post: Mid-wife – Maternity
(2) Location: Whipps Cross University Hospital
(3) Band: 6; Hours: Full Time (Permanent)
(4) Salary: Basic salary £20,655 plus High Cost Area allowance £3,092 per annum
(5) Start date in Authority: 1 October 1997
(6) End date of Band 6 Employment: 24 May 2003
(7) End Date in Authority: 31 March 2016

The Guidance accompanying the application form

22. The version of the Guidance being circulated with the application form in April 2017 when Ms Johnson was making her refund application states as follows.

> 'HMRC have written to NHS organisations information them that some NHS workers, where they are or have been required to undertake a full-time training course aimed at widening their professional knowledge, may be exempt from National Insurance (NI) and/or Tax. These are known as NHS Widening Access Training (WAT) schemes.
>
> Eligible employees (e.g. nurse, physiotherapist, health care worker etc.) in a full-time training course between September 1999 – present will typically heave temporarily swapped their normal day to day pattern (either full or part time) in order to attend an NHS WAT scheme course. Their employer requires them to attend this course and the employer pays for their attendance at a rate which may be at, or different to their usual earnings level. When the course is completed the worker will then resume normal duties.
>
> To qualify the worker must meet or have met the following conditions:
>
> - Be an NHS employee when starting a training scheme,
> - Looking to widen their existing knowledge, and
> - In full time attendance at an educational establishment for at least one academic year, and must have attended the course for at least 20 weeks in that academic year. If the course is longer they must attend for at least an average of 20 weeks over the period of the course.
>
> You can also use the eligibility checking charts, provide by HMRC…'

23. The Guidance also states the essential documents for processing a WATS claim. Apart from a copy of university/college certificate, and correspondence showing dates of attendance, the application needs to provide '*Evidence that the NHS paid you to study*' through one or more of the following: (a) letter of secondment from the NHS trust to attend the course, (b) copy of the NHS contract provided for period of the course, (c) any payslips that show your "trainee" or "student" status, (d) an email from the NHS trust that confirms hey sent you on a full time training course or any other documentation that you have rom your NHS Trust confirming that you were sent by them as a trainee to attend your course for the period stated.

24. The Guidance was accompanied by two instruction flow charts respective to checking if a refund for PAYE and NIC may be due. For the 'TAX Process instructions', the first box was to ask: *Is the student an employee of NHS Trust/organisation on the day they start their training*? If the answer is NO to this first question, then the arrow directs the outcome to 'not eligible for refund'.

25. In relation to the Tax Process, if the first question is answered in the affirmative, then the flow chart moves on to the second and third questions; each of which has to be answered in the affirmative to reach the outcome: 'Employee is eligible for NHS Widening Access Training Tax refund on total earnings payable to them in respect of their training attendance'.

> (a) *The second question* – Does the course last at least one academic year (from 1st September to 31 August following year)?
>
> (b) *The third question* – Is the student receiving full time instruction for at least 20 weeks in any academic year at a university, technical college, or similar educational establishment?

26. In relation to the NIC Process, the first three questions are the same as the Tax Process, and an additional fourth question asks: 'At the beginning of the academic year do you expect to be paid in excess of £15,460 to attend the training?' If the answer is in the affirmative, then the 'Employee is *not* eligible for an NHS Widening Access NIC refund'.

The processing of the application

27. Ms Johnson's WATS refund application was put on hold while Barts NHS awaited clarification from HMRC on the Guidance regarding the operation of the WATS refund. By email dated 15 June 2017, Barts NHS advised:

> '… the Trust has been seeking clarity on the guidance issued by HMRC to ensure we correctly assess eligibility of individuals. This guidance has been emerging over the recent months, as an example in late February HMRC concluded that clinical psychologists are in fact ineligible for any refunds, whilst the original guidance suggested otherwise.'

28. The decision by Barts NHS was given in a letter dated 18 September 2017, which advised Ms Johnson that following the 'clarification to the guidance from HMRC':

> '… employees of the Trust who were employed under a contract of employment and were receiving a salary and retained employment benefits (e.g. pay awards, increments, sickness, maternity and annual leave) should be classified as employees of Barts Health during the training period.'

29. On that basis, Barts NHS informed Ms Johnson that her application for refund was unsuccessful because she was an employee of the Trust receiving a salary rather than a training/scholarship bursary. No refund of income tax or national insurance was due for the period of her training.

30. By email dated 19 September 2017, Ms Johnson wrote to Barts NHS in relation to the decision, and in this communication, she stated:

> 'Please take note that I terminated my contract as a nurse (an employee) to commence training as a STUDENT not as an employee. It can be noted that he benefits of my student status were equivocal [sic] to employee status but that in no way made me an employee of Barts.' (capital original)
>
> 'Upon completion of my training, I applied for a position as an employee and was interviewed and accepted as an employee … Barts contract was with the University and indirectly with the students. That would in no way make the students [sic] an employee.'

31. A standard letter from Barts NHS dated 13 October 2017 gave further background to the decision process in applying HMRC guidance to Ms Johnson's application:

> '… HMRC's position is clear that only those employees who have received payments that are distinct and identifiable as scholarship income or a bursary (as opposed to a payment of salary) are entitled to be considered for a refund of tax and/or NICs under a WAT scheme. Only if this criterion is met is it necessary to move on to the other criteria in HMRC's process charts …'

32. The standard letter also relates the fact that 'some individuals who were previously refunded by other NHS Trusts are now being assessed as ineligible by HMRC and would not receive such a refund'. Barts NHS advised Ms Johnson to contact HMRC if she did not agree with the Trust's decision. Ms Johnson confirmed that she believed Ms Julian's application, like hers, was also unsuccessful.

Appeal to HMRC

33. On 5 October 2017, Ms Johnson appealed to HMRC against the decision by Barts NHS with enclosures, and was advised that Barts NHS would need to submit a claim on her behalf, and that NHS Trusts are aware of the criteria for refunds.

34. The case then went back to Barts NHS, and a letter dated 3 November 2017 from the Trust to Ms Johnson related why her application was not eligible for WAT Scheme refunds:

> 'As we have previously advised, HMRC's position is clear that only those employees who have received payments that are distinct and identifiable as scholarship income or a bursary (as opposed to a payment of salary) are entitled to be considered for a refund of tax and/ or NICs under a WAT scheme. … Our position on this matter has therefore not changed, based on HMRC's current confirmations.'

35. On 12 June 2018, HMRC received an undated letter from Ms Johnson requesting a refund of all tax and NICs paid during the period when she was undertaking the midwifery training.

36. On 22 June 2018, Officer Davey replied, confirming that NHS Trusts normally deal with WATS claims from their employees, and that it is only where the information cannot be provided by the NHS Trust that HMRC deal with the refund applications. Since Barts NHS as her employer could not support the claim, HMRC could not take the claim further.

37. On 12 November 2018, Ms Johnson submitted a letter naming two individuals and said that they had a different outcome, and that she wanted to ensure that the rules regarding the same had been applied fairly.

38. On 30 November 2018, Officer Carrick replied to say that HMRC are unable to discuss details relating to colleagues who had received refunds. The letter continued by stating:

> 'We now know some of our previous decisions resulted in mistakes and that some refunds were paid incorrectly. We are now making the correct decisions in line with the qualifying conditions for a refund.'

39. Further sets of correspondence followed between Ms Johnson and HMRC: (i) 5 December 2018, replied 21 December 2018; (ii) 21 March 2019, replied 29 August 2019; (iii) 3 September 2019, replied 15 November 2019; (iv) 22 November 2019, replied 16 March 2020, which was the View of Matter decision under appeal.

APPELLANT'S CASE

40. Ms Johnson made extensive submissions on the point that she was *not* an employee of Barts NHS during her training period. On this point, however, she stated in her oral reply (after HMRC's submissions) that: 'I stand corrected that [the employment] was continuous in that respect'. Given Ms Johnson's statement in reply, it serves no good purpose to set out her submissions on her employment status during her training period. We focus on her other grounds of appeal.

41. In the main, Ms Johnson relies on the Guidance as was made available at the time she made the application. She made submissions that she fit all criteria to be eligible for the tax and NIC refunds, and that some others in the same circumstances as she was during the training period had received their refunds because their applications were processed before the issue of further guidance from HMRC to clarify the position.

42. In this respect, Ms Johnson referred specifically to the *absence* of the additional criterion as related in Barts NHS' standard letter of 13 October 2017 following the updated guidance, whereby the relevant payments need to be 'distinct and identifiable as scholarship income or a

bursary'. She submits that if 'this criterion was part of the original Guidance and document' then she 'would not have made an application' since she would have been 'deemed ineligible'.

43. It is her position that the absence of such information in the Guidance at the time of her application meant that she fit the criteria as set out by HMRC, and that it should be those criteria as in the original Guidance that should be used to determine her refund application, and not with reference to the additional criterion in the updated guidance.

44. The main ground of appeal can be summarised as what the appellant considers to be 'inconsistencies' in the processing of the WATS refunds. Her submissions in this respect are in the form of questions:

(1) Since HMRC did not indicate or notify applicants of such Guidance is subject to reassessment and review, neither was there an indication of a change of the law, could the review then be ethical and legal even when its application was retrospective?

(2) Did HMRC in collaboration with Barts NHS act legally? Could such a review be legally binding on both parties?

(3) Is it legal to apply such 'emerging, further, updated, new' guidance retrospectively?

45. Ms Johnson also challenges the legality of the deductions of income tax and NI *at the time* when she was undertaking the midwifery training. In view of the Guidance that has been formulated and updated, her question is whether it was lawful for Barts NHS to have deducted PAYE and NIC from her income back in September 2001 to March 2003.

HMRC'S CASE

46. HMRC submit that the appellant remained employed as a nurse in the NHS while undertaking training to enhance her skills and to move into a specialist area of nursing. The Trust considered the appellant to be an employee for the entirety of the period, including the period of training. The appellant was paid a salary under the collective Agenda for Change pay agreement for NHS employee, and the Barts NHS continued to allow the appellant to contribute to the NHS pension scheme.

47. The appellant's email to Barts NHS on 19 September 2017 stated that she had terminated her employment to commence training as a student, and that she applied for a position on completion of her training under an employment contract. However, the certifying letter from Barts NHS of 10 April 2017 confirmed the appellant's continuous employment from 1 October 1997 to 31 March 2016. While there was a change in salary banding during this period, (as when an employee gains promotion or obtains a new job title), there had been no change to the employment status.

48. Furthermore, the period of training would be counted as continuous NHS service for the purposes of, for example, accruing annual leave entitlement. The Trust continued to deduct tax and NICs form the appellant's earnings and was unchallenged by the appellant in the subsequent 15 years.

49. The NIC Process flow chart produced by the appellant confirms that if the earnings threshold of £15,480 is exceeded, then NIC refund is not available in any event. HMRC highlight that the threshold in the flow chart applied *after* 2005, and not during the appellant's training period. The appellant's earnings were subject to NIC deductions in any event, since the 'NIC disregard' only came into force after 2005.

50. In respect of income tax refund, HMRC refer to the Statement of Practice 4/86, entitled 'Payments made by employers when in full-time attendance at universities and technical colleges', wherein it is stated that for s 776 purposes, the limit for income tax exemption was set at £7,000 for academic years ending on or before 31 August 2005. The appellant's annual

income in the relevant year was at £23,411.20 and far exceeded the threshold to be eligible for income tax exemption under s 776.

51. HMRC submit that the appellant undertook training as part of career development or job role change, but it was continuous employment and not a break in continuity of employment for NICs and/or pension contributions. The NHS pension scheme is only accessible to NHS workers between 16 and 75, who are directly employed by the NHS, and does not apply to NHS WATS participants whose roles are classified as non-medical.

DISCUSSION

52. Having heard the submissions from the parties, we consider the relevant issues for determination in this appeal are:

(1) Whether the payments received by the appellant during the training period from Barts NHS were earnings subject to s 62 ITEPA ,or were eligible for relief under s 776 ITTOIA?

(2) What was the position in relation to national insurance contributions consequent on the determination of the first issue?

(3) Whether the Tribunal has jurisdiction to interfere with the processing of the applications for WATS refunds?

Whether 'earnings' or 'scholarship'?

53. From the obtainable evidence, we make the following relevant findings of fact.

(1) The appellant was in employment with Barts NHS from 1 October 1997 to 31 March 2016 when she retired.

(2) There was a change in her job position on 24 May 2003, from being a Band 6 RGN to an RMN on obtaining her qualification as a Registered Midwife Nurse.

(3) The appellant's employment with the Trust was continuous throughout the period from 1 October 1997 to 31 October 2016. This is consistent with the fact that only workers directly employed by the NHS can participate in the superannuation scheme; that the Trust continued to make contributions as an employer into her NHS superannuation scheme during her training period; and the appellant confirmed that there had been no gaps in her own contributions into the pension scheme.

(4) During the training period from September 2001 to March 2003, the appellant continued to be paid as an employee by Barts NHS, at the same salary Banding as she was paid prior to commencement of her training, and she continued to receive benefits that accrued to employees only, such as the employer's contributions into her NHS pension scheme. This was in line with the guarantee being given when the appellant made the decision to undertake training, that she would not take home less than before.

(5) The end date of the appellant's Band 6 Employment on 24 May 2003 was when she took up her position as a RMN with Barts NHS, and was not a date which signified a break of employment.

54. Ms Johnson's evidence consistently maintained the assertions that she ceased to be an employee of Barts NHS when she commenced her training; that she was a student and not an employee throughout the training period; and that she only became an employee of Barts NHS again when she took up a position as an RMN. However, her statement in reply to HMRC's submissions that she stands corrected effectively negates her own evidence in this respect. It is unnecessary to address what would otherwise be contrary evidence to our findings of fact.

55. We conclude that the income received by the appellant during her period of training from September 2001 to March 2003 represented 'earnings' for the purposes of s 62 ITEPA, and was therefore liable to income tax under PAYE.

56. The corollary of our conclusion is that the income received during the training period was not eligible for relief under s 776 ITTOIA. As a matter of law, the relief has a very restrictive application, and is relevant only to 'Scholarship income' held by an individual in full-time education, which covers 'bursary, exhibition or other similar educational endowment'. This is the *prior* condition that must be met before the other conditions detailed under the Guidance or the flow charts need to be considered.

57. For s 776 relief to apply, the income in relation to which the relief is sought must be identifiable as scholarship income. It is a fact that no part of the income received by the appellant during the training period can be identified as scholarship income. We conclude therefore that s 766 relief is not available to relieve any part of the income paid by Barts NHS to the appellant during the training period.

Whether NIC exemption

58. Based on our conclusion that the income received during the training period was 'earnings' for s 62 ITEPA purposes, then the income was subject to the relevant provisions under SCCBA as a matter of law.

59. The appellant's P60 for the year to 5 April 2002 shows that she was employed as a student midwife, and Employee NI contribution under category D was deducted from a gross pay of £23,411.20. This was correctly deducted in accordance with s 2(1)(a) and s 6(1)(a) of SCCBA.

60. In any event, and as HMRC have emphasised, the 'NIC disregard' where the income received was less than £15,480 was implemented only after 2005. It was only with the NIC disregard that an NIC refund could become in point if combined with the fact that the threshold was not exceeded. The NIC disregard would not have applied to the appellant's income during the training period which was before 2005 for any NIC refund to be in point.

Tribunal's jurisdiction

61. Apart from the substantive grounds of appeal, the appellant has raised issues as concerns the fairness of the process, and the legality in 'changing' the Guidance on which she had relied in making the application for WATS refunds.

62. The original Guidance would appear to have failed to state the prior condition clearly, that 'only those employees who have received payments that are distinct and identifiable as scholarship income or a bursary (as opposed to a payment of salary) are entitled to be considered for a refund of tax and/or NICs under a WAT scheme'.

63. The prior condition was that criterion *without which nothing*: 'only if this criterion is met is it necessary to move on to the other criteria in HMRC's process charts'. The material clarification in relation to this *prior* condition came some six months after the appellant's application, and was set out in Barts NHS' standard letter of 13 October 2017.

64. By the Trust's own admission, there had been refunds processed incorrectly as a result of this missing prior condition being made clear at the outset. Where refunds had been processed when they were not due, the applicants received a 'windfall' owing to the error.

65. It is important to state that the function of the Tribunal is to interpret legislation as passed by Parliament, which has the force of law. It is for this reason that s 62 ITEPA and s 776 ITTOIA are the legislative provisions on which the decision of this Tribunal is founded.

66. The Guidance and flow charts that have been relied on by the appellant have no force of law because they are not Acts of Parliament on which a judicial decision can be based. However much the appellant has relied on the Guidance and flow charts, these documents form part of the factual background and cannot take the place of the statutory provisions.

67. Furthermore, we do not see any merit in this argument. It seems to us, the appellant's submission on legality and fairness is to say that her application should be treated in like manner as those refund applications that had been processed in error. It is without merit because it simply is not arguable that a court or tribunal should be asked to perpetuate an error, in order to serve the cause of justice and fairness. We must therefore dismiss this ground of appeal.

68. In any event, this Tribunal does not have powers to adjudicate on matters of legality and fairness in the judicial review sense. The Tribunal's jurisdiction is limited to those powers expressly conferred by statute, and there is no authorisation for this Tribunal to consider this ground of appeal.

DECISION

69. For the reasons stated, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. 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.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 10 DECEMBER 2021