TC03733

Appeal number: TC/2013/03276

Income Tax and PAYE liabilities – National Insurance contribution liabilities - whether the security guards that the Appellant provided to various building sites were agency workers such that the Appellant was liable for PAYE and NIC deductions in respect of the amounts paid to them - Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GABRIEL OZIEGBE

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: JUDGE HOWARD M. NOWLAN
MRS SONIA GABLE

Sitting in public at 45 Bedford Square in London on 30 May 2014

Abayomi Adegbuyi-Jackson of DMO Consultancy & Accounting Services Ltd on behalf of the Appellant

Gill Carwardine of HMRC on behalf of the Respondents

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DECISION

Introduction

1. This was one of the cases in the line of cases dealing with the status issue of whether the Appellant was liable for PAYE tax and NIC contributions in respect of a few security guards that he provided for security services, generally on building construction sites. At one point the issue had been whether the relevant workers had been employed by the Appellant, but once HMRC had concluded that the workers were not the Appellant's employees, the issue had turned to the related question of whether the provisions dealing with "agency workers" applied. Under these provisions, if the Appellant was supplying "workers to provide individual services to [various construction company clients] in circumstances whereunder the workers were subject to (or subject to the right of) supervision, direction or control as to the manner in which the services were provided", the Appellant would be liable to deduct PAYE tax and NIC deductions and make other NIC payments in respect of the relevant workers, just as if they had been his employees.

2. We have decided this Appeal on the basis of whether the relevant provision of section 44 Income Tax (Earnings and Pensions) Act 2003, and the essentially identical NIC provision were in point and we gave an immediate decision at the hearing that neither provision was in point and that the Appeal was allowed. We might mention, however, that the amount originally in dispute, taking into account not only the basic required PAYE and NIC deductions and payments, but also interest and penalties (but before giving credit for tax and NIC payments that the workers themselves would anyway have paid) was very substantial, in the order of £40,000 to £50,000. The fact that the amount in question was obviously beyond the means of the Appellant to pay was irrelevant to the issue before us, but in the internal documents that we have considered since the hearing, it is obvious that HMRC realised that there was no prospect of the Appellant fully discharging the liability, had there been one.

3. Whilst we will mention various points relevant to the antecedent, and perhaps now irrelevant, issue of whether the workers were strictly the Appellant's employees, the main issue before us was the "agency worker" question, and in that context principally the issue of whether the workers were subject to the control and supervision or the right of control and supervision of either the Appellant or indeed, probably more relevantly, the construction company clients. We found it odd that the assessments had all been raised when the interview notes between HMRC and the Appellant had certainly not established this fact, and when moreover HMRC had not sought information on this crucial issue (indeed any information) from either the workers involved or the construction company clients. When the Appellant's own evidence was produced, establishing that the workers were not subject to any such control or right of control, the Respondents' representative effectively accepted that the Appeal should be allowed and that had, this information been known in advance, the assessments might not have been raised. For our part, and quite independently of those indications, we had concluded that the Appeal should in any event be allowed.

The facts

4. The only evidence given was that given by the Appellant himself. Not only was the Appellant transparently honest, but we should confirm that at all times he had provided all information requested by the Respondents during the enquiries that they undertook. He also sought to register for PAYE purposes in order to comply with what he concluded at one point

must have been his obligation, in order to comply with directions from HMRC, only to have to *"formally inform you (i.e. HMRC) that everyone I had listed to work for me left as I registered for PAYE and it was either I pay all costs required to do these jobs or they move on since they can get same arrangement elsewhere"*.

5. The Appellant himself had trained and secured the required licence to act as a security guard, and in 2007 he commenced working for clients, generally construction companies operating building sites, as a security officer. Around the same date the Appellant began the practice of engaging other similarly qualified security guards on any occasions when a client had work that he could not perform personally.

6. The Appellant signed a Contract for Services with any security guards he ever engaged. Most of the terms of the Contract are worth quoting as follows:

> ***Provision of services/payment***
>
> *1. You undertake to provide security services scheduled at the location and prices or rate(s) agreed. These rates may be varied from time to time in my absolute discretion. In the event that any works are cancelled or a site is closed due to inclement weather or any other reason, you will not be entitled to any form of compensation.*
>
> *2. I will pay you upon submission of the appropriate invoices or any other form of documents as agreed for claiming payments.*
>
> ***Conditions of service***
>
> *1. I am under no obligation to offer or provide opportunities for services to be provided by you, but may in my absolute discretion offer them when and as I deem fit.*
>
> *2. You are under no obligation to provide services when required by me. Acceptance and provision of any services is in your absolute discretion.*
>
> *3. I will not control or have any right to control how you undertake the services to be provided but I am entitled to lay down standards of quality and a time period within which the works must be completed at the commencement of any particular service. You will be obliged to act upon any assignment instruction provided by me.*
>
> *4. You are responsible for providing relevant equipment and tools for the job. You will make sure that equipment and tools when provided are handled safely and any damages or loss will be your responsibility.*
>
> *5. You are responsible for full compliance with health and safety regulations including providing own safety boots/footwear and obeying any site rules and regulations. Uniforms and other PPE will be provided by the company where the work is undertaken as part of its quality control. Any special personal protective clothing and equipment will be provided by you.*
>
> *6. You will be responsible for correcting any defective works without payment and within a reasonable time of notification.*

a. I may in my absolute discretion choose to carry out remedial works and claim the cost from you.

b. Alternatively, I may decline to pay you for any defective services. Or

c. Any such sums arising from sub-clauses a or b above may be deducted from payments due to you for these particular services or any other services past or future and you hereby agree to any such deductions.

7. In the event of any company or customer's property being damaged, lost or stolen due to your negligence in service, I shall be entitled to recover the cost of replacement or repair and shall be entitled to deduct from any monies due to you for these particular services or any other past or future services and you hereby agree to any such deductions."

7. There was no cross-examination of the Appellant to determine to what extent these terms were realistic, but we concluded that they were. The Appellant told us that people who worked for him would periodically leave to work entirely on their own account or with some other operator, and that this regularly occurred. We might also quote from a letter to HMRC dated 29 December 2011 in which the Appellant expanded on the reality of the way in which the terms of engagement supported the notion that each of the workers was in business on his own account, and was certainly not an employee of the Appellant. It read as follows:

"To start with I want to explain a few things which I did not probably tell you the initial time we had a conversation. The thing is that I am not really making profit from this work. Please note that some of my colleagues are paid exactly the amount from client, i.e. I get paid between £7 and £8 per hour from clients. Then I pay to some the same £8, to some £7, to some £6.5 and to others the least of is £6. These jobs are highly capital intensive in the form of professional training and licensing, transportation as most jobs are based in Oxfordshire, London, Surrey, Birmingham etc with average mileage to and from a job location being about 150 miles. They are really far away.

In order to do these jobs, you must have to purchase a car, and you spend minimum of 30% to 40% on fuel. These people need to buy Uniforms and protective equipment and other materials they will need for these jobs. We don't have any holiday entitlement, no sick pay and no benefits whatsoever. All cost borne by the worker.

Any defective jobs are the responsibility of the worker and they are able to get a replacement worker where they are not available to carry out a contract. They are able to work for as many clients as possible and have no direct control from me while on the job but are bound to follow the rules of the specific assignment.

They take their own job risks and the amount of profit they make is in their control.

These people have been advised to pay their tax as required by law and has done so in the form of self assessment."

8. There was no cross-examination of the Appellant that sought further clarification of any of the points recorded in that letter, but we accept that the statements were broadly realistic.

From his oral evidence, we certainly gained the impression that the respects in which "colleagues" could be taken on, and engagements terminated, and in which colleagues might walk out and work elsewhere, independently or with some other operator, were realistic. In terms of the claim that the workers were in business on their own account and that they paid their appropriate tax and NIC liabilities, it was noteworthy that the Appellant's accountant was able to furnish to HMRC in a letter, the tax and NIC details and reference numbers for at least four of the people that the Appellant had engaged and, as we will mention below, a letter was also produced from one of those workers, challenging from his standpoint the proposition that he was anything but a worker in business on his own account.

9. We have summarised some of the above facts because they have a bearing on both the status question of whether the Appellant actually employed the workers, and also on the slightly distinct issue of whether the "agency worker" rules were in point. As we have already indicated, HMRC had confirmed that although at one point they had considered the issue of whether the workers were actually the Appellant's employees, this line of enquiry had been dropped. In the Respondents' Skeleton Argument, it was stated that:

> *"HMRC concludes self employment in the first instance, a matter accepted by the Appellant and his agent. This was concluded on the basis of non-exclusivity of engagement, the workers having their own respective business structures, some of the workers having incurred costs and expenditure, and the intention of the parties being that of self employment."*

We agree.

10. While HMRC abandoned their enquiry in relation to whether the workers were the Appellant's employees, they then turned to the issues of whether the "agency workers" provision of section 44 Income Tax (Earnings and Pensions) Act 2003, and the similarly worded NIC provision, nevertheless resulted in the Appellant being liable for PAYE deductions and NIC deductions and employer liabilities under those provisions.

11. The terms of section 44 are as follows:

> *"(1) This section applies if-*
>
> *(a) an individual ("the worker") personally provides, or is under an obligation personally to provide, services (which are not excluded services) to another person ("the client"),*
> *(b) the services are supplied by or through a third person ("the agency") under the terms of an agency contract,*
> *(c) the worker is subject to (or to the right of) supervision, direction or control as to the manner in which the services are provided, and*
> *(d) remuneration receivable under or in consequence of the agency contract does not constitute employment income of the worker apart from this Chapter"*

Were section 44 to apply because the above circumstances prevailed, then it is clear that the Appellant would have had the liability to deduct PAYE tax and NIC amounts.

12. This section is designed essentially to deal with the position of agency workers who are neither employed by the agency, nor the client to which they are provided (in the latter case largely because there will probably be no contractual relationship at all between the worker and the client), but nevertheless the workers fit into the infrastructure of the client, albeit possibly only on a temporary basis, and work under the control of the client rather as if they were employees. Accordingly an essential part of the test quoted above is that the worker must be subject to the control or right of control of some person (either the agency or the client) as to how he performs his functions. We accept that control by the agent (as distinct from the client) can result in the provision being in point, though in this case, we accept the Appellant's evidence that he had no control over the way in which the workers performed their responsibilities. He said that he was never on site with them, and he said that they, as equally qualified security guards, would have been working as they considered appropriate.

13. While control by the agency could bring the "agency worker" provisions into effect, it is clear that the more usual facts that will bring the relevant provisions into operation are those where it is the client who has control or the right of control over how the worker provides his services. Accordingly, before addressing the limited evidence in this case, it is worth noting that the provision is most likely to be engaged when the agency worker fulfils a role in which it is natural and obvious that the client will exercise control over how the worker performs his or her services. Thus in the case, for instance, of secretaries provided by an agency who perform an identical function to secretaries that the client might directly employ, and who will be expected to fit in with all the work practices of the particular client, the control requirement will clearly be satisfied.

14. The most obvious situation in which the "control" requirement will not be satisfied is where the particular service being rendered is one that is extraneous to the basic activity of the client, such that it is entirely natural that the client will have no control or right of control over the way in which the services are provided. The example that we gave during the hearing was of the service that the same construction companies might contract to receive from a specialist provider responsible for servicing their mechanical equipment. Thus, if the construction companies had various dumper trucks and excavating equipment on site, and this equipment needed servicing, and an independent entity contracted to service the equipment, we would not expect a worker or sub-contracted worker (not an employee) of the maintenance firm to be regarded as working under the control of the client. The construction company would obviously indicate that it was time to service some particular vehicles, or that one vehicle had suffered some defect, but the worker would then do the required maintenance work on his own account, and not remotely in accordance with the direction or control of the client.

15. HMRC's own guidance in relation to the nature of the "control" requirement entirely accords with this example. The question is not whether the client indicates the particular job to be done, but rather the issue of how it is to be done. Admittedly in some circumstances (the surgeon, for instance), the conclusion may be that a surgeon provided on an agency basis may be said to act under the control of the client hospital, notwithstanding that nobody in the hospital would presume to have any control over how the surgeon actually performs his functions, but in that situation the "control" test is less material because exactly the same reality applies to employed doctors and surgeons. By contrast if the specialist service provider was maintaining the x-ray equipment, an activity that the client hospital would purport to have no knowledge about, or right of control as to how the function might

be performed, it is extremely unlikely that an independent contractor working for the specialist provider would be regarded as working under the control of the client hospital.

16. As we have already indicated, HMRC had obtained no evidence or information either from any of the workers or the clients (none of whom had been approached) in relation to this crucial "control" test. None of the construction company clients had even been identified.

17. The Appellant's unchallenged evidence was nobody had control over how self-employed workers performed their tasks. Such workers would go to the relevant sites, and would be shown by the site manager the relevant access points to the site, any areas of particular danger, and the type of security provision that the client was contracting to receive. The client company would thereafter have no involvement with how the licensed and specialist security guards performed their function. The construction companies would get on with the job of constructing the building, and leave the function of site security to the separately engaged specialists. Similarly the Appellant himself would never be on site with the sub-contractors who HMRC accept were not his employees and he would have no control or right of control over how they performed their functions.

18. We conclude that on these unchallenged facts the "control" requirement of the "agency worker" provisions was not satisfied and that neither the Appellant nor the construction company clients had control or the right of control over how the worker's work was actually performed. We have mentioned that one of the workers had himself written to HMRC strongly challenging the contentions that HMRC had advanced in relation to the Appellant. Many of the points in the particular worker's letter were more material to the strict "employment" question, but the relevant worker did assert that *"I had my freedom to decide what work to do, how and when to do the work and where to provide the services."* This claim seemed to us to be realistic and to be further support for the unchallenged evidence of the Appellant that nobody had control or the right of control over how the work was done.

19. As we have also recorded, the Respondents' representative conceded that, had the Appellant's evidence emerged earlier and been clear to HMRC, it is unlikely that he would have been faced with the relevant assessments, and claimed penalty liabilities in the first place. Moreover she seemed to accept that it was appropriate for us to allow this Appeal.

20. That is our decision. This Appeal is allowed in full.

Right of Appeal

21. 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.

HOWARD M. NOWLAN

TRIBUNAL JUDGE

RELEASE DATE: 18 June 2014