



TC04933

Appeal number: TC/2015/00065

National Insurance Contributions - police officer seconded to Foreign and Commonwealth Office in Kosovo – application of Family Allowance, National Insurance and Industrial Injuries (Yugoslavia) Order 1958 (the “Order”) to Kosovo – whether Order took effect under s 179 SSAA 1992 – whether Appellant in government service for purposes of the Convention– held not in such service as a police officer, but in such service by virtue of terms of secondment.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALAN EDWARDS

Appellant

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public in Exeter on 8 December 2015

Anthony Peacock of Affordable Tax Services (by telephone) for the Appellant

Linda Ramsay for the Respondents.

DECISION

1. Mr Edwards appeals against a decision of HMRC in which it was held that he was liable to Class1 National Insurance Contributions (NICs) for the period from 25 March 2014 to 31 October 2014.

2. Mr Edwards served in the UK as a police officer with West Mercia Police (WMP) until March 2013 when he was seconded to the Foreign & Commonwealth Office (the "FCO") to work in Kosovo. He remained on secondment for a period which extended beyond 31 October 2014. While on secondment I understood that he was paid by WMP. At the end of his secondment he returns to work with WMP in the UK.

3. Mr Peacock contends that after the first 12 months of Mr Edwards' secondment, Mr Edwards was not liable for NIC contributions in the UK as the result of the provisions of the Family Allowance, National Insurance and Industrial Injuries (Yugoslavia) Order 1958 (the "Order").

The legislative background

4. NIC contributions are payable under the Social Security Contributions and Benefits Act 1992 ("SSCBA") on the remuneration of an "employed earner". An "employed earner" is defined by section 2 (1) as a person "employed in Great Britain either under a contract of service, or in an office with general earnings.

5. A police officer is not an employee under a contract of service but an office holder, whose emoluments would be general earnings. Thus while Mr Edwards was employed in Great Britain his earnings would have been liable to NIC. But when he ceased to work in the UK and was seconded to Kosovo, he ceased to be employed in Great Britain, and his earnings fell outside the immediate ambit of the Act.

6. Section 179 of the Social Security Administration Act 1992 ("SSAA") provides that Her Majesty may by order in Council make provision for modifying or adapting the SSCBA for the purpose of giving effect to any agreement with the government of the country outside the UK providing for reciprocity in matters relating to payments for purposes similar inter alia to the SSCBA .

7. The Social Security (Consequential Provisions) Act 1992 ("SSCP") repealed prior social security and national insurance legislation but provided, in section 2, that anything done under or in pursuance of a repealed enactment would, if it could have been done under SSCBA or the SSAA, have effect as if done under those new Acts.

8. In 1958 Her Majesty, by order in Council made the Order, which gave effect to a social security convention between the UK government and that of the Federal People's Republic of Yugoslavia (the "Convention"). That Order could have been made under section 179 SSAA. It is therefore to be treated as if made under section 179 *if* it could have been made under the repealed provisions.

9. The Order was expressed to be made in pursuance of powers in the National Insurance Act 1946 (as amended) and the Family Allowances and National Insurance Act 1956, which permitted orders in Council to give effect to reciprocal arrangements: Article 2 provided:

“2. The provisions contained in the Convention set out in the Schedule to this Order shall have full force and effect, so far as the same relate to England, Wales and Scotland and provide by way of agreement with the Government of the Federal People's Republic of Yugoslavia for reciprocity in any matters specified in either subsection (1) of section 64 of the National Insurance Act, 1946, as extended by subsection (1) of section 4 of the Family Allowances and National Insurance Act, 1956, or subsection (1) of section 85 of the National Insurance (Industrial Injuries) Act, 1946 (which subsections relate to reciprocal agreements with other governments), and the Family Allowances Acts, 1945 to 1956, the National Insurance Acts, 1946 to 1957, and the National Insurance (Industrial Injuries) Acts, 1946 to 1957, shall have effect subject to such modifications as may be required therein for the purpose of giving effect to any such provisions.”

10. Thus if the Order was made under the provisions concerned by the 1946 and 1956 Acts, it would have effect under the 1992 legislation. The National Insurance Act 1946 (as amended) and the 1956 Act provided that Her Majesty might by Order in Council make provision for modifying or adapting the Acts in its application to cases covered by a reciprocal agreement with another country. Thus the Order was made under those Acts and has force as a result of section 179 SSAA.

11. The Convention, which was scheduled to the Order, provided in Article 2(2) that it would apply to any law which amended, supplemented or consolidated the National Insurance Act 1946. It thus applies to the 1992 legislation.

12. Articles 1, 4 and 6 of the Convention provide:

“ARTICLE 1

...(i) “employed person” means a person who comes within the definition of an employed person...in the legislation which is being applied..”

...

ARTICLE 4

(1) Subject to the provisions of paragraph (2) of this Article and Article 6, where a national of either Contracting Party is employed in the territory of one Party, the legislation of that Party shall, and the legislation of the other Party shall not, apply to his employment.

(2) If a person, not ordinarily resident in the territory of one Party, is employed in that territory by an employer who is resident in the territory of the other Party or has his

principal place of business there, then, during the first twelve months of his employment in the former territory-

(a) the legislation of the latter Party shall apply to his employment, as if he were employed in the territory of that Party;

(b) the legislation of the former Party shall not apply to his employment.

(3) When the employment specified in paragraph (2) of this Article lasts longer than twelve months, the provisions of that paragraph shall continue to apply to that employment, if the social security authority of the Party in whose territory he is employed agrees thereto before the end of the period of twelve months specified in that paragraph.

...

ARTICLE 6

(1) Subject to the provisions of paragraph (1) of Article 8, the present Convention shall not apply to established members of the foreign service of the United Kingdom or to diplomatic and consular officers of Yugoslavia.

(2) Subject to the provisions of paragraph (1) of this Article, where a national of one Contracting Party is employed in the territory of the other Party in the government service of the former Party and is not permanently settled in that territory, or any person is employed in the private service of such a national so employed and is not so settled, the legislation of the former Party shall apply to his employment as if he were employed in the territory of that Party, and the legislation of the latter Party shall not apply to his employment.

(3) Subject to the provisions of paragraph (1) and (2) of this Article, where a national of either Party is employed in the territory of one Party in a diplomatic or consular post of the other Party, or any person is in the private service of a national of either Party so employed, the legislation of the Party in whose territory he is employed shall apply to his employment.”

13. The effect of the declaration of independence of Kosovo and the breakup of Yugoslavia was considered by the FTT (Judge Kempster and Roger Freeman) in *Paul W Martin v HMRC* TC/2014/4591. The FTT said:

“8. On 17 February 2008 the Republic of Kosovo declared independence from the Republic of Serbia. On 19 September 2008 the FCO in Pristina wrote a “*note verbale*” stating:

“The British Embassy presents its compliments to the Ministry of Foreign Affairs of the Republic of Kosovo and has the honour to refer to the Parliamentary Assembly of Kosovo's Declaration of Independence of 17 February 2008.

The British Government has the honour to note the affirmation by the Kosovo Assembly in that Declaration, reaffirmed in a letter dated 17

February 2008 from the President and Prime Minister of the Republic of Kosovo to the Secretary of State for Foreign and Commonwealth Affairs, that Kosovo shall be legally bound to comply with the provisions contained in that Declaration, including, especially, the obligations for Kosovo contained in the Comprehensive Proposal of UN Special Envoy Ahtisaari, and that the Government is entitled to rely on that affirmation.

The British Government further has the honour to note that, in that Declaration, Kosovo expressly undertook its international obligations, including those concluded on its behalf by the United Nations Interim Administration Mission in Kosovo and those to which Kosovo was bound as a former constituent part of the Socialist Federal Republic of Yugoslavia, and the British Government hereby confirms that the British Government regards treaties and agreements in force to which the United Kingdom and UNMIK, and the UK and the SFRY, and as appropriate the UK and the Federal Republic of Yugoslavia, were parties as remaining in force between the United Kingdom and the Republic of Kosovo.”

The *note verbale* scheduled “Bilateral treaties in force between the UK and Serbia which it is proposed should apply between the UK and Kosovo”, and this included the Convention.

9. On 22 April 2010 the Republic of Kosovo wrote to the FCO stating:

“The Ministry of Foreign Affairs of the Republic of Kosovo presents its compliments to the British Embassy in Prishtina, and acknowledging the latter's Note Verbale No. 02/2008 dated 19 September 2008, has the honour to inform the Embassy of the following:

The Ministry of Foreign Affairs of the Republic of Kosovo confirms that the Note dated 19 September 2008 and this reply constitute joint confirmation that, the bilateral agreements and arrangements which are both listed below and listed in the Note dated 19 September 2008, remain in force between the Republic of Kosovo and the United Kingdom of Great Britain and Northern Ireland, without prejudice to the possibility that other bilateral agreements and arrangements may remain in force between the two countries in accordance with international law.”

Item 6 in the said list was the Convention...

“...21. The Convention which was enacted by the 1958 Order was between the UK and the Government of the Federal People's Republic of Yugoslavia, and art 1(a) states: “For the purpose of the present Convention, unless the context otherwise requires ‘territory’ means, ... in relation to Yugoslavia, the territory of the Federal People's Republic”. At that time, as we understand the position from the documents submitted by Mr Peacock, the territory of the Federal People's Republic comprised a number of Socialist Republics including the Socialist Republic of Serbia, which in turn contained two Socialist Autonomous Provinces: Vojvodina and Kosovo. With the break-up of Yugoslavia from 1991 onwards there is scope for uncertainty as to what international commitments of the former Yugoslavia would be accepted as available to and binding on the

successor states – which from February 2008 included Kosovo. However, for the purposes of the matters before this Tribunal in this appeal we are confident that:

(1) The territory that became the independent Republic of Kosovo in February 2008 had been part of “the territory of the Federal People's Republic” for the purposes of the Convention and thus also for the purposes of the 1958 Order.

(2) Any doubt as to whether the Convention continued to apply to Kosovo after its declaration of independence was put beyond doubt by the bilateral exchange of notes between the respective governments, described at [8-9] above.

(3) For UK law purposes the 1958 Order has continued in force throughout and, at the very latest from April 2010 when the Republic of Kosovo confirmed its agreement to the earlier *note verbale*, clearly covers the territory of the Republic of Kosovo.

(4) Therefore the 1958 Order did apply to the territory of Kosovo during the period relevant for this appeal – ie when the Appellant was working in Kosovo....”

14. Mr Peacock, who also appeared for Mr Martin in that case, did not dispute this reasoning..

15. The effect of Article 1(i) is that although Mr Edwards is not an employee he may be treated as such for the purposes of the Convention because he is so treated for the purposes of section 2 SSBA. Thus Articles 4 and 6 of the Order may affect Mr Edwards in the period relevant to the appeal.

16. Thus, subject to the effects of article 4(2) and 6, the effect of article 4 (1) would be that the legislation of Kosovo would apply to Mr Edwards. As a result he would not be liable to NIC. But that conclusion is subject to 4(2) and Article 6.

17. Article 4(2) has the effect of making him subject to UK NIC the first 12 months of his time in Kosovo. (That 12 month period could be extended if there had been agreement for the purposes of Article 4(3) but there was no evidence of any such agreement.)

18. Article 6(1) does not apply: Mr Edwards was not an established member of the UK foreign service.

19. Article 6(2) will apply if Mr Edwards was "employed in the territory of [Kosovo] in the government service of the [UK]" and was not (as we understood to be the case) permanently settled in Kosovo.

20. There may appear to be some conflict between article 4(2), which appears to make Mr Edwards subject to the NIC charge only for the first 12 months of his secondment and Article 6 which could leave him within the charge after that period if he satisfies its requirements. In my judgement Article 6 must take priority. That is because:

(1) Article 4(1) is subject to Article 6; the effect of Article 4(2) relates only to the first 12 months, thereafter control reverts to Article 4(1) but that is subject to Article 6;

(2) Article 6 is more specific, and the general must give way to specific; and

(3) if, article 6(2) were merely an exception to article 6(1), it would not have been drafted so as to require the relevant Party legislation to apply but merely as an exception.

21. As a result I conclude that if Mr Edwards was, when he was in Kosovo, "employed in the government service of" the UK, he is liable to NIC as if his employment had been in Great Britain.

Was Mr Edwards employed in the government service of the UK?

22. Mr Peacock submits that Mr Edwards remained a member of the WMP when he was on secondment. He was a police officer with all the powers and duties of such a person. He says that (1) a police officer is not employed in government service, and (2) he was not employed by the FCO, and so, even if the FCO was part of the government, was not employed in government service.

Discussion

23. Police officers are not employees, they are officeholders. They are paid by the Police Authority, a body corporate constituted by section 3(2) Police Act 1996. The relationship of an officer with the authority is not that of employer and employee or of principle and agent. A police force is under the direction of the Chief Constable or chief officer (section 10).

24. The Secretary of State may determine strategic priorities for policing (section 37A), may make regulations relating to procedures and practices (section 53A) and has certain other powers, but has no general power to direct the actions of the Chief Constable (or chief officer) or any officer who is a member of a police force *R v Metropolitan Police Commissioner, ex parte Blackburn* [1968] 2 QB 118 at 135 - 136.

25. A member of a police force carrying out his duties as a constable acts as an officer of the Crown and a public servant (see Halsburys Laws of England volume 36 (1) fourth addition paragraph 104 citing inter alia *P v Rasook* 1997 4 All ER 439) but his relationship with the Crown is not that of master or servant or principal and agent and, "if he is called a servant, it is in the sense in which any holder of a public office may be called a servant of the Crown or of the state" (Halsbury *ibid* paragraph 105 citing *AG for New South Wales v Perpetual Trustee Co Limited* [1955] AC 457 at 480- 481.)

26. In my judgement the "government" normally means the executive: those exercising the executive powers of the Monarch in whose name the activities of government are carried on; and those persons are ministers and the civil service. As a result it does not seem to me that a police officer is as such employed in government service. I am comforted in this decision by section 12 of the Official Secrets Act 1989 which provides that a Crown Servant means "(d) a person employed by the Crown

and (e) any constable ...". The distinction indicates that Parliament considered that a constable is not employed in the service of the Crown by virtue of his office as a constable.

27. As a result I conclude that Mr Edwards did not fall within Article 6(2) by reason of his office as a police officer of WMP.

28. That leaves the question as to whether, because of the terms of his secondment to the FCO he became employed in government service notwithstanding that he was a police officer and was paid principally by WMP. It seems to me that the FCO is clearly part of government.

29. HMRC provided a copy of terms of agreement for the secondment to the foreign and Commonwealth Office of Mr Edwards with West Mercia Police Force dated 21 January 2013. I understood that these terms had been signed by Mr Edwards and on behalf of the FCO. The terms of agreement appended summary terms and conditions. The terms agreement included the following provisions:

1. Commencement date and an initial duration;
- 2 "during ..., you will work as a civilian police (sic) for the Foreign and Commonwealth Office and will be based in ... Kosovo"
3. At the conclusion of the secondment ... you will return to your Force.
- ... 9. When on secondment to the [FCO] you owe duties of confidentiality and loyal service to the Crown.
10. The [FCO] will reimburse reasonable travel, subsistence ...expenses
- 11 and 13. Deal with leave and pension...

30. And in the Terms and Conditions:

- “2. You will be expected to conduct yourself in a manner consistent with your position as a representative of Her Majesty's government ...
- 3... you will be seconded to the mission by the FCO ... and will report to and be obliged to comply with any lawful instructions from your mission line manager
4. you will receive a per diem allowance ...
19. for the duration of your secondment police disciplinary regulations will apply...”

31. It seems to me that these provisions make Mr Edwards a servant of the FCO and thus in the service of the Crown.

32. In my judgement although Mr Edwards was not was not employed by the FCO it is a proper use of language to say that he was employed (in the extended sense of that word used by the Convention) by WMPC in the service of the FCO. In other words employed in government service.

33. As a result I find that Article 6(2) applies and UK NIC contributions are exigible in respect of the remuneration for that service.

34. I therefore dismiss the appeal

Rights of Appeal

35. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 2 MARCH 2016