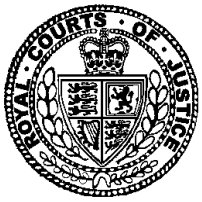

Neutral Citation Number: [2024] EWHC 2842 (Admin)

Case No: AC-2023-LON-000628

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2024

Before :

MR JUSTICE KERR

- -

Between :

THE KING **on the application of** **PAYEWORX LIMITED**	**Claimant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Defendant**

- -
- -

Harriet Brown and **Rebecca Sheldon** (instructed by **Jurit Smart Counsel**) for the **Applicant**
Ben Elliott (instructed by **His Majesty's Revenue and Customs**) for the **Respondent**

Hearing date: 6 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 8 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE KERR

Mr Justice Kerr :

Introduction

1. This is my short judgment on the renewal of the application of the claimant (**Payeworx**) for permission to bring a judicial review of a decision of the defendant (**HMRC**) made on 9 August 2023 to publish information under section 86(1) of the Finance Act 2022 about activities of Payeworx which HMRC suspected were done mainly to obtain or enable others to obtain a tax advantage, namely receipt by Payeworx's contracted workers of remuneration or cash benefits free of tax and national insurance contributions (**NICs**).

2. Swift J refused permission on the papers on 2 April 2024. I heard argument from both parties at the renewal hearing two days ago. Although this is a permission application, I am content for it to be cited, as other cases of this kind have arisen since the enactment of the novel provision in section 86 of the Finance Act 2022 (**the 2022 Act**); and several have been resolved at the permission stage.

3. The case has a curious procedural history. The claim was brought on wider grounds than are now pursued. An application to Lang J for interim relief failed. Swift J refused permission. A late change of counsel for Payeworx has led to a narrowing of the issues and much greater clarity. I am grateful to all counsel for their help and especially to Ms Brown and Ms Sheldon, instructed only the day before the hearing but delivering written and oral submissions none the less clear and polished for that.

Facts

4. It is common ground that Payeworx provides the services of workers to third party clients. According to its operations director, Mr Jonathan Lang, Payeworx charges the clients for the workers' services. He adds that the worker receives "a salary" and that the PAYE regime is operated in respect of that "salary", i.e. income tax and NICs are deducted. The "employer" for the purpose of that exercise is treated as Payeworx, though the worker works for the third party client.

5. Each participating worker must set up a "personal service company" (**PSC**). This is a not uncommon way in which workers (especially locum workers, for example in the NHS)

sometimes provide their services to an employer or more than one employer. According to Mr Lang, the worker's PSC "owns a 'cell' in Contractor Buddy PCC Limited (**Contractor Buddy**) which he describes as "an Isle of Man protected cell company". The worker's PSC also receives a larger payment in the form of a "dividend" from Contractor Buddy, over and above the "salary" paid to him or her by Payeworx.

6. Mr Lang denies any tax avoidance purpose:

> "My belief is that no tax is avoided, nor has the worker engaged in this structure to pay less tax."

Rather, he says, the arrangement has been made:

> "due to the threat of an IR35 risk to the third-party client. … the IR35 legislation does not apply where the worked is employed."

7. The "IR35" regime is, simplifying considerably, a system whereby putative employers of putative employees can be required by HMRC, on service of a notice, to operate the PAYE regime in the case of a particular worker, or at least show cause why they should not have to do so. This has been introduced progressively over recent years under legislation I need not go into.

8. The IR35 regime (also known as the off-payroll working rules) is a measure intended to strengthen HMRC's powers to detect and prevent tax avoidance by means of employment relationships being wrongly treated as self-employment. Mr Lang is referring to the unwillingness of Payworx's third party clients to take on workers sourced by Payeworx because of the concern that the clients will be served with an IR35 notice and will be required to operate PAYE in respect of workers supplied by Payeworx.

9. Payeworx's calculation is that HMRC will not serve IR35 notices on the third party clients because HMRC will have received tax and NICs from Payeworx in respect of those workers, who are treated as "employed" by Payeworx even though they are actually working for the third party client. Mr Lang denies that this is done for the purpose of avoiding tax or that any tax is avoided. However, he accepts that no tax or NICs are paid from the "dividends" received by the workers' PSCs from Contractor Buddy.

10. HMRC wrote to Payeworx on 5 January 2023. The letter started by paraphrasing the legislation, stating that under section 86(1) of the 2022 Act, "we can publish information (including documents) where an 'authorised officer' suspects a proposal or arrangements

are a relevant proposal or relevant arrangements"; that a relevant proposal is a proposal for relevant arrangements; and that arrangements are relevant arrangements if they might enable any person to obtain a tax advantage and that tax advantage is the main benefit or one of the main benefits that might be expected from the arrangements.

11. Payeworx does not take issue with that paraphrase of the legislation and nor do I. HMRC went on to describe the arrangements, in the same letter:

> "These arrangements involve participants or users providing their services to end clients/recruitment agencies through Payeworx Ltd and additionally they receive a share in Contractor Buddy …. in a unique cell specific to the … PSC of the participant. The result is the remuneration for their services is artificially separated into a national minimum wage salary and a secondary payment purported to be for the growth in the value of the share held in Contractor Buddy … The payments in relation to the share growth are not subject to income tax or … NICs … ."

12. I pause to observe that, apart from the tendentious words "purported" and "artificially separated", Payeworx has not, in submissions, taken issue with the accuracy of that description of the *modus operandi* or suggested that the mechanics of the transaction have been misunderstood by HMRC. There is, indeed, no material inconsistency between that description of the mechanics of the transaction and Mr Lang's description of it. Where the parties differ is in their perception of the purpose of the transactions.

13. The letter of 5 January 2023 went on to say that the authorised officer:

> "suspects that the proposal or arrangements are a relevant proposal or relevant arrangements … because the arrangements might be expected to enable the participants to obtain remuneration or other cash benefits free of income tax and NICs."

14. The writer went on to explain the rationale for forming that view:

> "This artificial separation of the user's remuneration creates an income tax and NICs advantage. Furthermore, the authorised officer contends that no individual would rationally agree to enter a contrived and potentially expensive set of arrangements were it not for the income tax and NICs advantage. Therefore, the income tax and NICs advantages are one of the main benefits, if not the only material benefit, to which the arrangements might be expected to obtain."

15. The letter went on to explain that Payeworx had the right to make written representations and gave further details about what might be published. Payeworx exercised its right to make written representations. These were provided to me at the hearing. They were attached to an email dated 17 February 2023. They made no reference to IR35, though Mr Lang did in his later witness statement (made on 31 August 2023).

16. The representations took the form of a draft Administrative Court pleading headed "claimant's grounds". It began by stating that Payeworx "seeks an injunction" to restrain HMRC from publishing the information it proposed to publish in reliance on section 86 of the 2022 Act. The "[f]actual [b]ackground" was set out at paragraph 4 of the document. It did not address Payeworx's *modus operandi*, other than to say it "carries on the business of the provision of the services of its workers to third parties".

17. The rest of the document set out in detail and at length four proposed grounds of challenge, approximately corresponding to the wider grounds of challenge in the later proceedings, which as I have explained have since been helpfully narrowed down as a result of the change of counsel. The representations did not persuade HMRC to stay its hand, though. It wrote again to Payeworx on 9 August 2023, stating its decision to publish, which is the decision challenged in these proceedings.

18. The letter of 9 August 2023 stated that the written representations had been considered, in the context of the legislation. Before explaining why the four grounds of challenge were, in turn, not accepted (an explanation I need not rehearse here), the HMRC officer addressed the issues in more detail, after reciting his description of the arrangements:

> "No income tax or National Insurance Contributions (NIC) are deducted from the second payment. This conclusion has been drawn from analysing the contracts of employment, share certificates, payslips, and descriptions of the arrangements provided by scheme users.
>
> In my view, the arrangements involve an artificial separation of amounts of what is in substance remuneration paid by an employer to an employee. The separation is artificial as it does not reflect the true substance of the economic relationship between the payer and payee, and its sole or main purpose is to generate a purported reduction of income tax and NIC payable.
>
> The supposed benefit of the arrangements is that, unlike the position in relation to payments of salary, the employer purportedly does not have to deduct income tax and NIC from the payment that is claimed to be a dividend. However, a deduction is made from that payment that is purported to be for the payment of corporation tax (CT) on the profits of CBP in the Isle of Man, where the actual corporation tax rate is 0%. Regardless of the claimed CT payment, the amounts of income tax and NIC that are accounted for to HMRC on the total contract value are reduced.
>
> Publication of the information would therefore be for the purposes of: (a) informing payers about risks associated with, or concerns the officer has about, the proposal or arrangements; and (b) protecting the public revenue.
>
> …
>
> It is appropriate for information about you and the arrangements you are promoting to be published so that persons who might wish to participate in, or rely on, the arrangements are aware that HMRC has concerns about those arrangements.

> In HMRC's view, the arrangements you are promoting to taxpayers are unlikely to produce the intended result. Persons relying on the arrangements are therefore likely to be under-paying income tax and NIC. Accordingly, the arrangements are likely to lead to UK tax revenues not being paid.
>
> Further, persons who rely on the arrangements could find themselves liable for arrears of unpaid tax (and, potentially, penalties) which could in some cases be substantial. Further and in any event, the arrangements involve artificial separation of amounts of what are in substance all part of an employee's remuneration from their employer, leading to the employer not accounting for income tax and NIC which would otherwise be deducted and accounted for by the employer by reference to the whole amount. This is unfair to UK personal taxpayers generally, who receive their salary payments from their employers after the full amounts of income tax and NIC have been deducted."

19. After that, on 24 August 2023 Payeworx (and Contractor Buddy) were added to the list of entities on HMRC's website under the heading "Current list of named tax avoidance schemes, promoters, enablers and suppliers". The information published about Payeworx was as follows:

> "The scheme user enters into an employment contract with PWL, and the scheme user's Personal Service Company (PSC) is issued a share in CBP, a connected protected cell company based in the Isle of Man (IOM). PWL pay the scheme user a salary that is around the minimum amount required by the National Minimum Wage Act 1998. CBP make a separate larger payment without deducting Income Tax and National Insurance contributions to the scheme user's PSC, supposedly for a dividend. CBP deduct around 2% from the larger payment as a fee, and a further 19% which they claim is Corporation Tax (CT). However, the rate of CT in the IOM is 0%. The scheme users are expected to distribute the alleged dividend amount as they see fit."

20. Payeworx then brought the present proceedings on 31 August 2023 (issued the next day), failed to obtain interim relief and failed to obtain the court's permission to proceed with its judicial review. Hence the renewal hearing before me, two days ago.

Issues, Reasoning and Conclusions

First ground: irrationality

21. Ms Brown, for Payeworx, submitted that it was arguably irrational to conclude that the suspicion required under section 86(1) of the 2022 Act could be entertained by HMRC. She submitted that it was not rational to suspect that the purpose of the arrangements was avoidance of tax. There was no evidence from which to conclude that the purpose of the "separation" of payments to workers masked the true nature of the tripartite economic relationship between the parties.

22. She pointed out that many workers perform their services intermittently; examples include oil rig workers and barristers. It does not follow that because the arrangements involved payments to workers from offshore in addition to their salaries subject to PAYE arrangements, the purpose was necessarily tax avoidance or an intended tax advantage. She accepted, once Payeworx's representations were produced at the hearing, that they did not mention IR35, but Mr Lang's witness statement did. Concern about IR35 would be a legitimate reason for setting up the arrangements but HMRC had not considered that.

23. Ms Brown also complained that HMRC's approach to the issue of possible tax avoidance was contradictory. It had written on 26 January 2023 to one of Payeworx's workers reassuring her or him that there was no tax avoidance issue because the person to whom the letter was addressed had been having tax and NICs deducted at source by Payeworx. The letter recorded that the documents considered were the worker's employment contract and payslips; and there had been a telephone conversation on 18 January 2023, the contents of which are not recorded.

24. It ought to have been obvious to HMRC, said Ms Brown, that a reluctance by the third party clients of Payeworx, receiving the services of the workers in question, to make "status determinations" under the IR35 regime was the reason for the outsourcing of part of the payment mechanism to an offshore company and for Payeworx playing the role of employer operating the PAYE regime. She pointed to a (redacted) email from (probably) a recruitment agency (albeit after the challenged decision was made) referring to the workers as "our mutual candidates".

25. The admittedly high threshold of irrationality was arguably reached, Ms Brown submitted. Her contention was that HMRC simply did not like the arrangements and considered them "a bit hinky" but that was not a sufficient rational basis for entertaining the level of suspicion required under section 86 of the 2022 Act. The suspicion must be reasonable and not grounded in prejudice. She added that it was only when HMRC filed its summary grounds of resistance in October 2023 that it added the contention that the arrangements would not succeed in avoiding tax being payable in respect of the payments made to Contractor Buddy. HMRC were now saying there was no tax advantage.

26. For HMRC, Mr Elliott started from the premise that the requirement in section 86 of the 2022 Act is only one of suspicion, which is a low bar; it can be described as a state of

conjecture or surmise where proof is lacking: *Shaaban bin Hussien v Chung Fook Kam* [1970] AC 942 per Lord Devlin at 948B. Further, it does not matter whether the arrangements in question succeed in avoiding tax or not; "tax advantage" is very broadly defined in section 234(3) of the Finance Act 2014 (**the 2014 Act**) and includes at (e) deferral of payment of tax as well as avoidance of a charge to tax.

27. Mr Elliott submitted that the decision letter included an indication of the writer's view that the scheme would not be effective to avoid tax. The letter referred to the "the artificial separation of amounts of what is in substance remuneration paid by an employer to an employee", which would mean both amounts would be taxable since disguised remuneration is treated as remuneration. It does not follow that because the amounts are or may be taxable, publication of information under section 86 cannot be decided upon to protect the public revenue.

28. Mr Elliott added that Payeworx did not rely in its written representations on IR35 and, even if it had done so, if the purpose of the arrangements was to sidestep the IR35 regime, as is now contended, that is in itself a tax advantage within the broad definition in section 134 of the 2014 Act. Hence, the suspicion that was entertained by the authorised officer was not even wrong, let alone arguably irrational.

29. I do not find it reasonably arguable that the decision to publish the statutory information under section 86 of the 2022 Act was irrational. The test of suspicion is low, as Mr Elliott submitted. The arrangements involved the PAYE regime being operated in respect of less than the full amount received by the worker. That in itself is a ground for suspicion. It is obvious that a possible reason for structuring the remuneration in that way could be to obtain a tax advantage within the broad definition in section 234(3) of the 2014 Act.

30. I also accept Mr Elliott's submission that Payeworx's reliance – belatedly, after the decision was made - on its clients being keen to avoid being served with IR35 notices, as the main reason for entering into these arrangements, supports the suspicion that the purpose of doing so is to obtain a tax advantage, rather than allaying any such suspicion. Avoidance of an IR35 notice is likely to lead to, at least, deferral of a tax charge which is a tax advantage within section 234(3) of the 2014 Act.

31. I do not think it avails Payeworx to point out that HMRC's case on why any proposed tax advantage would not be obtained was not fully developed until it filed its summary grounds of resistance in October 2023. It is of marginal relevance whether the scheme under consideration "works", i.e. delivers any actual tax benefit as a matter of law. An expectation that such a benefit may result from a remuneration scheme is not the same as a conclusion of law that the benefit does or does not accrue to the intended beneficiary.

32. For those brief reasons, I refuse permission to proceed with this judicial review on the irrationality ground and turn to consider the proposed second ground of challenge.

Second ground: Article 1, First Protocol to the European Convention on Human Rights

33. The second ground of challenge is that the decision challenged was unlawful because it was an actionable violation of Payeworx's rights under article 1 of the First Protocol to the European Convention on Human Rights (**A1P1**). Ms Brown began by submitting that previous domestic case law in this context on A1P1 was not in point because the issue was differently argued; while Strasbourg case law suggested the contention was arguable.

34. In particular, the decision of Ritchie J at permission stage in *R (Vision HR Solutions Ltd) v. HRMC* [2023] EWHC 1659 (Admin) was not of any assistance to HMRC, said Ms Brown. The judge there observed that publication of the statutory information in the same statutory context as in this case did not prevent the claimant from exercising its intellectual property rights. That was not in issue here. Ritchie J also said that future income streams are not a "possession" within A1P1. That is accepted by Ms Brown.

35. She submitted that here the "possession" that was unjustifiably interfered with by HMRC in making the challenged decision was the "goodwill" of Payeworx, not in the traditional English law sense of the word, but in the Strasbourg jurisprudence sense of the term, where it connotes the capitalised value of the clientele of a business or of a professional practice and the reputation that sustains and helps to retain that clientele. She relied on two admissibility decisions: *Ian Edgar (Liverpool) Ltd v. UK* (application no. 37683/97); and *Wendenburg v. Germany* (application no. 71630/01).

36. The first case concerned business losses caused to a gun seller's business by changes to UK gun control laws. The second concerned losses to German lawyers caused by legal restrictions on their rights of audience in certain courts. While both applications failed on

the facts at the admissibility stage, Ms Brown submitted that they support the proposition that a "possession" for A1P1 purposes is wide enough to encompass the "goodwill" of Payeworx in this case.

37. Furthermore, she submitted that unlike in the previous domestic cases (*Vision HR Solutions Ltd* and *R (Easyway Umbrella Ltd) v. HMRC* [2023] EWHC 3368 (Admin)), there is in the present case no wholesale attack on the statutory scheme itself. Payworx does not contend that the exercise of the power under section 86 of the 2022 Act *per se* violates A1P1; rather, it may do in an individual case, depending on the manner in which the power is exercised; and that it arguably did so in this case because the interference was obviously disproportionate and justification for it was obviously lacking.

38. For HMRC, Mr Elliott submitted that there was no real difference between future income streams from clients and the goodwill of a business in the traditional sense. The latter is no more than a present capitalised monetary value attributed to the former. Publication of a section 86 notice does not stop Payeworx from doing business with any clients willing to continue doing so. It does not close down the business.

39. As for the justification for any interference with an A1P1 right, even assuming Payeworx could establish the existence of a relevant "possession", the interference with the right was manifestly and incontestably justified. The proportionality of the statutory scheme had been expressly upheld in *Easyway Umbrella Ltd* (see the judgment at [39]-[43]). The margin of appreciation enjoyed by the legislature is broad.

40. It did not assist Payeworx, submitted Mr Elliott, to fashion the A1P1 claim as an attack on the manner of the power's exercise, rather than on the power itself. There was nothing unusual or different about the exercise of the section 86 power to publish information in this case than in any other. It was a straightforward case with no element of oppression or anything else to take the case outside the norm.

41. I accept Mr Elliott's submissions and I find this ground also unarguable, attractively though Payeworx's submissions were presented. Assuming in Payeworx's favour that it arguably benefited from the enjoyment of a right or chose in action or something qualifying as a "possession" for A1P1 purposes – which I strongly doubt - it is completely unrealistic to argue that Payeworx's right to enjoyment of it was violated.

42. It is in my view beyond argument that the statutory scheme in the 2022 Act, empowering publication of information of the kind published in this case, is not itself a disproportionate interference with the A1P1 rights of the person about whom the information is published; here, Payeworx. If that is acknowledged, as it must be, I agree with Mr Elliott that there is nothing unusual or oppressive about the circumstances of this case to make it arguable that Payeworx's A1P1 right has been violated when those of other "victims" of section 86 publications have not been.

43. I am satisfied that the second ground of challenge fares no better than the first and is also unarguable. I will therefore refuse permission on the second ground also and the case will proceed no further, except as to consequential matters. A point was taken by HMRC under section 31 of the Senior Courts Act 1981 that the well known "highly likely" test would be met even if there was an arguable basis for granting permission. I need not consider that issue in view of my conclusion that neither of the grounds is arguable.

Conclusions

44. I refuse permission. Under paragraphs 2, 3 and 4 of Swift J's order refusing permission on the papers, the claimant must pay the defendant's costs in the sum of £6,201.20, subject to any further representations if written submissions (not exceeding 3 pages) were filed within the 14 day deadline set by Swift J. If they were, I will address them in a short separate decision on costs.

45. The defendant's costs of the renewal application would not ordinarily be recoverable. I will consider any further representations in writing from either party in that regard, if any are made. They should be copied to the other party and sent to the Administrative Court Office by 4pm on 22 November 2024. In any event, and subject to any disagreement about costs, the parties are asked to draw up an agreed order for approval.