# TC02344

**Appeal number: TC/2010/04709**

***Costs – Rule 10 The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – whether HMRC had acted unreasonably in defending or conducting proceedings – whether costs to be awarded***

**FIRST-TIER TRIBUNAL**

**TAX CHAMBER**

**JOHN SCOFIELD** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE GUY BRANNAN**
**ANNE REDSTON**

**Sitting in public at 45 Bedford Square, London WC1 on 14 December 2011**

**Keith Gordon and Ximena Montes Manzano, Counsel, for the Appellant**

**Kim Sukul, Appeals and Reviews Unit, HM Revenue and Customs, for the Respondents**

DECISION

**Introduction**

1. This is an application by the Appellant seeking an order that the Respondents ("HMRC") should pay their costs in connection with a hearing on 20 January 2011.

2. The application is made under Rule 10 The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules "). Rule 10 provides, so far as is relevant:

> " 10 (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—
>
> (a) …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in
>
> bringing, defending or conducting the proceedings…"

3. The Appellant submitted that the Respondents' continued defence of the Appellant's appeal following a hearing before this Tribunal on 14 July 2010 and the way that they conducted themselves at a subsequent hearing on 20 January 2011 constituted unreasonable conduct within the meaning of Rule 10 (1) (b).

**Background**

4. At a hearing on 14 July 2010 the Appellant appealed against a determination by HMRC that his registration for gross payment under the construction industry scheme should be cancelled pursuant to section 66 (1) Finance Act 2004.

5. At that hearing we determined that there was no reasonable excuse for the Appellant's default (which HMRC alleged entitled them to cancel his registration for gross payment). In the course of the hearing we raised with Mr Shea, the representative of HMRC (who did not appear in subsequent hearings), our concern that section 66 (1) appeared to require HMRC to exercise a discretion in making their determination under that provision. HMRC argued that they had no discretion under section 66 (1). We noted (at paragraphs 40 - 42 of our decision) that the provisions dealing with gross payment appear to distinguish carefully between those which impose a mandatory obligation on HMRC (by use of the word “must”) and other powers.

6. Mr Shea applied for the hearing to be adjourned for further legal argument on the issue of HMRC’s discretion. We granted Mr Shea's application and adjourned the hearing for further argument on this and other related points. Our directions were as follows:

> "The appeal will be listed for further argument on the questions whether:
>
> (a) HMRC have a discretion whether to cancel registration for gross payment under s. 66 (1) Finance Act 2004; and

(b) if we conclude that such a discretion exists:

(i) whether HMRC failed to exercise any such discretion;

(ii) the consequences of a failure to exercise any such discretion; and

(iii) the nature of the Tribunal's jurisdiction under s.67(4) Finance Act 2004 to review a determination of HMRC under s.66(1) Finance Act 2004."

7. We also directed that skeleton arguments for the adjourned hearing should be lodged with the Tribunal four days before the commencement of the hearing.

8. The hearing was resumed on 20 January 2011. At this hearing, unlike the hearing in July 2010, the Appellant was represented by counsel.

9. HMRC submitted a skeleton argument prior to the hearing in January 2011 in which HMRC argued that section 66 (1) obliged HMRC to withdraw registration for gross payment where the requisite compliance failures had been established. HMRC cited a number of cases which supported the proposition that the word "may" can bear a mandatory meaning in certain contexts. HMRC also advanced certain contextual arguments in relation to the construction industry scheme provisions of the Finance Act 2004.

10. At the hearing in January 2011, HMRC's representative made additional oral submissions (which were backed up by a manuscript note of those submissions handed to the Tribunal). Those submissions, in part, argued in the alternative that, if the statute conferred a discretion, it was “built into” the computer program applying the legislation and was not exercised by individual officers. Moreover, HMRC argued that any such discretion was also codified through HMRC's power to make regulations.

11. It seemed the Tribunal, in advance of the January 2011 hearing, that since the primary argument of each party was that the word "may" bore an entirely different meaning and, in the light of the authorities (which established that the word “may” could bear different meanings, depending its statutory context), a review of *Hansard* might provide assistance. For this reason, prior to the hearing, the Tribunal had identified the relevant extracts from *Hansard*.

12. In the course of the hearing in January 2011, the Tribunal invited the views of the parties on whether it was legitimate to consult *Hansard* to assist the Tribunal in the correct interpretation of section 66. Both parties' primary submission was that the meaning of the word "may" was clear. Mr Gordon, for the Appellant, submitted that the word was clearly permissive. HMRC argued that, in context, the word was clearly mandatory. Both parties, however, acknowledged that the word was potentially ambiguous and, therefore, that *Hansard* could be used as an aid to statutory interpretation. HMRC stated to the Tribunal that there were no relevant extracts in *Hansard*.

13. When copies of the relevant extracts from *Hansard* were distributed and had been read by the parties (neither party had previously seen the relevant passages from

*Hansard*), the representative of HMRC (having consulted a colleague) suddenly changed HMRC's position and argued that the word "may" was unambiguous and that *Hansard* should not be used to clarify the meaning of the statute.

14. On 24 March 2011 we released our decision allowing the Appellant's appeal in a written decision of approximately 40 pages.

**The application**

*The Appellant's submissions*

15. In relation to this application, Mr Gordon submitted that the Respondents should have conceded their position after the hearing in July 2010. It was not acceptable, in his submission, that the Respondents should have misread the legislation since it came into force in 2007. Moreover, the Tribunal had pointed out the linguistic distinction used in the relevant provisions of the Finance Act 2004 between "may" and "must". The Respondents should have recognised that their position was indefensible. He submitted that it was obvious in this case that the legislation went out of its way to distinguish between the mandatory "must" and the permissive "may" and it should, therefore, have been abundantly clear to HMRC that their continued defence of the appeal was unreasonable.

16. Mr Gordon also submitted that it was unreasonable, particularly in the light of the Tribunal's direction that skeleton arguments should be lodged four days before the hearing, to raise a new and entirely separate argument (relating to the “inbuilt discretion” within the HMRC computer programme) at the hearing itself. He also submitted that those arguments were so misconceived that this of itself amounted to either unreasonable conduct or unreasonable defence in relation to the proceedings.

17. Mr Gordon submitted that the "about-turn" by HMRC concerning *Hansard* was also unreasonable conduct for the purposes of Rule 10 and, moreover, typified HMRC's "win at any costs" approach to the appeal. Mr Gordon also noted that HMRC had misled the Tribunal concerning whether there were relevant extracts in *Hansard*.

18. Mr Gordon accepted that it was difficult to say that any additional costs had been incurred because of the new arguments first raised by HMRC at the January 2011 hearing or by the *volte face* in relation to *Hansard*. He submitted, however, that the Tribunal was not limited by Rule 10 to award only “additional costs”. Instead, the Tribunal could award costs where a party's behaviour was unreasonable regardless of whether additional costs were incurred as a result of that behaviour.

19. Mr Gordon, therefore, asked for costs in relation to the January 2011 hearing.

*HMRC's submissions*

20. Ms Sukul (who did not appear in either of the earlier hearings) noted that it was the Tribunal that had first raised the issue of whether HMRC had a discretion when making a determination under section 66 (1). The Tribunal had considered it appropriate to have a further hearing on the point, admittedly at the request of HMRC.

Ms Sukul argued that it was not unreasonable for HMRC to make further submissions at a hearing which the Tribunal had directed should take place.

21. Moreover, the point was not so clear or straightforward that the Tribunal felt that it could be ruled upon summarily at the first hearing in July 2010. HMRC's position reflected its considered view at the time of both the July 2010 and January 2011 hearings. HMRC's view did have some merit and was not indefensible. The substantive issue was one of statutory interpretation. The Tribunal's decision identified six matters to be considered when interpreting a statute and, in Ms Sukul's submission, the issue was not a straightforward one.

22. Ms Sukul accepted that HMRC had changed its position in relation to *Hansard* in the course of the January 2011 hearing. Ms Sukul acknowledged that HMRC handled this issue in an unfortunate manner. The point did not, however, cause particular prejudice to the Appellant and was most adequately dealt with by counsel on the day.

23. In relation to *Hansard*, Ms Sukul's instructions were that HMRC were simply unaware of the relevant extract. It was a most unfortunate mistake but was not intended to prejudice the proceedings and was not a deliberate action on the part of HMRC.

**Decision**

24. Rule 10 (1) (b) gives us a discretion to award costs where one of the parties has acted unreasonably in bringing, defending or conducting the proceedings.

25. As Judge Berner pointed out in *Bulkliner Intermodal Ltd v HM Revenue & Customs* [2010] UKFTT 395 (TC) at paragraph 9:

> " This [Rule 10] has echoes of the costs jurisdiction of the former Special Commissioners, contained in reg 21 of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994. But there are crucial differences. First, the power of the Special Commissioners to award costs was confined to a case where a party had acted "wholly unreasonably". It was not enough that from time to time there had been unreasonableness (see *Gamble v Rowe* [1998] STC 1247, per Park J at p 1257). The need for the behaviour to be *wholly* unreasonable is not included in the 2009 Rules. Secondly, the wholly unreasonable behaviour had to be "in connection with the hearing in question". The power under the 2009 Rules is wider than this, and does not merely, as was held in *Gamble v Rowe*, encompass the hearing or preparation for a hearing."

26. In our view, Rule 10 (1) (b) must also be read in the light of the overriding objective (Rule 2 (1)) of the Rules which is "to enable the Tribunal to deal with cases fairly and justly." In particular, Rule 2 (4) provides that:

> "Parties must
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally."

27. In relation to Mr Gordon's main submission that HMRC had acted unreasonably in deciding to defend its position in the January 2011 hearing, we do not agree. It is true that HMRC's arguments did not find favour with us and it is also true that some of those arguments seemed to us to be wholly devoid of merit. Nonetheless, in our view, HMRC did have at least an arguable case and deployed some respectable arguments in defence of their position. We also note that the January 2011 hearing was held in accordance with the direction of the Tribunal, albeit at the request of HMRC. In all the circumstances, therefore, we do not consider that HMRC acted unreasonably by defending its considered view at that hearing.

28. In relation to HMRC's conduct of the proceedings at the January 2011 hearing, HMRC should derive little satisfaction from their behaviour.

29. First, HMRC incorrectly stated to the Tribunal that there was no relevant *Hansard* extract. We readily accept that this was an entirely innocent mistake. It was, however, careless and, therefore, in our view amounted to unreasonable conduct. If the Tribunal had not previously carried out its own research in relation to *Hansard*, a serious injustice may have resulted. The withdrawal of registration for gross payment under section 66 (1) would have had very serious consequences for the Appellant, as we heard in the evidence presented at the January 2011 hearing. The Tribunal and taxpayers are entitled to expect HMRC to know its business and not to make careless errors in making statements before the Tribunal. In the event, however, we are satisfied that the Appellant was not prejudiced and no material additional costs were incurred.

30. Second, HMRC's representative performed an extraordinary about-turn in relation to the extract from *Hansard*. This occurred after the extract had been handed to the parties and HMRC's representative, apparently acting on instructions from a colleague, realised that it did not support HMRC's position. We commented in our Decision that we thought HMRC's retraction came rather too late. Ms Sukul characterised HMRC's conduct as "unfortunate handling". It was, in our view, a significant error of judgement, which did HMRC no credit. It appeared to us that in the "heat of battle" HMRC lost sight of the requirement that parties appearing before the Tribunal "must… help the Tribunal to further the overriding objective" (Rule 2(4)). It was HMRC's duty to assist the Tribunal in dealing with this appeal fairly and justly and this duty should have overridden considerations (which in the circumstances were manifestly misguided) of narrow partisan advantage.

31. Any event, we were satisfied that HMRC's conduct in relation to the *Hansard* extract – although plainly unreasonable – did not result in any prejudice to the Appellant and did not cause the Appellant to incur additional costs.

32. Finally, at the January 2011 hearing HMRC produced new arguments which differed significantly from the skeleton arguments which the Tribunal had directed should be lodged four days before the hearing. We accept Mr Gordon's submission that this conduct was hardly satisfactory. We have had no explanation from HMRC why new arguments were advanced at such a late stage. The whole thrust of developments in civil procedure over the last decade has been to avoid parties being

"ambushed" by the production of late evidence or late arguments without good reason. Nonetheless, we are again satisfied that no prejudice resulted to the Appellant and Mr Gordon was able to handle the new arguments with aplomb. Equally, we are satisfied that no additional cost was incurred by the Appellant.

33. Although, in relation to the three matters mentioned above, we consider HMRC's conduct at the January 2011 hearing to be unreasonable, we are satisfied that no prejudice resulted for the Appellant and no additional costs arose. Were a costs award to be made in these circumstances, it would be punitive, not compensatory. For these reasons, we have decided not to exercise our discretion in favour of making an award of costs to the Appellant.

34. Although we have refused the Appellant's application, we trust that notice will be taken at the appropriate levels within HMRC of the comments made in this decision and that the necessary steps will be taken to ensure that the lapses identified in this case do not occur again.

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.

**GUY BRANNAN**
**TRIBUNAL JUDGE**

**RELEASE DATE: 10 January 2012**