Neutral Citation: [2022] UKFTT 371 (TC)

Case Number: TC08620

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/05706
TC/2020/03534

CASE MANAGEMENT – application to set aside an earlier direction and direct a case management hearing for permission to amend grounds of appeal – Tibbles considered – applications granted – directions given

Heard on: 21 September 2022
Judgment date: 11 October 2022

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

MYPAY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Rebecca Murray of counsel instructed by Jurit LLP solicitors

For the Respondents: Adam Tolley KC and Sadiya Choudhury of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is a case management decision which relates to four applications all of which stem from directions issued by the First-tier Tribunal ("**FTT**") on 18 February 2022 (the "**Directions**"), and in particular Direction 1 which states "*The Appellant has permission to amend its grounds of appeal in the form sent to the Tribunal on 24 January 2022".*

2. By an application dated 28 February 2022, HMRC apply under Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules"** each a "**Rule**"):

> (1) For Direction 1 to be set aside insofar as it applies to ground (1) of the appellant's amended grounds of appeal dated 24 January 2022 ("**ground (1)**") (the "**set aside application**"); and
>
> (2) For a case management hearing for the FTT to formally determine whether the appellant ought to be granted permission to rely on the ground (1) (the "**permission application**").

3. The appellant replied to the foregoing applications on 14 March 2022 submitting that they should be refused and that if no proposal was presented by HMRC for them to comply with the Directions under a revised timetable, a suggestion that the FTT should make an unless order for HMRC to file their statement of case by a reasonable deadline (the "**appellant's reply**").

4. On 28 March 2022 the FTT released directions from Judge Cannan in which he directed that HMRC should reply to the appellant's reply, and that the set aside and permission applications as well as the appellant's application set out in its reply of 14 March 2022 should be considered at a case management hearing. Notice of that hearing was given to the parties on 26 May 2022.

5. As directed by Judge Cannan, HMRC replied to the appellant's reply on 11 April 2022 ("**HMRC's reply**"). In HMRC's reply, they made a further application, namely for ground (1) to be struck out under Rule 8 (3) (c) of the Rules on the basis that it has no reasonable prospects of success ("**HMRC's strike out application**").

6. Notice of the case management hearing directed by Judge Cannan was given to the parties on 26 May 2022. The hearing was listed to take place on 21 September 2022 (the "**case management hearing**").

7. In an email dated 9 September 2022, to the FTT, HMRC sought confirmation that HMRC's strike out application would be considered by me at the case management hearing. The appellant opposed this application, and HMRC sought to justify it, for reasons given in a succession of emails between the parties between 9 September 2022 and 16 September 2022.

8. On 16 September 2022, the appellant applied to dismiss or, in the alternative, strike out the set aside application (the "**appellant's strike out application**"). HMRC opposed this application on its merits, and in any event submitted that it should not be heard at the case management hearing.

9. So as a preliminary matter, I needed to decide whether I should consider HMRC's strike out application and/or the appellant's strike out application at the case management hearing. I gave my decision on these applications at the hearing. I rejected both of them. I decided that I should consider neither at the case management hearing. I gave reasons for that decision at the hearing and said that in this decision I would confirm those reasons.

THE STRIKE OUT APPLICATIONS

The appellant's strike out application

10. The basis for this application is twofold. Firstly, that the set aside application has no reasonable prospect of success. Secondly, that HMRC have changed their position and have refused to call a witness on whose evidence they rely to support the set aside application. The appellant's view is that the set aside application is based on an allegation that the FTT was misled into giving Direction 1. Furthermore, as far as case law was concerned, the important case law is that concerned with the scope of the FTT's ostensibly unfettered power to amend a previous direction, and is not case law concerned with amending pleadings (when one has to look at the merits of the amended pleading to see whether it has a realistic prospect of success). On the basis of this case law, the set aside application has no real prospects of success. Furthermore, it appears that one of the planks of the set aside application is that it would cause real procedural difficulties. This is rejected, as too is the main submission made by HMRC in support of their application, namely that the FTT was misled. It is clear that this is not the case, and in any event, the allegation of being misled is contained in the witness statement from the witness which the appellant is now being denied the opportunity of cross-examining. For these reasons the set aside application should be struck out.

11. HMRC's response to this application is, in essence, that it is premature. In order to determine whether or not the set aside application has a reasonable prospect of success, one needs to consider it on the merits. If, on those merits, the set aside application is granted, then the FTT will have done so on the basis of full argument. If I grant the application, it is self-evident that it has a reasonable prospect of success. If I reject the application, then that is tantamount to granting the appellant's strike out application.

12. I agree with HMRC. I have read the witness statement and, frankly, there is little I can take from it which I could not divine from the relevant correspondence which relates to the procedural background. The set aside application requires an analysis of that procedural background. Once I have undertaken that analysis, I will be in a position to decide the set aside application. If I decide to set aside Direction 1, then the appellant's strike out application is otiose. It has successfully established that ground (1) should stand. If, on the other hand, I decide that Direction 1 should stand, then I will have inevitably decided that it has a real prospect of success. In those circumstances the appellant's strike out application should fail. It is my decision that the issues canvassed in relation to the appellant's strike out application will be dealt with as part of the set aside application and it is premature to consider a strike out application of that application before having heard the evidence relating to the set aside application. I decided, therefore, that I would not consider the appellant's strike out application at the case management hearing.

HMRC's strike out application

13. HMRC's strike out application is made in the alternative to the set aside application. If I were to decide that the set aside application should be rejected and thus ground (1) should stand, HMRC's position is that it has no reasonable prospect of success and should be struck

out. They contend that even if it was not in the contemplation of Judge Cannan that I should hear their strike out application as part of the case management hearing, it is a proportionate use of court time to do so. The appellant has not been ambushed by this. The set aside application makes clear that it will require an analysis of the merits. The appellant has therefore been on notice of this for some time and to suggest that it has not been able to prepare an argument on the merits is unmeritorious. The court will have to grapple with the merits at some stage, and it should do so now.

14. The appellant opposes HMRC's strike out application. It does so on the basis that there is no need to consider the merits of the respective positions evidenced by ground (1) when considering the set aside application. It would be an ambush to ask the appellant to respond to HMRC's strike out application at the case management hearing. Whilst the case law dealing with strike out would be relevant if the appellant had made an application for permission to amend its pleadings, the appellant has made no such application. The permission application is concerned with whether the FTT should direct for a case management hearing to decide whether permission is required, and so whether the appellant should make an application for permission to amend its grounds of appeal. But the case management hearing is not listed to deal with whether permission should be granted. As mentioned in the context of the appellant's strike out application, the relevant case law is that relating to the FTT case management powers, and not to the merits of the underlying issues. The case management hearing was listed to hear only the set aside application and the permission application, and to consider the appellant's request for an unless order. It was not listed to hear HMRC's strike out application.

15. I agree with the appellant. It is clear that the case management hearing was listed only to hear the matters mentioned at [2-3] above and not to consider HMRC's strike out application. To my mind the core issue is the extent to which the same issues need to be considered in the set aside application as need to be considered an application for strike out. My view is that the two applications require a consideration of different issues. Whilst I will need to consider the underlying technical positions of the parties when considering the set aside application, I will not need to do so to the same extent to enable me to decide whether or not ground (1) has a real rather than fanciful chance of succeeding. I agree that the important case law in this regard concerns the fetters which bind me as regards amending or setting aside a previous direction given the ostensible breadth of my case management powers to do so under the Rules. Furthermore, I do not agree that the court's time would be best spent considering HMRC's strike out application at the case management hearing especially if this puts pressure on time. There is no need to consider that application if I decide in HMRC's favour on their set aside application. In those circumstances I might well go on to direct that if the appellant wishes to amend its grounds of appeal to include ground (1), it should apply to do so. In other words I would grant the permission application. As part of that application, the merits of ground (1) would then be fully argued. If I reject the set aside application HMRC can bring a further application to strike out ground (1). It is my view, therefore, that dealing with HMRC's strike out application is premature and that I should adopt a wait and see approach depending on the decision I reach on the set aside and permission applications. For these reasons I decided that I would not consider HMRC's strike out application at the case management hearing.

THE SET ASIDE APPLICATION

The relevance of ground (1)

16. The technical issue which must be determined in the underlying the appeal concerns the tax deductibility of travel expenses. HMRC have issued determinations to the appellant for liabilities to PAYE income tax and Class I National Insurance Contributions. They have done

so on the basis that a contract of employment existed between the appellant and its workers when the workers were engaged on an assignment. It is clear to me that throughout the period during which HMRC conducted its enquiries and in its notice of appeal, the appellant maintains that those workers were employed by it. This is reflected in HMRC's statement of case where they state that it is common ground between the parties that a contract of employment existed between the appellant and each worker. The issue between the parties, however, concerns the extent of that employment. It was HMRC's understanding, prior to ground (1) that the appellant's position was that there was an overarching contract of employment between the appellant and the workers so that they were employees throughout the duration of their relationship, including periods when they were not on assignment. If this is right, the travel expenses will be deductible as they were not home to permanent workplace expenses. HMRC's position is that there was no such overarching contract. Instead there was a separate contract of employment in respect of each separate assignment. So travel expenses did not constitute allowable deductions as they were incurred in travelling from a workers home to a permanent workplace, namely the premises of the client for that particular assignment.

17. Ground (1) states in bald terms "*Mypay does not employ the Workers*". In other words it appears to represent a U-turn in the appellant's position.

The procedural history – findings of fact

18. From the bundle of documents with which I was provided, I make the following findings of fact as regards the procedural history:

(1) Jurit were appointed to represent the appellant in October 2021, and in an email to HMRC on 9 November 2021 indicated that when reviewing the grounds of appeal that had originally been submitted on behalf of the appellant, they were minded to make an application to amend those grounds of appeal *to "reflect the errors which we consider pertain to HMRC's calculations and also that we consider that we were entitled to rely on the dispensation"*.

(2) During that month the parties were attempting to agree directions. Jurit sought extensions to the FTT's deadlines which were agreed by HMRC, and on 29 November 2021 HMRC responded to the email of 9 November 2021 and in particular in relation to the alleged errors in HMRC's calculations and attitude towards the dispensation. HMRC went on to say that "*if the appellant wishes to amend its grounds of appeal to raise these points then provision for this can be made in the directions, as well as for a response from HMRC. We have therefore attached draft directions which allow for this"*.

(3) Direction 1 of those draft directions states *"Not later than 3 January 2022 the Appellant shall send and deliver to the Tribunal and the Respondent amended grounds of appeal"*.

(4) Following correspondence between the parties concerning revisions to those draft directions, on 11 January 2022 the FTT issued directions of its own which did not include provision for amended grounds of appeal. After further discussion between the parties the agreed directions were sent to the FTT by Jurit on 13 January 2022 under cover of an email in which they say *"We confirm that MyPay Limited agrees the latest set of directions proposed by the Commissioners. They are attached to this email and we would be grateful if the Tribunal would accept these are replacement directions issued on 11 January 2022. We hope that this is acceptable. We have copied the Commissioners*

representatives into this email and we would be grateful if they would confirm their position".

(5) That covering email from Jurit also refers to their email of 12 January 2022. In that email Jurit explained that there had been significant negotiation between the parties since it was appointed to represent the appellant as they had not drafted or submitted the appellant's original grounds of appeal*, "the parties have agreed that it is appropriate for the Appellant to provide amended grounds of appeal and that the Commissioners respond to these with an amended statement of case (if so advised). We apologise that, as matters stand, the parties are not quite agreed on the remaining directions but we hope that the outstanding matters can be agreed between the parties later this week……. The most important point to note regarding these directions is that the Appellant has permission to amend its grounds of appeal by 24 January 2022"*.

(6) Direction 1 of those directions reads: "*The Appellant has permission to amend its grounds of appeal and not later than 24 January 2022 the appellant shall send and deliver to the Tribunal and the Respondent amended grounds of appeal"*.

(7) In an email dated 21 January 2022, HMRC confirmed that "*we agree with the Appellant's representative for the parties' attached draft directions to replace the Tribunal's directions issued on 11 January"*.

(8) The appellant filed and served its amended grounds of appeal, which included ground (1), on 24 January 2022, in other words before the FTT formally issued the Directions. Those amended grounds of appeal included a footnote which reads *"These grounds are filed by way of supplement to the grounds of appeal filed with the notice of appeal, pursuant to the directions agreed between the parties and lodged at the Tribunal on 13 January 2022"*.

(9) When the Directions were issued on 18 February 2022 at the order of Judge Cannan, Direction 1 read *"The Appellant has permission to amend its grounds of appeal in the form sent to the Tribunal on 24 January 2022"*.

(10) In a letter dated 14 February 2022, HMRC sought an extension for service of their statement of case from 21 February 2022 to 28 February 2022. This extension was agreed.

(11) In a further letter dated 28 February 2022 HMRC indicated that in the course of reviewing the amended grounds of appeal and preparing their statement of case, HMRC had identified a significant issue, namely ground (1), and in their view the appellant should have applied for permission to rely on it. They indicated that they would make the set aside application and the permission application, which they did on that date.

The law

19. Rule 2 provides:

> "2. Overriding objective and parties' obligation to co-operate with the Tribunal
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

20. Rule 5 provides (as far as is relevant):

"5. Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction -

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit……..

(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction."

21. In the case of *Tibbles v SIG Plc* [2012] EWCA Civ 518 ("***Tibbles***") the Court of Appeal had to consider the powers of the court to vary or revoke an order which it had itself made pursuant to Rule 3.1 of the Civil Procedure Rules. In his judgment, Lord Justice Rix said as follows:

> "39. In my judgment, this jurisprudence permits the following conclusions to be drawn:
>
> (i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.
>
> (ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.
>
> (iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.
>
> (iv) Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.
>
> (v) Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.
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> (vi) *Edwards v. Golding* is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order. It was plain in that case from the master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the form which his order took would not permit the realisation of his adjudicated and manifest intention.
>
> (vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such

is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.

40. I am nevertheless left with the feeling that the cases cited above, the facts of which are for the most part complex, and reveal litigants, as in *Collier v. Williams*, seeking to use CPR 3.1(7) to get round other, limiting, provisions of the civil procedure code, may not reveal the true core of circumstances for which that rule was introduced. It may be that there are many other, rather different, cases which raise no problems and do not lead to disputed decisions. The revisiting of orders is commonplace where the judge includes a "Liberty to apply" in his order. That is no doubt an express recognition of the possible need to revisit an order in an ongoing situation: but the question may be raised whether it is indispensable. In this connection see the opening paragraph of the note in The White Book at 3.1.9 discussing CPR 3.1(7), and pointing out that this "omnibus" rule has replaced a series of more bespoke rules in the RSC dealing with interlocutory matters.

41. Thus it may well be that there is room within CPR 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with in an order but which in genuine error was overlooked (by parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court. This would not be a *second* consideration of something which had already been considered once (as would typically arise in a change of circumstances situation), but would be giving consideration to something for the *first time*. On that basis, the power within the rule would not be invoked in order to give a party a second bite of the cherry, or to avoid the need for an appeal, but to deal with something which, once the question is raised, is more or less obvious, on the materials already before the court.

42. I emphasise however the word "prompt" which I have used above. The court would be unlikely to be prepared to assist an applicant once much time had gone by. With the passing of time is likely to come prejudice for a respondent who is entitled to go forward in reliance on the order that the court has made. Promptness in application is inherent in many of the rules of court: for instance in applying for an appeal, or in seeking relief against sanctions (see CPR 3.9(1)(b)). Indeed, the checklist within CPR 3.9(1) must be of general relevance, mutatis mutandis, as factors going to the exercise of any discretion to vary or revoke an order".

Submissions

22. Mr Tolley submitted as follows:

(1) The FTT was under the mistaken impression that the parties had agreed that the appellant could rely on ground (1) when issuing the Directions. Judge Cannan thought that the parties had agreed the change in wording between the Directions and the previous drafts submitted by the parties. He was not aware that there was no such agreement.

(2) The correspondence shows that the appellant had never raised the possibility of amending its grounds of appeal to include ground (1). The correspondence shows that it had only raised the possibility of amending those grounds in relation to the quantum of the claim and the reliance on the dispensation. The possibility of introducing ground (1) was not in the contemplation of the appellant during this correspondence. In light of this correspondence it is clear that HMRC were agreeing only to the appellant amending its

grounds of appeal to deal with these issues. They were not agreeing to the introduction of ground (1).

(3) Ground (1) reflects a fundamental change in stance. It is not, as the footnote suggests, supplemental, but a total change of position. It is a completely new ground of appeal. There is an irreconcilable tension between the old and the new grounds. They are not alternatives, they are opposites. And ground (1) flies in the face of the appellant's position to date and of the documentary evidence.

(4) HMRC therefore needs to deal with two wholly contradictory positions which is unfair and prejudicial to them. HMRC will be required to show that there is no contract of employment, something which, in principle, reverses the burden of proof. Up until now it has been clear that it is for the appellant to show that the workers were employed under an overarching contract. Now it is not clear who has to prove what, nor what the order of play will be in the substantive hearing.

(5) Even though there has been a stay in these proceedings, there has been a long delay since the notices of appeal and the introduction of ground (1). This delay is about 17 months.

23. Miss Murray submitted as follows:

(1) The reason why the draft wording of Direction 1 changed during the negotiations was to ensure that the appellant had the right to amend its grounds of appeal but was not obliged to. They were drafted by counsel and it is not right to say that they were in the contemplation of Jurit whilst it was communicating with HMRC.

(2) The evidence shows that neither the FTT nor HMRC were misled, in particular by Jurit confirming, by email on 13 January 2022, that the appellant agreed the latest set of directions proposed by HMRC. Those directions speak for themselves, and were attached to that email. If HMRC had wished to restrict those directions, it could have done so. They are not restricted and the amended grounds of appeal were submitted in accordance with the draft directions and subsequently the Directions. In essence, they gave the appellant unqualified permission to amend its grounds of appeal.

(3) Indeed they had ample time to do so. The amended grounds of appeal were sent to HMRC on 24 January 2022, yet they did not object to them until 28 February 2022. They could have done so in the three week period between 24 January 2022 and the date on which the Directions were issued on 18 February 2022. HMRC should not be permitted to object to those grounds of appeal now when they could have done so before the Directions were issued.

(4) Rule 5 (2) appears to give the FTT an unfettered power to reopen, visit and set aside decisions it has previously made. The case of *Tibbles* (albeit in the context of the CPR) demonstrates that this power is not unfettered and that the courts power to set aside or revisit its own decisions is limited to three broad circumstances: first, whether there has been a material change in circumstances since the order was made; second, where the facts on which the original decision had been made had been misstated; and third, where there had been a manifest mistake by the judge in the formulation of an order. The circumstances of the set aside application fall within none of these circumstances.

(5) HMRC overstate the procedural difficulties. It is a question of law for the FTT to decide, whether the workers were employees. The legal test has to be applied to the facts on which HMRC rely (as per their statement of case). It is not fair to say that the only issue in this case is whether the workers are subject to an overarching contract or to specific contracts. The appellant's primary submission is that the workers were employees under an overarching contract, but they now introduce a second submission that that was not the case. At some stage the appellant will have to nail its colours to the mast, but that will be once the evidence has been collated, sifted, and disclosed.

24. In response to those submissions, Mr Tolley submitted further:

(1) A closer examination of *Tibbles* reveals that the principles suggested by Miss Murray apply where the court has made a judicial decision having heard argument, hence the restrictions. In the circumstances set out above, the court has not heard argument. It has not seriously considered the merits of the amended grounds, nor whether the parties had agreed them. HMRC, here, are not getting a second chance to argue their case. They have not had a first chance.

(2) There is nothing to suggest that Judge Cannan directed his mind to the substance of ground (1) nor to its compatibility with the appellant's previously pleaded case. The Judge was misled by omission in that ground (1) was not in the original grounds of appeal. And the appellant has not given any explanation as to why the correspondence leading up to the Directions made no reference to ground (1). Indeed that failure demonstrates that the appellant must have deliberately refrained from mentioning ground (1) in advance of filing the amended grounds of appeal on 24 January 2022 and in the full knowledge that HMRC had not been informed that the appellant was seeking to change its grounds of appeal in such a radical manner.

(3) The Directions were never intended to give the appellant a blank cheque or an unfettered right to amend its grounds of appeal. They were intended to give effect to what had been agreed between the parties, and this is what Judge Cannan understood the position to be when he issued them.

(4) Any delay in objecting to the amended grounds of appeal stem largely from the appellant's previous representations about the intended scope of those amendments.

(5) By relying on Direction 1, and not asking permission to amend its grounds of appeal to include ground (1), the appellant has gained a considerable procedural advantage without the knowledge or approval of the FTT, which was unknown to, or agreed by HMRC, and which, on the appellant's case, cannot now be reversed. This cannot be right given that ground (1) raises an entirely new case, which has been raised without warning, and will cause procedural difficulties.

Discussion

25. If taken at face value Direction 1 does appear to give the appellant the unfettered right to amend its grounds of appeal in any manner, subject only to the amendments being included in the document dated 24 January 2022. And the draft directions, leading up to the Directions do nothing to displace the apparent breadth of their right to amend. The draft directions which were sent to the FTT on 13 January 2022, and to which HMRC agree in their email on 21 January 2022 simply granted the appellant permission to amend its grounds of appeal subject

to sending those amended grounds to the FTT and HMRC on or before 24 January 2022. Those directions do not restrict the scope of the amendments which the appellant was entitled to make.

26. Mr Tolley did suggest that the footnote to the amended grounds of appeal which suggests that they were made "by way of supplement to the [original grounds of appeal]" misrepresents the position given that ground (1) reflects such a fundamental change of stance. In my view to say that this is an "amendment" is wrong. Ground (1) goes far beyond an amendment. It is effectively tearing up the appellant's primary submission set out in its original grounds of appeal (namely that the workers were employees) and replacing it with a submission that they were not employees. To my mind that does not fall within the definition of "amendment".

27. But Mr Tolley does not take this point, and indeed the Directions end up giving the appellant authority to amend its grounds of appeal pursuant to its document of 24 January 2022 rather than giving permission to generally amend its grounds of appeal. So whilst the extent of the change to the appellant's pleaded position by dint of ground (1) is relevant to my overall consideration of the set aside application, I cannot say that it falls outside the ambit of Direction 1.

28. The appellant is entitled to say, and this is a point with which I would agree, that HMRC are professional litigators and can be expected to understand procedural matters, something with which they deal on a daily basis, and in which they have far greater experience than most appellants and their representatives. They should, therefore, have understood the extent of the draft directions which they were being asked to agree, and indeed should have checked the wording of those directions before agreeing to them. It is, therefore, HMRC's own fault for having agreed a direction which allows the appellant to amend its grounds of appeal in an ostensibly unfettered manner, and they cannot now cry foul. The time to have ensured that the directions were to their liking was before agreeing them, and the time for challenging them has now passed.

29. And the appellant might go further. It might say that it has done nothing wrong in simply submitting ground (1) on 24 January 2022 in its amended grounds of appeal pursuant to the draft directions which had been agreed by HMRC on 21 January 2022, such draft directions giving the appellant the right to amend its grounds of appeal in any manner it chose. It was simply complying with the draft direction which it was entitled to take at face value.

30. However, whilst I am sympathetic to this position, I am also conscious that the overriding objective of the Rules is that I should deal with cases fairly and justly, and to my mind ground (1) represents such a fundamental change of stance by the appellant to its pleaded case that it is only fair and just that it is subject to judicial scrutiny. And that should the appellant wish to introduce ground (1), it should make an application for permission to amend its grounds of appeal. A hearing of that application would then provide that judicial scrutiny.

31. Rule 5 gives the jurisdiction to set aside Direction 1, but as Miss Murray has pointed out, that jurisdiction is not unfettered. I accept that the principles set out in *Tibbles* which are applicable to the amendment or setting aside of previously made directions in the context of the CPR are equally applicable to the amendment or setting aside of directions made by the FTT.

32. Having reviewed Lord Justice Rix's judgment in that case, and in particular the extract set out above, it is my view that the circumstances of this case fall within the circumstances in which I might exercise my discretion to set aside an earlier direction.

33. That extract speaks for itself, but what I take from it is as follows:

(1) The primary circumstances in which my discretion might be appropriately exercised is normally only where there has been a material change in circumstances or where the facts on which the original decision were made were (innocently or otherwise) misstated.

(2) When considering such a misstatement, I need to consider all the circumstances of the case. But such statement can include a statement by omission and concern argument as well as facts.

(3) In exercising my discretion I can consider factors such as whether the misstatement is conscious or unconscious, and whether the facts or arguments are known or unknown, knowable or unknowable. I am more likely to exercise my discretion to set aside if there has been misstatement because of known facts where there has been a conscious decision not to disclose them.

(4) Finality in litigation is important and the circumstances in which discretion should be exercised are rare.

(5) But where there has been a genuine error which was overlooked by the parties and the court the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, mean there is scope for considering the merits of an application to set aside a previous direction.

(6) In such cases of genuine error, justification for considering the merits of an application is based on the fact that there has not been a previous consideration of the facts or arguments on which the earlier direction is based. An application to set aside would in essence be considering the matters for the first time.

(7) Provided such an application is made promptly there is likely to be little prejudice to the respondent in such an application.

34. Broadly speaking, I agree with Mr Tolley's closing submissions on the application of these principles to the facts of this case. It is clear from the correspondence that the appellant had only mentioned the possibility of amending its grounds of appeal to take into account issues of quantum and the applicability of the dispensation. The fundamental change of stance evidenced by ground (1), namely that the workers were not employees at all, was never mentioned. And I find this surprising given it was such a significant change of stance.

35. I do not know (nor did Mr Tolley, as it is cloaked quite rightly in the mantle of professional privilege) when the idea of introducing ground (1) occurred to the appellant and those advising it. I sincerely hope that it was after the correspondence which led to the draft directions, since in my view, having such a wholesale change in tack, in mind, but dealing, in correspondence with HMRC only with the comparatively uncontentious areas of quantum and dispensation, (perhaps hoping that HMRC would not spot their agreement to an ostensibly unfettered concession to allow an amendment to the grounds of appeal) is very unattractive. Mr Tolley has gone so far to suggest that this was the case and that the appellant deliberately refrained from mentioning ground (1) in the correspondence. I do not go that far. There is no compelling evidence to support that supposition.

36. But what we do know is that when the FTT came to approve the draft directions, there had been no correspondence between the parties concerning the introduction of ground (1).

37. Furthermore, the nature of the correspondence gives the very strong impression (albeit that it does not say this in terms) that the amendments sought by the appellant to its grounds of appeal had been agreed by HMRC. And I am firmly of the view that the FTT and Judge Cannan thought that the nature of the amendments had been agreed. And that when the amended grounds of appeal of 24 January 2022 were submitted to the FTT at the same time as being sent to HMRC, the Judge thought that those grounds had been agreed. And so he simply amended the draft directions to replace the more general direction granting permission to amend, to a specific direction granting permission to amend in accordance with the grounds of appeal of 24 January 2022.

38. I am equally of the view that had Judge Cannan known firstly that ground (1) represented such a complete change of position by the appellant, and that secondly that change had not been agreed by HMRC, he would not simply have endorsed the amended grounds of appeal of 24 January 2022. It is my view that he would have directed that the appellant make an application to amend which, if contested by HMRC, would have generated a case management hearing at which the merits of that amendment would be considered in detail.

39. It is my decision that these circumstances fall within those set out in *Tibbles* and thus justify my exercise of discretion in favour of setting aside Direction 1. HMRC appear to have been misled, by omission, that the grounds of appeal would be amended to include only matters dealing with quantum and the application of the dispensation. Ground (1) was not mentioned in correspondence, and, frankly, HMRC were ambushed by its inclusion in the amended grounds of appeal on 24 January 2022. This is not an appropriate way to conduct litigation. This is a material misstatement in the context of agreeing directions, one of which relates to amending grounds of appeal. I am not prepared to go so far as to say that this was a conscious misstatement, as Mr Tolley has suggested, but the fact of the misstatement in the context of seeking to agree directions where, as most representatives know, the FTT will not subject those directions to the same forensic analysis which would be applied at a formal hearing, is material to the exercise of my discretion. The FTT has not subjected ground (1) to any form of judicial scrutiny. It has simply waved it through. In my view it is done so on the basis that it assumed that the amended grounds of appeal had been agreed by HMRC. This was an incorrect assumption. But it means that by setting aside this application I am not giving HMRC a second bite at the cherry. The FTT has never considered the merits of the inclusion of ground (1). By setting aside Direction 1 and directing the appellant to make a formal application (if it so wishes) to amend its grounds of appeal by the inclusion of ground (1), all that is happening is that there will be judicial consideration (on the basis that HMRC have already said that they would oppose such an application) of the merits of the inclusion of ground (1), for the first time.

40. HMRC have acted commendably promptly in bringing the set aside application, and I do not see that the appellants will be prejudiced by me allowing it. They have known since February 2022 that HMRC do not accept that ground (1) should be allowed. I do not believe that they have proceeded with the preparation of their case on the basis that ground (1) is accepted and forms the revised basis of its appeal. Miss Murray made no submission that the appellant would be so prejudiced.

41. For the foregoing reasons I have decided that in order to deal with this case fairly and justly, I should grant the set aside application and make the direction sought by HMRC in its permission application.

DECISION

42. I grant the set aside application and the permission application.

43. Accordingly, I DIRECT as follows:

(1) Direction 1 is set aside. For the avoidance of doubt, pending the decision in the case management hearing which I direct below in relation to the permission application, the appellant is not entitled to amend its grounds of appeal to include ground (1).

(2) The remaining Directions are suspended.

(3) If the appellant wishes to amend its grounds of appeal to include ground (1), then it shall make a formal application to the FTT to do so, copied to HMRC, within 14 days from the date of release of this decision.

(4) Within 14 days from the date of receipt of any such application, HMRC shall send to the FTT and to the appellant their reply to it.

(5) The appellant's application (if any) and HMRC's reply shall be considered at a case management hearing to be heard by way of a video hearing and, if possible, be conducted by either Judge Cannan or myself.

(6) Within 7 days from the date of circulation of HMRC's reply, the parties shall send to the FTT and to each other a statement detailing: the names, email addresses and direct telephone numbers of all participants; the anticipated duration of the hearing; and dates to avoid for a hearing in the period 1 December 2022 to 31 March 2023.

(7) The parties should agree a PDF bundle of documents for the hearing and HMRC shall send the PDF version of the bundle to the FTT at least 14 days before the hearing.

(8) Liberty to apply.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

44. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 11TH OCTOBER 2022