

**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0151

Before

Judge

David Farrer Q.C.

Tribunal Members

Paul Taylor

and

Anne Chafer

Between

Michael Keenan

Appellant

and

The Information Commissioner ("The ICO")

First Respondent

and

Her Majesty's Commissioners for Revenue and Customs ("HMRC")

Second Respondent

Mr. Keenan appeared in person.
Peter Lockley appeared for the ICO.
Christopher Knight appeared for HMRC.

“The DN” refers to the ICO’s Decision Notice dated

Decision

The Tribunal finds that, at the material time, HMRC did not hold the requested information. The appeal is therefore dismissed.

1. Government departments engage many off - (departmental) payroll contractors. (“OPCs”). There is clearly a strong public interest in ensuring that OPCs account properly to HMRC for tax and national insurance (“NICs”) in respect of payments made to them under such contracts.
2. A Procurement Policy Note (“the PPN”) issued in August, 2012 and entitled “Tax Arrangements of Public Appointees” required government departments to seek formal assurances from all OPCs with contracts extending beyond six months and costing more than £220 per day that their income tax and NIC obligations were being met. Absent such assurance, said the PPN, the department concerned should terminate the OPC’s contract.
3. A high proportion of OPCs are engaged through a personal service company (a “PSC”). Typically, the OPC is sole shareholder and director of the PSC. The department contracts with the PSC and pays the PSC for the services of the OPC. The PSC is liable for corporation tax on any resulting profit. The PSC remunerates the OPC, whether by a salary or by a dividend, or by a combination of the two.
4. Legislation known as IR35 requires the OPC to pay income tax and NICs via PAYE, deducted at source by the PSC, if he/she would be treated as employed for tax purposes but for the interposition of the PSC. In these circumstances the PSC is

liable to account to HMRC both for corporation tax and the PAYE and NICs deducted from the OPC's remuneration.

5. Some OPCs are employed by companies or organisations (e.g., a university) through which they put payments from the department and which deduct tax and NICs on such payments at source. The terms of the assurance and the supporting evidence required varies according to the status of the contractor.
4. If a department is not satisfied by the assurance and the evidence that it receives or, of course, if no assurance is provided, then the PPN states that it may send details of the case to HMRC for consideration of possible non-compliance with tax and NIC obligations (a "referral"). According to HMRC, almost all referrals relate to OPCs paid through a PSC.
5. On 19th. July, 2016 Mr. Keenan made a series of six closely linked requests for information relating to referrals made by the Department for Work and Pensions ("the DWP") to HMRC in the four preceding tax years.. It initially refused all these requests on the grounds of cost (FOIA s.12) but abandoned that exemption, after conducting an internal review. Thereafter, HMRC provided the information specified in request 6 but refused requests 1, 3 and 5 in reliance on the exemption provided by s.44 of FOIA and request 4 on the ground that it did not hold the requested information.
6. The ICO upheld Mr. Keenan's subsequent complaint as to each of those refusals and HMRC does not appeal her findings. That leaves request 2, which reads -

"In relation to the Department for Work and Pensions for the financial periods,

.....

2 *The number of referrals who remained in post after being referred to HMRC for possible income tax evasion for each government department for each of the aforementioned financial reporting periods".*

Despite its wording, this request was evidently confined to referrals from the DWP. It raised an issue of public importance, namely compliance with the PPN, as did the other five requests. Whether HMRC was the department best equipped to respond

to it is another matter.

7. HMRC refused this request, stating that it did not hold the requested information. There was, it stated, no business requirement for the DWP to tell it how many OPCs remained in post. The DN was preoccupied with HMRC's reliance on FOIA s.44 in relation to other requests. It simply accepted that HMRC's bald assertion as to request 2 was probably right and upheld its refusal. The evidence subsequently presented to the Tribunal indicated that this was far from a complete or accurate picture of HMRC records on the subject.
8. Mr. Keenan appealed to the Tribunal against the DN finding as to request 2. That is the sole issue with which the Tribunal is concerned. He argued that HMRC must hold the requested information because they would have recorded the date on which a referral was received and would have received from the DWP the start and finish dates for the relevant contract for the purposes of investigating the matter and assessing whether and/or in what amount tax was due.
9. By Notice dated 11th. September, 2017 HMRC applied, pursuant to rules 5(2) and 8 of the 2009 Rules, that the appeal be struck out on the ground that it had no reasonable prospect of success. Having regard to subsequent developments it is unnecessary to rehearse in detail the argument advanced. In summary, it amounted to a claim, unsupported by evidence, that HMRC received various pieces of information relating to the engagement of a PSC by the DWP but not such as to inform HMRC as to the terminal date of the engagement nor the amounts paid to the OPC through the PSC. The strike - out application stood as HMRC's Response, if the application failed. It did.
10. The ICO stood by her findings on this issue, such as they were, in the DN.
11. HMRC's case changed course in December, 2017, with the service of a witness statement made by Colin Crutchley, formerly Business Unit Head of the HMRC Employment Status and Intermediaries team. He had been involved in preparing the HMRC Response to this appeal and then in further searches in preparation for the appeal. Those searches produced further relevant information. Whether it was responsive to request (ii) as framed is an issue for the Tribunal to determine.

12. Mr. Crutchley's evidence was directed to three matters -

- (i) Why HMRC does not routinely hold information as to when an OPC ends its engagement with a particular department (here the DWP). (This was the main thrust of the strike - out application.)
- (ii) The further searches undertaken by HMRC when reviewing its investigation and the further information which emerged.
- (iii) Further specific questions which had arisen since the launching of this appeal. The question relevant to this appeal was the proportion of referrals involving PSCs to which the answer was apparently 100%.

13. Put shortly, the evidence (and HMRC's case) on (i) was that , following an initial screening, many referrals were assessed as "low - risk", in that the tax at stake was likely to be quite modest, not exceeding a predetermined risk level. These referrals were not further investigated, doubtless because finite resources require the setting of priorities. HMRC would have received from the DWP the names of the PSC and the OPC but not the dates of engagement and termination.

14. Where the referral merited further investigation, further inquiries were made. These generally produced the dates when the engagement began and ended because the length of the engagement was material to the application of IR35.

15. Thus, said Mr. Crutchley, HMRC held information as to the relevant dates only in cases which merited further investigation. It did not hold all the information needed to respond to request (ii).

16. However, as to (ii), HMRC further reviewed its electronic files held for referrals ¹ which had not been "deselected" due to a low - risk assessment. Most of these had evidently been investigated. Mr. Crutchley produced a body of referral information,

¹ His evidence in cross examination was that most referrals were by email.

for the financial years from 2012 - 13 to 2014 -15, covering numbers and dates of referrals, numbers of investigations and of cases where no investigation was undertaken, numbers of cases in which the OPC appeared to have remained engaged after a referral, others where the engagement had ended before the referral and others where no date for termination was recorded.

17. This evidence was vigorously tested by Mr. Keenan. Dealing with Mr. Crutchley's evidence as to 21 referrals made by the DWP in 2013 - 14, Mr. Keenan put to him a figure of 71 referrals from the DWP for the same period quite plainly adopted by HMRC in its letter to him dated 8th. June, 2016 in response to an earlier request along the same lines. Mr. Crutchley was obliged to accept a significant discrepancy which must be due to a substantial error within HMRC in the production of these statistics. Mr. Keenan also quoted to Mr. Crutchley the divergence in relation to 2013 - 14 and 2014 - 15 between his figures for referrals and those provided by the DWP from its annual report and accounts when answering Mr. Keenan's request for information on 13th. October, 2017. It is right to add that the DWP's figure of 27 for 2013 - 14, although higher than Mr. Crutchley's 21, was much closer to it than HMRC's earlier figure of 71.
18. Mr. Keenan attributed these disparities to a desire, apparently common to HMRC and the DWP, dishonestly to conceal from the public the true scale of cheating on tax practised by these contractors, hence the losses to public finances. His case remained that HMRC must hold the information he requested in order to perform its basic function of collecting the tax due from these OPCs.

The findings of the Tribunal

19. We accept Mr. Crutchley's evidence regarding the gaps in the information held by HMRC as to how many OPCs remained engaged after referral and the reasons why it had no all - embracing record of such cases. HMRC did not initially conduct a thorough or efficient search of its records and was guilty of culpable delays, as to which the ICO issued a trenchant and entirely justified rebuke. (DN §§35 - 42). Such failings tends to rouse suspicions in an appellant, especially an appellant with the combative instincts of Mr. Keenan, that information is being deliberately and unlawfully withheld. We are satisfied that such suspicions were unfounded in this

case and that HMRC's changes of stance were the result of inadequate preparation and perhaps a degree of complacency during the ICO's investigation. They are, nevertheless, most regrettable.

20. So are the exorbitant allegations of fraud and conspiracy made by Mr. Keenan, both in writing and at the hearing, notwithstanding the observations in the previous paragraph. Such accusations, whether made against an individual or a public authority, from behind the shield of litigation, can be justified only by convincing evidence, which was plainly lacking in this case. That does not mean that public authorities and those who conduct their affairs should ever be immune from accusations of grave misconduct, where plausible and relevant, but that such accusations must be not just fearless but also well - founded, based on solid and persuasive evidence.
21. The case for HMRC, as presented by Mr. Knight, was that the totality of the information now shown to have been held by HMRC does not satisfy his request, hence that its revised response was correct and the ICO right to uphold it. (albeit, in the Tribunal's view, without any close scrutiny of HMRC's denial.) Mr. Lockley, for the ICO, adopted a similar stance in written and oral submissions.
22. The question is not whether HMRC's figures for referrals and related information were accurate but whether, correct or incorrect, they answered request 2. They did not. In none of the three financial years did HMRC conduct investigations of all referrals; in every one there are records of referrals as to which HMRC lacked any information regarding the termination of the engagement. (2012 - 13 is the nearest to an apparently complete record ; the other years contain a significant number of referrals with unknown engagement dates.)
23. The request was unambiguous - for the precise number of cases in which OPCs continued in post after referral, not for whatever patently incomplete figures relating to that issue were held by HMRC. Such a request can properly be met with the provision of a complete set of figures, which is believed to be correct but may be inaccurate but not by a partial set of figures which does not purport to be complete, hence accurate. We therefore conclude that HMRC did not hold the requested information. Given that Mr. Keenan and the public now have everything that HMRC

has to offer in the shape of Mr. Crutchley's evidence, and the DWP's answer to request 2 (see §24), the result may seem somewhat academic.

24. It is strange that Mr. Keenan should go first to HMRC for this information which was obviously held by the DWP. When finally approached shortly before the hearing, the DWP produced figures relating to request 2 and asserted that no OPC had ever kept its engagement after referral. Just how thorough was this search for information we do not know.

25. For these reasons we dismiss this appeal.

26 This is a unanimous decision.

27 Mr. Keenan may disclose Mr. Crutchley's evidence to others 35 days after the publication of this Decision unless, within that period, he has applied for permission to appeal to the Upper Tribunal. If he obtains permission to appeal to the Upper Tribunal ("the UT"), any further order regarding disclosure is a matter for the UT.

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Signed

David Farrer QC,

Judge of the First-tier Tribunal

Date: 6th. February, 2018