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Red card

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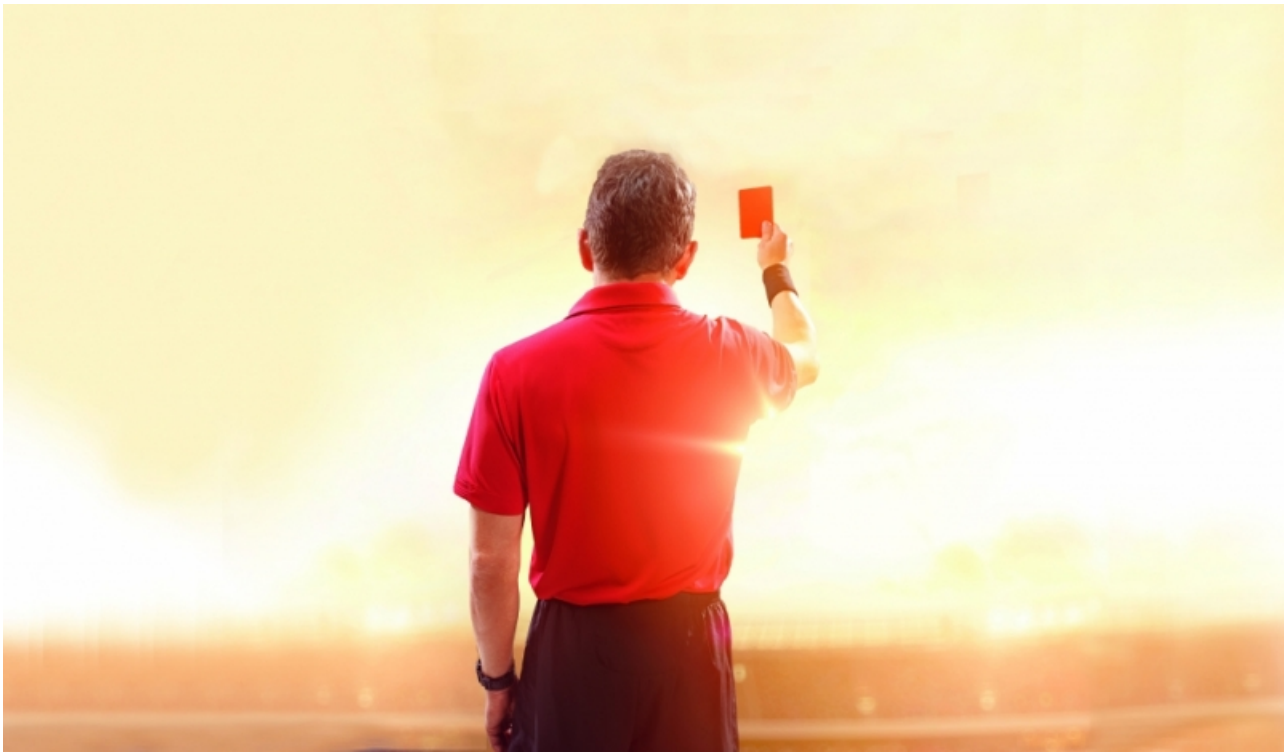

Keith Gordon discusses the Court of Appeal's decision in *BPP Holdings Ltd v HMRC* [2016] EWCA Civ 121 and the Tribunals' approach to uncooperative litigants

What is the issue?

When a judge bars HMRC from future participation in a case, in what circumstances can that decision be overturned on appeal?

What does it mean to me?

If HMRC are being dilatory, it will often be worth seeking the tribunal's assistance.

What can I take away?

The tribunals and courts will not readily allow HMRC to be sloppy with their obligations to the Tribunal and taxpayers.

In the October 2014 issue of *Tax Adviser*, I reviewed the Upper Tribunal's decision in *Leeds City Council v HMRC*. The background to that case was the civil courts' hardening of attitudes towards litigants' non-compliance with court rules and the extent to which those changing attitudes could be applied in the Tribunals, where a different set of procedural rules is in force.

To summarise the key cases:

- *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) – the Upper Tribunal considered that the approach taken by Civil Procedure Rules (CPR) (as applicable in the civil courts) could be adopted by analogy in the Tribunals. My concerns about this decision are set out in my earlier article.
- *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 in which a change in the CPR was interpreted to herald a tougher attitude towards non-compliance.

- *McCarthy & Stone (Developments) Ltd v HMRC* [2014] STC 973 in which the Upper Tribunal considered that the Tribunal should now adopt the harder line in accordance with the views expressed in Mitchell.
- *Denton v TH White Ltd* [2014] 1 WLR 3296 endorsed the approach taken in Mitchell but considered that the Mitchell case had been widely misunderstood.
- *Leeds* where the Upper Tribunal effectively overruled the decision in *McCarthy & Stone* in the light of the clarifications of *Mitchell in Denton*.

The debate, so far as the Tribunal rules are concerned, has now found its way to the Court of Appeal in the BPP case.

The facts of the case

BPP's dispute with HMRC concerns the VAT status of printed materials produced by one company within the BPP group in conjunction with the supplies of education services provided by other group companies. In essence, the case asks whether the printed materials constitute a separate zero-rated supply or part of a composite supply of education services. Although this question was considered by the First-tier in the case of Kumon Educational UK Co Ltd v HMRC [2014] UKFTT 109 (TC), the BPP case concerns subsequent amendments to the rules for zero-rating of printed matter as effected by FA 2011, s 75.

When a case is first notified to the Tribunal, the first step that usually occurs (except in basic cases) is that HMRC provide the Appellant (and the Tribunal) with a statement of case. This is a document which sets out their position with regard to the case. In non-paper tax cases, the statement of case is usually due 60 days after HMRC are sent formal notification of the appeal by the Tribunal. Occasionally, HMRC consider it appropriate to delay production of the statement of case and, in such circumstances, they can ask the Tribunal for an extension.

In *BPP*, HMRC's statement of case was almost three weeks late (and accompanied by a retrospective application for an extension of the time limit). BPP did not object to the lateness of the statement of case, but did consider that what had been produced was inadequate in that it did not make clear HMRC's position. BPP duly made a request of HMRC for further information, requesting a response within seven days. (In the Upper Tribunal, Judge Bishopp considered the request to be reasonable, but the timescale to be 'excessively short'.)

HMRC accepted that they ought to provide this additional information but refused to commit themselves to a timescale for any such reply. BPP, therefore, approached the Tribunal seeking that the Tribunal direct that:

- HMRC produce the information within 14 days; and
- any failure to comply would lead to their being barred from future participation in the case.

In due course, the parties agreed a timetable (HMRC having managed by then to delay proceedings by more than three months – between the already-late statement of case of 21 October 2013 and the agreed response date of 31 January 2014). However, HMRC refused to accept upon themselves what is often referred to as an 'unless order' (i.e. unless you comply, you will be barred from future participation in the case – to use a footballing analogy, a red card). In the event, the First-tier (through Judge Charles Hellier) gave what is effectively a compromise decision requiring HMRC's compliance by 31 January 2014, with any failure possibly leading to their being barred (loosely equivalent, perhaps, to a yellow card in football but possibly more accurately to a potential red card).

HMRC provided a response on 31 January 2014 (i.e. on the last day), but BPP considered that the response was still insufficient. BPP duly made an application to the Tribunal seeking an order barring HMRC from any future participation in the case, as provided for by Judge Hellier. Had BPP obtained the unless order originally sought, then the barring would have been automatic (subject any application by HMRC to have its breaches overlooked). The order actually obtained meant that BPP had to apply for HMRC to be barred from future participation (and that decision was ultimately at the Tribunal's discretion). That application was heard (in June 2014) by Judge Barbara Mosedale who granted BPP

the order it requested. It should be noted that it was only when preparing their skeleton argument for the hearing before Judge Mosedale that HMRC finally stated their case in sufficient detail.

After a failed attempt under rule 8(5) to have Judge Mosedale's decision set aside by the First-tier itself, HMRC then appealed against her decision to the Upper Tribunal. There the case was heard by Judge Bishopp who allowed HMRC's appeal. BPP then appealed against Judge Bishopp's decision to the Court of Appeal, seeking the reinstatement of Judge Mosedale's order.

The court's decision

The case was heard by Lord Justices Moore-Bick, Richards and Ryder, the latter being the current Senior President of Tribunals. It was Lord Justice Ryder who gave the main judgment with his two colleagues stating their agreement.

He noted that the source of HMRC's difficulties was the decision by Judge Hellier. That decision was not the subject of any appeal. In other words, HMRC had accepted that they were to be bound by it. Furthermore, the decision was what is categorised as 'case management' in nature. As case management decisions ultimately turn on the exercise of a judge's discretion, courts are very reluctant to interfere with them on appeal, except where they have been made on an erroneous basis. Lord Justice Ryder expressed an unwillingness 'to go behind an un-appealed, regular case management order in effect to determine whether it should have been made'. He also noted that a court's duty to encourage compliance by parties is not just to assist the parties of any particular case but also to promote the wider interests of justice. This is because delays in one case will lead to delays in other cases being heard and a general waste of limited Tribunal resources.

Lord Justice Ryder's judgment continued to note that HMRC had no excuse for their continued failures and that it seemed to have been accepted within the First-tier and Upper Tribunals that HMRC should have realised that their 31 January 2014 document was clearly inadequate. Indeed, Lord Justice Ryder made reference to the following criticisms of HMRC's conduct that were found in Judge Bishopp's judgment 'difficult if not impossible to understand', 'inadequate' and 'unhelpful'.

Lord Justice Ryder then proceeded to consider the different views expressed by the Tribunals concerning the approach to be taken in cases of non-compliance, as discussed in *Leeds*. In short, in *Leeds*, it was suggested that the Court of Appeal in *Denton* had corrected the incorrect view that 'the enforcement of rules and directions is a factor of particular importance, to be given substantial weight'. However, Lord Justice Ryder felt that the correction itself had represented the wrong approach.

He focused on the judgment in *McCarthy & Stone* in which the Upper Tribunal disassociated itself from rigid adherence to the CPR but nevertheless endorsed the stricter approach to non-compliance as reflected in *Mitchell*. As the Upper Tribunal had noted in that case, the ultimate guide to the exercise of a judge's discretion (referred to as the overriding objective, being to deal with cases fairly and justly) is expressed in almost identical terms in the CPR and in the Tribunal rules. Lord Justice Ryder noted that the Upper Tribunal, being a superior court of record, has the right to issue guidance on practice and procedure (supplementing that in the Tribunal rules themselves). This was what was done in *McCarthy & Stone* and, Lord Justice Ryder made clear, also in *Leeds*.

Judge Mosedale's decision had been made after *McCarthy & Stone*, but before *Denton* and *Leeds*. More importantly, Judge Mosedale also expressly disassociated herself from the authorities which turned on a specific provision in the CPR which is not reflected in the Tribunal rules. Instead, she considered the facts before her and applied the overriding objective to those facts in the light of the general guidance emanating from *Mitchell* and *McCarthy & Stone*. As a consequence, Lord Justice Ryder considered that Judge Mosedale's decision could not be challenged as erroneous in law.

As a result, the Court of Appeal considered that the Upper Tribunal had been wrong to allow HMRC's appeal and Judge Mosedale's decision was duly reinstated.

A note on the Tribunal procedure rules

It should be noted that the Tribunal rules operate two slightly different codes – depending on whether the non-compliant party is the Appellant (almost invariably the taxpayer in the First-tier) or the Respondent (almost invariably HMRC) (with references to 'the taxpayer' and 'HMRC' being adjusted as appropriate in cases involving appeals against other government departments whose decisions are also dealt with in the Tax Chamber).

In appropriate cases, the Appellant's lack of cooperation will lead to the appeal being dismissed, whereas the Respondent's lack of cooperation will lead only to the Respondent being barred from future participation in the case (rule 8(7)).

Thus, BPP's victory in the Court of Appeal will not necessarily grant it success in its appeal, but ought to make it considerably easier. To continue the earlier footballing analogy, the Court of Appeal's decision is equivalent to HMRC's 11 players all being sent off, but this still requires BPP to score a goal to win. Of course, there can be situations, when HMRC are required to prove part of the case, when their non-participation will amount to the appeal being bound to succeed. In those cases, rule 8(8) provides that the Tribunal can accelerate the inevitable and summarily allow some or all of the appeal.

Commentary

This case will come as a huge relief for taxpayers embroiled in litigation with HMRC. Although HMRC often complain (loudly) about delays in the litigation process being caused by taxpayers who are allegedly taking petty points in order to waste time, my own experience is very different. It will frequently be the case that HMRC will seem reluctant to argue a particular case and, rather than give up gracefully, they will themselves resort to all sorts of tactics in order to delay the eventual resolution of the matter.

One trick I have often seen is for HMRC to write to the Tribunal on (or sometimes after) the due date for a statement of case asking for additional time, often for spurious reasons. Such an application, even when it has no merit, has the immediate effect of giving HMRC an additional month, often longer, depending on how long it takes for the Tribunal to process the application. Although HMRC's frequent approach is known to be wrong, the Court of Appeal's decision makes abundantly clear what should happen in future when it is considered that a time limit might be missed.

> 'The correct starting point is compliance unless there is good reason to the contrary which should, where possible be put in advance to the tribunal. … If HMRC have a difficulty with compliance they should, where possible, make application to the tribunal to be relieved of compliance on the basis of some alternative proposal which should be canvassed with the taxpayer prior to the application.'

It is clear that the Court of Appeal was shocked by the casual attitude taken by HMRC in this case. Words such as 'disturbing', 'unacceptable' and 'shoddy' are not usually used by such senior judges in relation to a government department. These were in addition to those criticisms levelled by the Upper Tribunal. The Court of Appeal was similarly unimpressed by HMRC's frequent tendency to push for one particular approach 'when it suits their purposes' but to adopt a completely contradictory approach in other cases.

One aspect of HMRC's arguments was that, in the age of austerity, it did not have resources to conduct its litigation properly. The court gave that approach short shrift:

> 'Even in the tribunals where the flexibility of process is a hallmark of the delivery of specialist justice, a litigant in

person is expected to comply with rules and orders and a State party should neither expect to nor work on the basis that is has some preferred status – it does not.'

It is to be hoped that HMRC have now learned their lesson and will start to revise their approach to litigation. I do not expect change to be quick, however. Nevertheless, the *BPP* judgment should remind taxpayers that serious breaches will not be so easily forgiven by the judiciary.

Further information

Read Keith's article 'The 3.9 steps [1]' on the Upper Tribunal's decision in *Leeds City Council v HMRC*.
