



UT Neutral citation number: [2025] UKUT 00034 (TCC)

UT (Tax & Chancery) Case Number: UT/000097/2023

**Upper Tribunal
Tax and Chancery Chamber**

Hearing venue: Decided on Paper

Judgment date: 31 January 2025

Procedure – whether to make a direction for a preliminary issue – whether the Authority is a “qualifications body” for the purposes of the Equality Act 2010

Before

JUDGE JONATHAN CANNAN

Between

NAILESH MANUBAI TERAIYA

Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

The application was decided on paper on the basis of written submissions by the parties

DECISION

Background

1. The Applicant has made an application dated 16 December 2024 for a direction that an issue in this reference should be dealt with as a preliminary issue. The Authority responded to the application on 7 January 2025 and the Applicant replied to that response on 20 January 2025. I have dealt with the application on paper.

2. I can briefly describe the nature of the proceedings based on the grounds set out in the Applicant's reference dated 19 October 2023, the Authority's statement of case filed on 27 November 2023 and the Applicant's reply to the statement of case dated 15 March 2024. The Authority alleges that the Applicant, as director and chief executive of Indigo Global Partners Limited ("Indigo"), breached Principle 1 of the Authority's Statements of Principle and Code of Practice for Approved Persons. Principle 1 requires an approved person to act with integrity in carrying out his accountable functions. Essentially, it is alleged that the Applicant was dishonest and failed to act with integrity by allowing Indigo to participate in a trading strategy which involved cum-dividend trades in Danish company shares so as to facilitate tax reclaims from the Danish tax authorities. It is alleged that the Applicant knew that the trades were not genuine. The tax reclaims amounted to some €91m.

3. In a Decision Notice dated 22 September 2023, the Authority decided to impose a financial penalty on the Applicant of some £5.9m and to make an order prohibiting him from performing any function in relation to any regulated activities.

4. The Applicant denies all allegations made against him in the statement of case. In short, his case is that he had an honest and reasonable belief that the trades were genuine and legitimate. The Applicant also contends that in any event part of the case against him is time-barred. Indigo was involved in the relevant trades in the period 14 March 2014 to 29 January 2015. It is contended that the Authority's action in relation to conduct on or before 24 July 2014 is time-barred.

5. The Applicant also contends in his reference and in his reply that the Authority is subject to the Equality Act 2010 ("the 2010 Act") and has unlawfully discriminated against him on the grounds of his race. The Applicant is of Indian origin and it is alleged that the Authority has failed to take any action against two comparators, namely Caucasian males in materially identical circumstances. As such, it is said that the Authority's continuation of its enforcement proceedings against the Applicant amounts to a breach of the 2010 Act ("the Equality Issue"). The Applicant seeks to have the Equality Issue determined as a preliminary issue.

6. The Authority denies that it has discriminated against the Applicant, although it accepts that the Tribunal has jurisdiction to consider the allegations of discrimination in the reference.

7. The Applicant's case on the Equality Issue is based on Part 5 of the 2010 Act which concerns discrimination in the context of work and employment. Section 53 applies to "qualification bodies", and section 53(2) provides:

(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification —

(a) by withdrawing the qualification from B;

(b) by varying the terms on which B holds the qualification;

(c) by subjecting B to any other detriment.

8. Section 54 defines a qualifications body as follows:

(2) A qualifications body is an authority or body which can confer a relevant qualification.

(3) A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.

9. The Applicant says that the Authority is a qualifications body for these purposes because it can confer a relevant qualification. Moreover, the sanctions the Authority seeks to impose on the Applicant in the Decision Notice fall within s53(2).

10. The Authority contends that it is not a qualifications body in relation to Mr Teraiya, although it accepts that it may be a qualifications body in relation to permissions of an authorised person who is a sole trader. It contends that a prohibition does not amount to the withdrawal of a qualification. Further, it contends that the imposition of a financial penalty does not fall within the scope of section 53(2)(c) because it is not exercising its powers as a qualifications body.

11. The Authority does not contest the Tribunal's jurisdiction to consider the factual basis of Mr Teraiya's claim of discrimination in determining the reference. However, it does not appear to accept that any findings the Tribunal made would affect the outcome of the reference. I take the Authority's position to be that the Tribunal can make findings in relation to discrimination, but even if discrimination is made out, that should not affect the outcome of the reference.

The principles to be applied

12. There is no dispute as to the principles I should apply in determining this application. They are summarised by the Upper Tribunal in *Lord Wrottesley v HM Revenue & Customs* [2015] UKUT 0637 (TCC) at [28] and were applied in the context of financial services cases in *Prodhan v The Financial Conduct Authority* [2018] UKUT 0414 (TCC):

(1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.

(2) The power should only be exercised where there is a "succinct, knockout point" which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a "knockout" one.

(3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.

(4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way – (3)(a) above.

(5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.

(6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.

(7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.

(8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly.

13. I consider those factors in the discussion which follows, taking into account the parties' written submissions.

Discussion

14. In my view the Equality Issue is a "*succinct, knock out point*". Both parties accept that it could be dealt with in a half day hearing and if the Authority is successful then it would dispose of that part of the Applicant's case based on discrimination. The Applicant has said in correspondence that he will withdraw his case on discrimination if the Tribunal determines that the Authority is not a qualifications body.

15. There is no reason why a preliminary issue hearing could not be heard without delay. Neither party suggests that any evidence is required to determine the preliminary issue. It is a pure question of law. The parties will need to agree a bundle of documents and exchange skeleton arguments, but other than that no further directions would be required for the preliminary issue hearing.

16. The preliminary issue is a discrete issue and any finding on the issue would not have implications for other aspects of the reference.

17. I should take into account any risk that determination of the preliminary issue may prove to be irrelevant. The Authority contends that at the final hearing the Tribunal may find it unnecessary to determine whether the Authority is a qualifications body. If the Tribunal were to find that the Authority did not as a matter of fact discriminate against the Applicant, then no further finding would be necessary.

18. It appears to me, at this stage, that the panel hearing the reference would be unlikely to take such an approach. There would be no reason for the Tribunal to effectively side-step a relatively short legal point on which it had heard full argument.

19. It will still be necessary to have a substantive hearing of the reference, whatever the outcome of the preliminary issue. The parties have differing views as to how long the substantive hearing of the reference might take. At this stage, no evidence has been served in relation to the reference. It is difficult to estimate therefore how long the substantive hearing will take. The range of views is that the substantive reference will take between 5 and 7 days if there is no preliminary issue. This includes evidence and submissions on the Equality Issue. If the preliminary issue is determined in favour of the Applicant then it would still be necessary to have evidence and submissions on the Equality Issue. The time estimate would not change significantly. If the preliminary issue is determined in favour of the Authority, then evidence and submissions on the Equality Issue would not be required.

20. The evidence relevant to the Equality Issue could be wide ranging. The Authority does not admit that the two comparators identified by the Applicant were in materially the same position as the Applicant. It would therefore be necessary to hear evidence as to the situation of the comparators and the circumstances in which the Authority decided not to pursue enforcement action against the

comparators. Mr Teraiya has said that he will seek to adduce evidence from the comparators and that he himself will give evidence on the Equality Issue. It would also be necessary to hear evidence from the Authority on the issue. The parties would make submissions on that evidence and on the significance of the evidence in terms of the enforcement action taken by the Authority.

21. The Authority says that the Equality Issue could be dealt with in the space of a day at the final hearing. The Applicant says that it would require at least 3 days. It seems to me that a day is very optimistic and 3 days is unduly pessimistic. I shall assume that a substantive hearing including the Equality Issue would take 6 days. A substantive hearing which did not need to determine the Equality Issue would take 4 days. There is therefore a potential saving of 2 days at the final hearing and a saving in terms of pre-trial preparation, in particular the preparation and service of witness statements and documentary evidence relevant to the Equality Issue.

22. I am satisfied on the material before me that if the preliminary issue is determined in favour of the Authority, the substantive hearing would be significantly shorter. Further, it would not be necessary for the parties to incur the expense of obtaining and serving evidence in relation to the Equality Issue. There would be a significant reduction in the costs of both parties in terms of pre-hearing preparation for the substantive hearing and of the reference itself. I do not accept the Authority's submission that a preliminary issue would increase the parties' costs. Whilst the overall costs might be increased if the preliminary issue is determined in favour of the Applicant, it does not appear to me that the increase would be significant or indeed disproportionate to the potential benefit of determining the preliminary issue.

23. I take into account that there is the potential for delay if I direct a preliminary issue. The losing party may seek to appeal the decision to the Court of Appeal. If that is the case, then steps could be taken to mitigate any delay. I have in mind that if the preliminary issue did go to an appeal, then the parties could be required to continue their preparation of all other issues in the reference. In particular, the service of witness statements on those issues. Such evidence will be necessary in any event. The reference would then be ready for a substantive hearing, subject only to the parties serving evidence on the Equality Issue if the preliminary issue were eventually determined in favour of the Applicant.

24. The Authority is rightly concerned about delay in proceedings. There has already been some delay in the progress of this reference. The pleadings were complete in March 2024, but since then the parties appear to have been in discussions about case management directions. No case management directions have been agreed and the question of a preliminary issue then arose.

25. Taking all these factors into account, including the overriding objective of dealing with cases fairly and justly, and adopting a cautious approach, I am satisfied that it is appropriate to direct the hearing of whether the Authority is a qualifications body as a preliminary issue.

Conclusion

26. For the reasons given above I propose to direct the hearing of a preliminary issue. It will be necessary for that direction to clearly specify the nature and scope of the preliminary issue. The parties should seek to agree the terms of the preliminary issue and associated directions for hearing within 14 days of the release of this direction.

JUDGE JONATHAN CANNAN

Release date: 31 January 2025