Neutral Citation: [2023] UKFTT 00029 (TC)

Case Number: TC08688

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/02945

TAX AND NATIONAL INSURANCE CONTRIBUTIONS – whether income was salary or bursary – whether in-time income tax repayment claim made – whether concession for Widening Access Training Scheme ("WATS") courses applied – Tribunal jurisdiction in relation to concessions – appeal refused

Heard on 17 November 2022
Judgment date: 05 January 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
DR CAROLINE SMALL

Between

EDWARD PHELAN

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant in person

For the Respondents: Ms Helen Davies, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. Between 30 April 2012 and 22 March 2013, Mr Phelan attended a course ("the Course") run by the University of Essex ("the University"). On 12 March 2017, Mr Phelan wrote to HM Revenue & Customs ("HMRC") seeking a repayment of the income tax and National Insurance Contributions ("NICs") which had been deducted from his pay during the period he had attended the Course.

2. Mr Phelan's position was that the money he had been paid was a bursary and therefore:

   (1) exempt from tax under the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), s 776, and from NICs under Sch 3, Part VII, para 12 of the National Insurance Contributions Regulations 2001 ("the NICs Regs"); and in any event

   (2) was not taxable or subject to NICs because the Course had been a "Widening Access Training Scheme" ("WATS") course, and so fell within a concession entitled "Widening Access Training Scheme: refunds for NHS Trust workers" (the "WATS Concession" or simply "the Concession").

3. On 19 June 2019, HMRC decided Mr Phelan had not made an in-time claim for an income tax repayment; HMRC's position was that if such a claim been made, it would have been refused. On 3 July 2020, HMRC issued their decision refusing to make a NICs repayment. Mr Phelan appealed to the Tribunal.

4. Mr Phelan is a layman who acted as a litigant in person during his appeal, so it was unsurprising that he found it difficult to separate (a) the legal provisions in ITTOIA and the NICs Regs from (b) the relaxation introduced by the WATS concession.

5. There are however important differences between (a) statute and regulations, which are made by Parliament, and (b) concessions, which are introduced by HMRC by virtue of a discretionary power to "care and manage" the tax system. The Tribunal has to distinguish the two, not only because they are different in their wording, scope and application, but also because the Tribunal does not generally have the jurisdiction (broadly, that means "the power") to decide disputes about concessions, but only to decide appeals about the operation and effect of legal provisions.

6. In relation to NICs, we decided that the payments to Mr Phelan were not a bursary and so did not fall within the exemption provided by the NICs Regs. In relation to tax, we agreed with HMRC that no valid in-time claim had been made by Mr Phelan, but that in any event the payments did not come within the statutory exemption. We refused Mr Phelan's appeal and upheld HMRC's decision.

7. We agreed with Ms Davies that the Tribunal has no jurisdiction to decide disputes over the WATS Concession. We record for completeness, because it was fully argued, that were we to have that jurisdiction, we would have agreed with HMRC that Mr Phelan did not fall within its scope.

8. The rest of our judgment explains these conclusions in more detail.

THE EVIDENCE

9. The Tribunal was provided with a Bundle of documents ("the Bundle") prepared by HMRC, which included:

   (1) the correspondence between the parties, and between the parties and the Tribunal;

   (2) the Contract between Mr Phelan and Basildon Mind ("the Contract");

(3) Mr Phelan's payslips for the tax year 2012-13; and

(4) various letters and documents from Basildon Mind, and from the University.

10. Mr Phelan gave oral evidence-in-chief, was cross-examined by Ms Davies and answered questions from the Tribunal. We found him to be a generally honest and straightforward witness, other than in two respects:

(1) he relied on two letters from Basildon Mind, see §68. These had been written at Mr Phelan's request some six years after the events in question; they contradicted both the contemporaneous evidence and Mr Phelan's own correspondence with HMRC; and

(2) his new evidence about the funding of his role with Basildon Mind, see §75(1). That evidence was unsupported by any documents and had never previously been put forward by Mr Phelan, and we did not accept it.

11. On the basis of the evidence summarised above, we make the findings of fact in the next part of this decision. There is a further finding of fact at §78(4).

FINDINGS OF FACT

12. We first set out our findings about Mr Phelan's work, followed by findings about the Contract and then about what happened subsequently, including Mr Phelan's correspondence with HMRC.

Basildon Mind

13. Basildon Mind is a charity and a limited company. In 2008, Mr Phelan began working at Basildon Mind as a volunteer counsellor, and he continued to work in that capacity until 5 February 2012.

14. The Contract took effect from 6 February 2012. It was signed by Ms Sheila Chesney, Chief Executive of Basildon Mind, on behalf of Basildon Mind, and by Mr Phelan. The Contract is headed "Fixed Term Employment Agreement" and is divided into a "Principal Statement" and a schedule which expanded on the points in that Principal Statement.

15. The Principal Statement named Mr Phelan as "employee" and Basildon Mind as "employer" and said that Mr Phelan's "job title" was "Wellbeing Practitioner". The "Purpose of Work" was stated to be "To provide a service called 'Therapy for You' managed by South Essex Partnership NHS Foundation Trust (SEPT)". In relation to "Location of Work" the Contract set out Mr Phelan's "employment base" and then said:

> "due to the nature of your role, you are required to travel between the various operational addresses and to other locations within the UK on behalf of Basildon Mind and clients of Basildon Mind."

16. Mr Phelan's salary from his start date until 5 April 2013 was calculated pro-rata on the basis of an annual salary of £18,402; from 6 April 2013 it was calculated based on an annual salary of £21,388. Under the heading "Payment of Salary", the Contract stated that Mr Phelan's salary was paid to him in twelve equal instalments each year.

17. Mr Phelan's "Hours of Work" were recorded as follows:

> "Your official hours of work are based on 37.5 hours per week between 8.00am and 8.00pm, Monday to Friday, with a 1 hour lunch each day and between 8.00am and 1.00pm on Saturday mornings. The actual hours you work each day are completely flexible and planned in accordance with the requirements of SEPT, your university course (where relevant) and Basildon Mind. Due to the nature of your position with Basildon Mind, you may on occasions be asked to work additional hours."

18. Under the heading "Flexible Duties", the Contract said:

> "You are required to undertake whatever duties may be necessary in order to fulfil the needs of the organisation. This may involve you providing support to other functional areas of the Organisation although you would only be expected to provide support in areas that were generally within your own work scope or level of ability. Flexibility is essential and your cooperation in this matter is appreciated."

19. In the schedule, under the heading "University Course", the Contract said:

> "Your University of Essex course [is] being fully funded and supported by SEPT. If you are not required at university you must inform your Manager so that appropriate arrangements can be made.
>
> Your continued employment is strictly conditional upon you successfully passing your University of Essex course."

20. Under the heading "Remuneration", the Contract said "you will be paid at the intervals detailed in your Principal Statement. You will be notified in writing of your gross and net salary and the nature and amount of any deductions" and went on to set out the position if his salary was overpaid or deductions were made by Basildon Mind from his salary.

21. In accordance with the terms of the Contract, Mr Phelan was paid a monthly salary of £1,533 gross per calendar month. His payslips show that in 2012-13 he received gross salary for tax purposes of £18,642, from which tax of £2,024 and NICs of £1,324.80 had been deducted.

22. On 3 September 2013, Ms Chesney wrote to Mr Phelan, saying:

> "As your employment with us came to an end yesterday, 1 wanted to thank you for your hard work and commitment to both your University studies and to the Therapy for You Service. I do appreciate that at times, it has been difficult, but you were able to stay the course and complete your Qualification as a Psychological Wellbeing Practitioner."

The Contract and the sessions

23. Mr Phelan was registered as a post-gradate student on the Course, which was entitled "the Psychological Wellbeing Practitioner Programme". It ran from 30 April 2012 to 22 March 2013. Mr Phelan attended the University one day a week, and the other days he provided one-to-one counselling sessions as a Psychological Wellbeing Practitioner to patients within GP surgeries.

24. In his oral evidence he said he carried out "one day of standard training" and that when working at the GP surgeries he gradually began to put into practice what he had learnt on the Course; he described it as "a slow gradual process". His sessions at the GP surgeries were unsupervised, and he saw each patient regularly for a maximum of four sessions; he described that maximum as "the national standard".

Subsequent events

25. In 2015-16, when Mr Phelan was employed by Humber NHS Foundation Trust, he attended a WATS course and claimed a refund of the tax and NICs suffered on the basis that the payments were a bursary. HMRC paid him that money because they accepted that he fell within the WATS Concession for that course.

26. On 12 March 2017, Mr Phelan wrote to HMRC as follows:

> "During tax year 2012-13 I was employed by Basildon Mind as a Trainee Psychological Wellbeing Practitioner (PWP). I am reliably informed that I am

> eligible to reclaim income tax and NI contributions paid whilst a trainee, as these should not have been deducted from my salary during my training period. Please indicate what information you require from my former employer, Basildon Mind, in order to process a refund of my income tax and NI contributions for the said training period."

27. On 30 March 2017, HMRC wrote back. Their letter began:

> "Thank you for your request for a refund of National Insurance contributions (NICs) that you paid while you were training with Basildon Mind."

28. The letter continued by asking Mr Phelan for further information so that HMRC could establish whether he was "due a refund of NICs". On 8 July 2017, Mr Phelan provided the Contract, the payslips, and other information. Correspondence continued, with HMRC focusing on the NICs position. On 14 January 2019, HMRC paid Mr Phelan a consolatory payment of £150 because of the time taken to resolve his case.

29. On 19 June 2019, HMRC told Mr Phelan that he was out of time to complete a self-assessment ("SA") return for 2012-13, and also out of time to make a claim for income tax; They added that any challenge to that conclusion would have to be made by way of claim for judicial review.

30. On 3 July 2020, HMRC issued a formal Notice of Decision, refusing to repay NICs of £1,211.76 which had been deducted during the period of the Course. On 23 July 2021, that decision was upheld on statutory review.

31. On 15 August 2021, Mr Phelan filed an appeal with the Tribunal; his Notice of Appeal said that he was appealing "National Insurance Contributions" and he attached the review letter. Under the heading "desired outcome" he first referred to the NICs, and then said:

> "Moreover, I am also looking for my claim for full refund of the Income Tax unlawfully deducted from my said bursary/scholarship to be reassigned from Judicial Review to appeal to the Tax Tribunal."

WHETHER THE PAYMENTS WERE EXEMPT FROM NICS

32. We first considered whether the payments made to Mr Phelan during the Course were exempt from NICs under the NICs Regs.

The NICs Regs

33. Schedule 3, Part VII of the NICs Regs is headed "Payments in Respect of Training and Similar Courses", and para 1 of that Part reads:

> "The training payments and vouchers mentioned in this Part are disregarded in the calculation of an employed earner's earnings."

34. Within that Part, under the heading "Payments made by employers to earners in full-time attendance at universities &c", para 12 reads, so far as relevant to this case:

> "(1) A payment to an employed earner receiving full-time instruction at a university, technical college or similar educational establishment (within the meaning of section 331 of the Taxes Act) if the conditions in sub-paragraphs (2) to (6) are satisfied, but subject to the exclusion in sub-paragraph (7).
>
> (2) The employed earner must have enrolled at the educational establishment for a course lasting at least one academic year at the time when payment is made.
>
> (3) The secondary contributor must require the employed earner to attend the course for an average of at least twenty weeks in an academic year.
>
> (4)-(5)…

(6) The total amount of earnings payable to the earner in respect of his attendance, including lodging, travelling and subsistence allowances, but excluding any tuition fees, must not exceed £15,480 in respect of an academic year.

(7) This paragraph does not apply to any payment made by the secondary contributor to the employed earner for, or in respect of, work done for the secondary contributor by the earner (whether during vacations or otherwise).

(8)…

(9) In this paragraph

'academic year' means the period beginning on 1st September of one calendar year and ending on 31st August of the following calendar year..."

Whether Mr Phelan came within that statutory exception

35. It was Mr Phelan's case that the payments made to him by Basildon Mind during the Course were made "to an employed earner receiving full-time instruction at a university" as required by Sch 3, Part VII, para 12(1) of the NICs Regs, and so fell to be disregarded under para (1) of that Part. In particular, he submitted that the days he spent working at the GP surgeries were part of the Course. He also said that he had attended the Course for a full year, which was thus an "academic year" as required by para 12(2).

36. Ms Davies said that HMRC's main disagreement was in relation to the "full-time" requirement. In her submission, it was clear from the facts that Mr Phelan had attended the Course only one day a week, and worked in GP surgeries on behalf of Basildon Mind for the other four days. Ms Davies also placed reliance on the maximum payment of £15,480 in para 12(6), pointing out that Mr Phelan's earnings during the Course were significantly more than this: in 2012-13 his annual gross salary was £18,642.

The Tribunal's view

37. We agree with Ms Davies that Mr Phelan does not satisfy the NICs exemption, for the reasons explained below.

38. First, the Course was not "full-time". Instead, Mr Phelan attended the University one day a week, and carried out work for Basildon Mind on the other days. As provided in the Contract, that work was "to provide a service called 'Therapy for You' managed by South Essex Partnership NHS Foundation Trust (SEPT)". When Mr Phelan was providing these counselling sessions for patients, he was not supervised by anyone from the University. He was instead working as a practitioner, on behalf of Basildon Mind, for particular patients on a regular basis.

39. When the Course finished, he continued with the same work, although now for five days a week. Mr Phelan's letter of termination from Basildon Mind referred to his commitment "to both your University studies and to the Therapy for You Service", and we find this is an accurate reflection of the fact that he was both attending the Course and working as a therapist. We accept that during these therapy sessions, Mr Phelan began to put into practice what he had learnt on the Course, but it does not follow that the Course itself was "full-time".

40. Second, the Course did not run for a full "academic year" as required by para 12(2). Although it lasted from 30 April 2012 to 22 March 2013, this is not an "academic year" as defined by para 12(9). Instead, an academic year "means the period beginning on 1st September of one calendar year and ending on 31st August of the following calendar year".

41. We also considered whether, as Ms Davies submitted, the payments made to Mr Phelan during the Course exceeded the maximum permitted by Sch 3, para 12(6). If, contrary to our findings above, the money paid to Mr Phelan was a bursary, Ms Davies is right that it would have exceeded that permitted maximum.

42. Mr Phelan has therefore not satisfied para 12(1), para 12(2) or para 12(6). As a result, his claim for a NIC repayment must fail.

The quantum of the claim

43. Mr Phelan also submitted that HMRC had miscalculated the amount of his NICs claim. He relied on his payslips for the periods for the tax months of April 2012 through to March 2013 inclusive, which totalled £1,324.80.

44. Ms Davies responded by saying that the Course ran from 30 April 2012 to 22 March 2013, and was thus not for a full tax year. We agree with Ms Davies and find that the amount of the claim had been correctly calculated by HMRC as being £1,211.76.

WHETHER MR PHELAN HAD MADE A VALID IN-TIME CLAIM FOR REPAYMENT OF THE TAX

45. Mr Phelan's position was that his letter of 12 March 2017 was a claim for the refund of the tax deducted from the income paid to him during the Course. However, HMRC did not accept that this letter met the statutory requirements. The related provisions are complex, as set out in the next following part of this decision.

The law on making a claim for repayment

46. The starting point is the Taxes Management Act 1970 ("TMA"), s 33. This is headed "Recovery of overpaid tax etc" and reads "Schedule 1AB contains provision for and in connection with claims for the recovery of overpaid income tax and capital gains tax".

47. Para 1 of Sch 1AB includes the following:

> "(1) This paragraph applies where
>
> (a) a person has paid an amount by way of income tax or capital gains tax but the person believes that the tax was not due…
>
> (2) The person may make a claim to the Commissioners for repayment or discharge of the amount.
>
> (3) …
>
> (4) Paragraphs 3 to 7 (and sections 42 to 43C and Schedule 1A) make further provision about making and giving effect to claims under this Schedule."

48. Since Mr Phelan believed he had paid an amount of income tax which was not due, he falls within para 1(a), and could therefore make a claim for its repayment under subpara (2). However, such a claim is subject to the further provisions set out in subpara (4). These include para 3 of the same Schedule, which is headed "making a claim" and provides:

> "(1) A claim under this Schedule may not be made more than 4 years after the end of the relevant tax year.
>
> (2) In relation to a claim made in reliance on paragraph 1(1)(a), the relevant tax year is
>
> (a) …
>
> (b) otherwise, the tax year in respect of which the payment was made."

49. In Mr Phelan's case, the year in question was 2012-13, and the four year time limit therefore expired on 5 April 2017. Mr Phelan's first letter was sent on 12 March 2017, so just within that time limit. All subsequent correspondence was outside the time limit.

50. Sch 1AB para 1(4) also requires that a claim must meet the conditions in TMA s 42. That section is headed "Procedure for making claims etc" and so far as relevant reads:

> "(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.
>
> (1A) Subject to subsection (3) below, a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.
>
> (2) Subject to subsections (3) to (3ZC) below, where notice has been given under section 8…of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included.
>
> (3) Subsections (1A) and (2) above shall not apply in relation to any claim which falls to be taken into account in the making of deductions or repayments of tax under PAYE regulations.
>
> (4)-(10)…
>
> (11) Schedule 1A to this Act shall apply as respects any claim or election which
>
> > (a) is made otherwise than by being included in a return under section 8…of this Act…".

51. Section 42(1A) therefore requires that all claims be quantified at the time they are made, other than a claim "which falls to be taken into account in the making of deductions or repayments of tax under PAYE regulations", see s 42(3). We return to this quantification issue at §60 below.

52. Section 42(2) provides that if a person is within SA. any claim must be made by being included in the SA return if it could be so included. Section 42(11)(a) then provides that if a person is not within SA, the rules set out Sch 1A apply. As Mr Phelan was not within SA for 2012-13, he was unable to include the repayment claim in his SA return and had instead to follow the rules in Sch 1A for claims made outside SA returns.

53. A person such as Mr Phelan making a claim for repayment is thus required by TMA s 42 to follow Sch 1A; as we have seen at §47, this was also required by Sch 1AB para 1(4).

54. Sch 1A is headed "Claims etc not included in returns", and para 2 of that Schedule is headed "making of claims". It includes the following provisions:

> "(1) Subject to any provision in the Taxes Acts for a claim to be made to the Board, every claim shall be made to an officer of the Board.
>
> (2) No claim requiring the repayment of tax shall be made unless the claimant has documentary proof that the tax has been paid by deduction or otherwise.
>
> (3) A claim shall be made in such form as the Board may determine.
>
> (4) The form of claim shall provide for a declaration to the effect that all the particulars given in the form are correctly stated to the best of the information and belief of the person making the claim.
>
> (5) The form of claim may require
>
> > (a) a statement of the amount of tax which will be required to be discharged or repaid in order to give effect to the claim;

> (b) such information as is reasonably required for the purpose of determining whether and, if so, the extent to which the claim is correct and;
>
> (bb) the delivery with the claim of such accounts, statements and documents, relating to information contained in the claim, as are reasonably required for the purpose mentioned in paragraph (*b*) above;…"

55. Para 2(3) therefore requires that a person who makes a claim outside a return must do so in "such form as the Board may determine", where "the Board" means "HMRC".

56. It was Ms Davies' submission that the required "form" was set out in HMRC's Self Assessment Claims Manual ("SACM"), at chapter SACM12150; this is headed "overpayment relief". The Tribunal agrees: it is clear from SACM12005 that by "overpayment relief", HMRC means claims made for the repayment of tax in accordance with Sch 1AB.

57. SACM12150 is headed "Form of claims" and includes the following text:

> "Overpayment relief claims must be made in writing and
>
> - must clearly state that the person is making a claim for overpayment relief
> - identify the tax year or accounting period for which the overpayment or excessive assessment has been made
> - state the grounds on which the person considers that the overpayment or excessive assessment has occurred
> - state whether the person has previously made an appeal in connection with the payment or the assessment
> - if the claim is for repayment of tax, you must have documentary proof of the tax deducted or suffered in some other way as you may be required to provide this at a later date - see SACM3015
> - include a declaration signed by the claimant stating that the particulars given in the claim are correct and complete to the best of their knowledge and belief
> - state the amount that the person believes they have overpaid."

Application to Mr Phelan

58. Mr Phelan denied that he was making a claim for "overpayment relief", but we find that this was because he did not understand the applicable statutory provisions. We agree with Ms Davies that he was making such a claim.

59. Mr Phelan would only have made a claim within the four year time limit had he done so in his letter of 12 March 2017. Ms Davies said that the letter was not such a claim, because it was not "quantified" at the time it was made, as required by TMA s 42(1A) and it did not meet the "form" requirements in SACM12150 because it similarly did not "state the amount" Mr Phelan believed he had overpaid; in addition it also failed to comply with other specified "form" requirements.

60. We noted that the requirement at TMA s 42(1A) that a claim be "quantified" at the time it was made is subject to the exception in s 42(3) for a claim which "falls to be taken into account in the making of deductions or repayments of tax under PAYE regulations". We did not receive submissions on the meaning and effect of that provision, but having reviewed the PAYE regulations, they include numerous provisions relating to the requirements placed on employers using tax codes to make deductions from earnings and to use the same codes to

make repayments. Mr Phelan's repayment claim did not fall to be taken into account in the making of such deductions or repayments. Instead, as his Contract had ended, he was asking for a sum of money to be paid to him directly. We decided that this exception did not apply to Mr Phelan, and that he was therefore required by s 42(1A) to quantify the claim when it was made, and he did not do so.

61. It follows from the above that Mr Phelan's letter of 12 March 2017 was not a valid in-time claim for a repayment of income tax because:

(1) he did not quantify the amount of relief he was claiming, as required by TMA s 42(1A) and by SACM12150 (which applies by virtue of TMA Sch 1A, para 2(3));

(2) it did not explicitly state that Mr Phelan was making a claim for "overpayment relief", as required by SACM12150; and

(3) he did not provide a signed declaration that the particulars given in the claim were correct and complete to the best of his knowledge and belief, as also required by SACM12150.

62. Since the letter of 12 March 2017 was not a valid in-time claim for a repayment, and as the four year time limit had expired on 5 April 2017, Mr Phelan is out of time to make a claim for income tax repaid.

Jurisdiction to allow claim to be made late?

63. As noted above, HMRC had informed Mr Phelan that, since he was too late to make a valid repayment claim, he could only take this matter forward by way of judicial review: in other words, by applying to the High Court on the basis that HMRC's refusal to accept a late claim was unreasonable, procedurally unfair, illegal or disproportionate. In his grounds of appeal, Mr Phelan asked that this issue "be reassigned…to the Tax Tribunal".

64. Ms Davies said that this was not possible, because the Court of Appeal had confirmed in *HMRC v Raftopoulou* [2018] EWCA Civ 818 that the Tribunal has no jurisdiction to allow a person to make late claims. We agree with Ms Davies. In *Raftopoulou*, the Court considered whether TMA s 118(2) gave the Tribunal the relevant jurisdiction (no other provision having been identified) and Richards LJ, giving the only judgment with which Arden LJ agreed, roundly rejected that submission. He said at [70] that Parliament had instead "created a specific statutory procedure for the extension of certain…time limits where it has considered it appropriate". No such specific statutory extension applies to the time limits at issue in Mr Phelan's case.

Conclusion on income tax claim

65. For the reasons set out above, Mr Phelan's letter of 12 March 2017 was not an in-time claim for repayment of income tax, and the Tribunal has no jurisdiction to allow him to make a late claim.

THE INCOME TAX PROVISIONS

66. Mr Phelan therefore did not make made a valid in-time claim for income tax relief. We add for completeness, and because the point was fully argued, that had the claim been in time, it would have failed. The relevant provision is ITTOIA s 776; this is headed "Scholarship income" and so far as relevant reads:

> "(1) No liability to income tax arises in respect of income from a scholarship held by an individual in full-time education at a university, college, school or other educational establishment.
>
> (2)-(2A)…

> (3) In this section 'scholarship' includes a bursary, exhibition or other similar educational endowment."

67. Mr Phelan was not in "full-time education" for the reasons given at §38. He also did not receive a "bursary". Instead, the Contract explicitly and repeatedly describes the money he was paid as a "salary", and this is also reflected in his payslips. The fact that Mr Phelan was also paid when attending the Course one day a week does not turn his salary into a bursary.

68. In coming to that conclusion we have not ignored the two identical letters from Ms Chesney dated 13 February and 23 May 2019, written at Mr Phelan's request, which state *inter alia* that Mr Phelan "studied at the University of Essex and received a bursary for his training". However:

(1) as Ms Davies said, "a bursary is a payment for attendance at educational establishments and it is the purpose of the payment which determines whether it is a bursary; not what it may be referred to as";

(2) Mrs Chesney's letters were written in 2019, some six years after the Course had been completed; and

(3) it is clear from the contemporaneous evidence of the Contract and the payslips that the sums paid to Mr Phelan were earnings, not a bursary.

THE WATS CONCESSION

69. Mr Phelan also relied on the Concession. We first set out the relevant passages, followed by the parties' submissions and our view.

The Concession

70. The Concession was entitled "Widening Access Training Scheme: refunds for NHS Trust workers". Under the heading "Find out if you're eligible for a refund", the text read:

> "If you've received payments from your NHS employer whilst attending a Widening Access Training (WAT) course, you might be entitled to a refund of the Income Tax and National Insurance contributions you paid."

71. Under the heading "Courses attended before 6 April 2013", the text stated that "Your NHS Trust will submit a claim to HMRC on your behalf. HMRC has asked trusts to provide full details of eligible workers, and will process claims when they're received". If a person considered they were entitled to a refund which they had not received, they were instructed to contact "your NHS Trust".

72. The Concession was withdrawn for courses which started on or after 1 September 2019. From that date, HMRC's online guidance includes the following text:

> "NHS staff can attend degree-level training courses to achieve a professional qualification and develop their career. Participation in these courses is often under the widening access training scheme (WATS). Participants are required to carry out clinical placements, usually with their employing NHS trust or health board.
>
> Income Tax and National Insurance contributions are due on payments made to NHS employees attending these courses. This is because these are payments of salary and are not scholarship income."

73. That current guidance also states that HMRC will not seek to recover refunds previously made when the Concession was in place.

Submissions

74. Mr Phelan submitted that as it was common ground that the Course was a WATS course, the payments made to him were exempt from NICs under the WATS Concession. HMRC's position was that the Concession did not apply to Mr Phelan as he did not work for the NHS, and that in any event the Tribunal had no jurisdiction to decide appeals against concessions.

75. Mr Phelan responded in the course of the hearing by saying that:

(1) Basildon Mind was working "in partnership" with the NHS and was not "a separate entity in its own right"; that the money he was paid "was provided by the NHS to Basildon Mind" and that as "a trainee with Basildon Mind" he was exactly the same as an NHS trainee; there was no difference in the training or in the Course; and

(2) he was "shocked" that HMRC could suggest that the Tribunal did not have the relevant authority to consider the concession, and that it was plainly in the public interest that the Tribunal have oversight of concessions.

76. Ms Davies did not accept that the money paid to Mr Phelan had been provided by SEPT, the local NHS Trust. She said there was no related evidence in the Bundle, and the point had never previously been made by Mr Phelan. It was instead clear that Basildon Mind was a separate entity and Mr Phelan was its employee.

The Tribunal's jurisdiction

77. We first set out the position on jurisdiction. We agree with Ms Davies that the Tribunal has no jurisdiction to hear disputes over concessions. In *BT Pensions Scheme v HMRC* [2015] EWCA Civ 713, the Court of Appeal reaffirmed that the Tribunal only has the jurisdiction given to it by Parliament, so it can, for example, hear appeals against legal challenges where the statute gives a taxpayer a right of appeal. A concession, in contrast, is "a statement as to how HMRC will operate in the circumstances there specified", and if a person disagrees with the way HMRC have operated the concession, this "denies the legitimate expectation of taxpayers who had been led to expect that they would be treated in accordance with it", and any such a challenge must be brought by judicial review, see [133] and [142] of the judgment.

The scope of the Concession

78. In any event, even if the Tribunal were to have the jurisdiction to consider the Concession, we would have agreed with Ms Davies that he did not come within its scope. It is clear from our findings of fact that:

(1) Mr Phelan was an employee of Basildon Mind;

(2) Basildon Mind is a separate limited company, not part of the NHS;

(3) although Mr Phelan provided a service which was managed by the SEPT, the local NHS Trust (see §15), he was not employed by SEPT; and

(4) as Ms Davies said, there was no documentary or other third-party evidence to support Mr Phelan's statement, made for the first time in the hearing, that all the money he received had been paid to Basildon Mind by SEPT. The Contract states only that *the Course* was funded by SEPT (see §19), and we find that this is a reference to the cost of the Course itself, ie the fees payable to the University. Based on that evidence, and the lack of any documentary support for Mr Phelan's statement that SEPT had funded all his earnings, we find as a fact that SEPT funded only the Course itself.

79. Since the WATS Concession is limited to NHS employees, and since Mr Phelan was not an NHS employee when he worked for Basildon Mind, he was not within its scope.

DELAY

80. Mr Phelan wrote his first letter on 12 March 2017; HMRC issued their decision refusing the appeal on 3 July 2020, and they issued their review decision on 23 July 2021.

81. Mr Phelan submitted that "delays on the part of HMRC have occurred throughout my claim. These delays have then been exploited by HMRC to argue that my claim is out of time". He also said that "it is possible delay was a tactic wittingly employed by HMRC in an attempt to demoralise me, in the hope that pursuit of the claim would be relinquished".

82. Ms Davies acknowledged that there had been delays in dealing with Mr Phelan's case, noting that on 14 January 2019, HMRC had paid him £150 as compensation. She said that for part of the period, HMRC had been reviewing the Concession and as recorded above, it was eventually withdrawn. However, Ms Davies did not accept that this delay was relevant to Mr Phelan's case at the Tribunal, because he did not come within the statutory provisions in any event.

83. No case law was cited by either party about the relevance (or otherwise) of delay. The Tribunal considered the following:

(1) judgments which consider the impact of delay in the context of Article 6 of the European Convention on Human Rights ("the Convention"), see *King v UK (No 3)* [2005] STC 438 and *Kishore v HMRC* [2021] EWCA Civ 1565. However, this case law concerns the rights of a person charged with a criminal offence, including tax penalties, to have the case heard within a reasonable time. Mr Phelan's appeal does not concern tax penalties or any other matter which is criminal for the purposes of the Convention.

(2) Section 6 of the Human Rights Act 1998 provides that it is "unlawful for a public authority to act in a way which is incompatible with a Convention right" and that the meaning of "act" includes a "failure to act", and so would encompass delay. However:

(a) that provision would only be relevant were Mr Phelan able to show that HMRC's delay had breached one or more of his rights under the Convention; and

(b) even if he were able to prove that a right had been breached, that would not provide a reason for allowing his appeal. The Tribunal cannot decide his case on the basis that delay trumps the relevant statutory requirements.

(3) Section 8(2) of the Human Rights Act provides that compensation can be awarded for delay, but such an award can only be made by "a court which has power to award damages, or to order the payment of compensation, in civil proceedings" and the Tribunal is not such a court.

84. Thus, even if Mr Phelan had been able to show that his human rights had been breached by the delay in dealing with his claim, that could not affect the outcome of this appeal.

85. Finally, and contrary to Mr Phelan's submissions, HMRC have not "exploited" these delays to argue that his claim was made late. Instead, as explained in the part of this judgment beginning at §45ff, Mr Phelan's income tax claim is out of time because it was not made in accordance with the statutory requirements before the deadline of 5 April 2017.

OVERALL CONCLUSION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

86. For the reasons set out above, Mr Phelan's appeal is dismissed and HMRC's decision upheld.

87. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this preliminary 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.

ANNE REDSTON
TRIBUNAL JUDGE

Release date: 05th JANUARY 2023