[2022] UKFTT 00123 (TC)

TC 08454

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07457

DECISION
ON AN APPLICATION FOR REINSTATEMENT
IN THE CASE OF

DR ANWAR ANSARI **Appellant**

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

1. This is an application by Dr Anwar Ansari ("**Appellant**") for the reinstatement of his appeal which was struck out in accordance with Tribunal directions dated 18 December 2020.

RELEVANT CHRONOLOGY

2. Following the hearing of a strike out application on 12 December 2019 the Tribunal issued directions which provided for HM Revenue & Customs (**HMRC**) to confirm whether the Appellant's out of time claim to multiple dwelling relief would be allowed no later than 9 March 2020. In the event that it was refused the directions provided that the present appeal be stayed for a period of 3 months to permit the Appellant to bring a judicial review claim in respect of the refusal. In the event no judicial review was bought the appeal was to be automatically struck out.

3. HMRC refused the application on 2 March 2020 and the Appellant did not seek permission for a judicial review claim within the required 3-month period and his appeal was automatically struck out on 14 July 2020. The Appellant sought reinstatement of the appeal by correspondence dated 20 July and 3 August 2020. Despite HMRC's objection the appeal was reinstated, and the Appellant was permitted a further 2 months to bring a judicial review claim. The application was permitted essentially in the interests of justice and by reference the pandemic. However, the directions again provided that if no judicial review claim were made within the extended period the appeal would be automatically struck out. The effect of the directions was that without an application to judicial review being made prior to 18 February 2021 the appeal was struck out.

4. However, the strike out was notified to the Appellant on 15 November 2021. On 2 December 2021 the Appellant again sought reinstatement and a further 3 months to bring a judicial review claim. The Appellant contends that he has been unable to progress his judicial review due to ill health. The evidence of ill health indicates that the Appellant was given a sick note to excuse attendance at a court hearing in early December 2020 because he had previously had whooping cough and given his age and ethnicity the covid risk was significant. Further evidence indicated that he had covid in July 2021 which caused him to be acutely unwell. By the second letter indicates that the Appellant is generally of good health, does not take treatment for asthma and questions whether he even suffers from it. It noted that he was over the worst

of covid within a couple of weeks. He indicated that he proposed to commence obtaining the documentation necessary to bring a judicial review.

5. HMRC object to the application to reinstate.

TEST TO BE APPLIED

6. An application to reinstate represents the ultimate relief from the sanction of having an appeal struck out.

7. The test to be applied by the Tribunal in the context of a reinstatement application made under rule 8(5) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**FTT Rules**") is as provided by the Upper Tribunal ("**UT**") in the case of *Martland v HM Revenue and Customs* [2018] UKUT 178 (TCC) ("**Martland**"). Martland concerned the question as to whether the Tribunal should allow the taxpayer's application in that case to bring an appeal out of time.

8. Martland concerned the question as to whether the Tribunal should allow the taxpayer's application in that case to bring an appeal out of time however, and subject to paragraph 11 below, the test is also applicable to a strike out application.

9. The UT considered the relevant authorities of the Court of Appeal and Supreme Court and the appropriate test when considering a breach of the FTT Rules and relief from the associated sanction. The UT summarised the approach taken in the authorities:

> "[40] In *Denton*, the Court of Appeal was considering the application of the later version of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [24]):
>
> > "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' ... If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b) in Rule 3.9(1)]"
>
> [41] In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered.
>
> [42] The Supreme Court in BPP implicitly endorsed the approach set out in Denton. That case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FTT
>
> [43] … The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". …"

10. The UT then concluded that a similar approach should apply to the Tribunal.

11. In applying the *Martland* test in the context of reinstatement the UT has provided further guidance in the case of *Chappell v The Pensions Regulator* [2019] UKUT 209. Critically when considering a reinstatement following strike out the UT requires that the Tribunal:

> (1) Take account of the previous breaches in compliance which led to the granting of the unless order breach of which led to the strike out when considering stage 1 of the *Martland* test i.e. when determining the seriousness and significance of the breach (at paragraph [99]);
>
> (2) When conducting the balancing exercise at the third stage particular importance is to be given to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders (at paragraph [100]);
>
> (3) The Tribunal should take no account of merits of underlying appeal for failure to comply, the merits being relevant only in the case of a strike out on the basis of no reasonable prospects of success(at paragraphs [87] and [94]).

APPLYING MARTLAND

12. In the context of reinstatement the first two components of the Martland test require the Tribunal to consider what led to the appeal being struck out and determine the seriousness and significance of the failure.

13. Any failure to comply with an unless order will be significant. The terms of an unless order explicitly warn the taxpayer of the consequence of a failure to comply and so it should be expected that, in the ordinary course, a failure to comply should carry the stated consequence.

14. In this regard the appeal was struck out because the Appellant failed to bring judicial review proceedings within the time stated in directions which provided that the appeal would be struck out should he so fail. This is the second time this has occurred and, the Appellant has still not made any application for permission to bring judicial review proceedings. That is so despite the fact that it is now 2 years since the original decision of HMRC regarding the late multiple dwellings' relief application was rejected.

15. As confirmed in *Chappell* it is appropriate to consider the whole period of delay in compliance that led to the issue of the unless order and not merely to focus on the final period of non-compliance resulting in strike out.

16. No real explanation has been given other then covid but that is no substantive reason. The Appellant continued to run his business and presumably simply gave other matters his attention rather than compliance with the Tribunal's directions.

17. A failure to comply with a direction which indicates that strike out will ensue and to continue to do so for a period of nearly 2 years can only be described as serious and significant.

In all of the circumstances …?

18. It is therefore necessary to consider all of the circumstances.

19. The Appellant has provided medical notes which confirm that he was advised not to travel to Liverpool in December 2020 and that in August 2021 he was briefly hospitalised with covid. He contends that he has not been well enough and otherwise unable to progress the judicial review application.

20. At the previous strike out application HMRC noted that the Appellant was out of time to bring a judicial review of their decision. In December 2020 Judge McKeever stated that a matter for her to consider. However, in doing so Judge McKeever may not have appreciated the strictness of the time limits which apply in judicial review proceedings. A petition for

permission to bring such proceedings must adhere strictly to the relevant pre-action protocol and pursuant to the provisions of the Civil Procedure Rules must be bought "as soon as reasonably practical and not later than 3 months" after the administrative act or decision complained of.

21. In accordance with *Chappell* prospects of success are not a matter to be considered unless on its face the appeal has no reasonable prospects of success. Critically here, the appeal has always had no reasonable prospect of succeed because the acceptance of a late claim to multiple dwelling relief is a matter of HMRC's discretion over which this Tribunal has no jurisdiction. In connection with the judicial review, Tribunal is of the view that it is now inconceivable, despite the pandemic, that the administrative court would accept a judicial review application so far out of time and as such even if the claim were to be prepared and submitted it would not be accepted and this appeal would be struck out. As such the Appellant has simply run out of road and has no recourse to challenge HMRC because of his own failure to bring the judicial review.

22. There is really no need to consider the balance of prejudice because the Tribunal has no jurisdiction to consider the decision which the Appellant disputes despite his failure to comply with the unless orders.

23. The application for reinstatement is therefore refused.

24. 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.

AMANDA BROWN QC
TRIBUNAL JUDGE

Release date: 06 APRIL 2022