[2020] UKFTT 0051 (TC)

TC07547

PROCEDURE - application for costs - rule 10 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/01961

BETWEEN

JAMES QUINN **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in Chambers in Edinburgh on 23 January 2020 having read the application by HMRC dated 23 July 2019 and supporting email dated 14 November 2019, the appellant's reply dated 25 July 2019 and the appellant's Response purportedly dated 2 November 2019 but emailed to the Tribunal on 2 December 2019 presumably in response to Directions dated 14 November 2019.

DECISION

INTRODUCTION

1. On 15 July 2019 the Decision dismissing the substantive appeal in this matter was issued and it is reported at [2019] UKFTT 461 (TC). On 9 October 2019, the Decision on the application for set aside of that Decision was issued and that is reported at [2019] UKFTT 618 (TC). Neither Decision has been appealed.

2. On 23 July 2019 HMRC lodged with the Tribunal an application for costs in terms of Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). That application was predicated on two alternative grounds, namely

> (a) Costs of and incidental to defending the appeal from the first date of the appellant's non-compliance with the Tribunal's Directions being 23 November 2018, or
>
> (b) Wasted costs in relation to the hearing on 2 July 2019. That was correctly stated to be under Section 29(4) of the Tribunal, Courts and Enforcement Act 2007 ("TCEA") but erroneously stated to be in terms of Rule 10(1)(b) of the Rules whereas the correct reference is Rule 10(1)(a).

A schedule of costs was annexed.

3. Unfortunately due to an administrative error that was not processed and the release of the Decision on set aside triggered a reminder from HMRC.

4. On 14 November 2019 I issued Directions seeking confirmation from HMRC as to whether, in light of the application for set aside they were adhering to their application. They duly replied confirming that they wished to pursue the application in its original format.

5. Those Directions ordered the appellant to lodge a response by no later than noon on 27 November 2019. The appellant did not respond within that timescale. On 2 December 2019 the appellant's agent emailed the Tribunal with what purported to be a Response dated 2 November 2019. Obviously that must be a typographical error.

6. As I have recorded in both of the Decisions referred to in paragraph 1 the appellant has a lamentable history of non-compliance with Directions or cooperation with the Tribunal.

7. On 6 December 2019 the Tribunal administration, on my instructions, emailed the appellant's agent stating:

> "You have <u>not</u> complied timeously with the Directions issued by the Tribunal on 14 November 2019.
>
> If you wish your submission to be considered by the Tribunal please lodge an Application for late admission in terms of the Rules with a supporting submission citing relevant law."

Nothing has been heard from the appellant or his agent since.

8. I have had due regard to Rule 2 of the Rules and decided simply to proceed on the basis of the available information.

The Law

9. The Tribunal has only limited powers to award costs. These are set out in Rule 10 as follows:

> "10.—(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;

(c) [*inapplicable to Standard cases which this was*]".

10. As can be seen, Rule 10 allows the Tribunal to make an order for costs under Section 29(4) of the TCEA. This is known as a "wasted costs" order. As Judge Mosedale observed in *Humphries v Revenue & Customs*[1]:

> "13. 'Wasted' costs have a very specific meaning under s 29(4) and they are limited to orders against the representative of the litigant to pay the whole or part of costs (s 29(5)) which were incurred:
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it unreasonable to expect that party to pay.
>
> 14. In other words, a wasted costs order is an order against a representative to pay the other party's costs because of the representative's own behaviour."

HMRC's arguments

11. HMRC summarised the appellant's history of non-compliance. I had also done so in the Directions that I issued on 21 June 2019 and in the substantive Decision. In summary:

(a) The original Directions released by the Tribunal on 18 July 2018 were very clear in their terms and had been accompanied by two pages of notes explaining them. That should have made everything abundantly clear to an unrepresented appellant. In this instance the appellant was represented by solicitors. There should have been compliance by the appellant with those Directions on various matters by 24 August, 21 September and 5 and 19 October 2018. There was none.

(b) On 30 January 2019, the Tribunal wrote to the appellant's representative stating: "… Judge Poole has instructed that the Appellant should be given a last opportunity to comply with the outstanding case management directions." It went on to state that if the appellant did not comply within 30 days then he may not be permitted to rely at the hearing on any documents or witness statements that had not been delivered. The appellant was also reminded that the Directions required the appellant to produce hearing bundles for the appeal hearing by no later than 27 March 2019.

(c) No witness statement has been delivered for the appellant at any juncture. That letter was obviously received since the representative complied with the Directions for lodging a list of documents. That list referred to a "To Whom It May Concern" document dated 16 December 2018. The best that can be said of that document is that there is a possibility that that might be stated to be a witness statement from a Mr Kelly. At paragraphs 10 and 11 of HMRC's Skeleton Argument, Mr Millington put the appellant on notice that Mr Kelly's statement was not accepted and "…Martin Kelly is required to attend for cross-examination on the contents of this document." Mr Kelly did not attend the hearing.

(d) The appellant did not comply with that Direction and on 21 May 2019, HMRC wrote to the Tribunal confirming that the hearing bundle had not been received. HMRC required the bundle as a matter of urgency. They had chased the appellant's representative on 3 April, 10 May and 21 May 2019 but there had been no response.

[1] [2019] UKFTT 88 (TC)

(e) No bundle was produced by the appellant so on 30 May 2019 HMRC produced the bundle and sent copies to the appellant. The appellant was reminded of the two deadlines for production of the Skeleton Arguments and the Joint Authorities Bundle.

(f) In terms of the original Directions the appellant's Skeleton Argument should have been lodged with the Tribunal and with HMRC by no later than 18 June 2019. As no Skeleton Argument had been lodged, the Tribunal administration contacted the appellant's representative's office on 19 June 2019 indicating that they required to hear from him as a matter of urgency. It was only then that it was lodged by email at 17:22.

(g) On 20 June 2019, the Skeleton Argument not having been forwarded to me, I issued the Directions, which were an Unless Order, to the Tribunal administration who then issued the Directions to parties. The Directions confirmed that unless the Skeleton Argument and Authorities Bundle were lodged timeously the appeal would be struck out. Both were served late but HMRC did not lodge any objection.

12. HMRC argued that in the light of the appellant's failure to attend the hearing with no explanation the appellant had acted unreasonably and costs should be awarded on either basis.

The appellant's arguments

13. The appellant responded promptly on 25 July 2019 arguing that the admitted failures in compliance had caused no prejudice to HMRC, that the appellant had attended but had simply been in the wrong part of the Court and that in any event any decision on costs should be deferred until after the application for set aside had been decided.

14. I observe that in the putative response, the appellant appears to argue that there was no requirement to serve his own witness statement since the transcript of the interview "…contained all information and details regarding the position of the Appellant, thereby acting as a witness statement on which the Appellant would rely."

15. The appellant argued that HMRC and their witnesses were required to attend the hearing whether or not the appellant attended in order to "….prove and adopt their statements as evidence in order to substantiate the defence of the matter."

Discussion

16. At the outset, for the avoidance of doubt, I refute completely the appellant's argument that HMRC acted unreasonably and disingenuously in obtaining an Unless Order for a document that had already been served (the Skeleton Argument). Quite apart from the fact that that assertion is irrelevant in relation to costs, it is entirely untrue. On 21 May 2019, HMRC wrote to the agent with a copy to the Tribunal stating that no bundle had been received and asking for compliance. The Tribunal administration subsequently chased the appellant on 19 June 2019 and sent the file to me. I drafted the Directions and it was entirely my choice, given the almost total lack of compliance, to make it an Unless Order.

17. I am bound by the decision in ***Tarafdar v HMRC***[2] where the Upper Tribunal observed that:

> "[18]…The scope of [unreasonable conduct] has been discussed in this Tribunal in *Catana* [201] UKUT 172 (TCC) where Judge Bishopp, at [14], described it as covering:
>
> > 'cases in which … either party has acted unreasonably in the course of proceedings, for example by persistently failing to comply with the rules and directions to the prejudice of the other side'…

[2] [2014] UKUT 362 (TCC)

> [20] Even if the tribunal is satisfied that a party has acted unreasonably in the terms of rule 10 , the tribunal nevertheless has a discretion whether or not to make a costs order, or as regards the extent of a costs order. Such a discretion, like any other discretion conferred on the tribunal, must be exercised judicially."

Wasted costs

18. I refuse the application for wasted costs. I made it clear at paragraph 14 in the set aside decision that "I am far from persuaded that any fault lies at the door of Mr Williamson..." and I went on to explain that the failure to attend was the fault of the appellant and that "…It was his responsibility notwithstanding his attempt to blame Counsel.". That remains my position and, on the evidence available to me, there is no indication that there is any basis for an award of wasted costs based on that allegation from the appellant.

19. I do not know the reasons for the failures in compliance but there is no evidence that the fault for those lie with the appellant's lawyer. It may simply be that the appellant failed to give instructions or pay legal fees. I simply do not know. Again there is no basis for an award of wasted costs.

Did the appellant act unreasonably in bringing or conducting the proceedings?

20. Clearly the appellant had every right to lodge an appeal with the Tribunal.

21. The conduct of the proceedings and the significant failures in compliance were undoubtedly lamentable (and in that context, I do not accept that the document from Mr Kelly was a witness statement so there was also no compliance in that regard).

22. Most readers of this Decision will be conversant with the well-known criteria for assessing whether conduct is unreasonable set out by the Upper Tribunal in *Distinctive Care Ltd v HMRC*[3] at paragraphs 44 to 46 so I do not intend to repeat them here at length. It suffices to say that there is no single test but it is be considered objectively and should not be applied with the benefit of hindsight.

23. As I observe at paragraph 6 of the substantive decision:

> "Mr Millington confirmed that he would have taken no action in relation to the late lodging of the Skeleton Argument and the Authorities. The problem was the non-attendance at the hearing with no explanation. The witness, Miss Beattie, had travelled from Scotland and Counsel had travelled from England."

24. That was indeed the problem and it was precisely because the appellant did not attend the hearing that I went on to state at paragraph 13 that "In summary, Mr Millington argued that the appellant had 'wasted everyone's time'. We agree. He reserved his position in relation to a possible application for wasted costs."

25. Although I have no doubt that, for example, there was extra cost incurred in chasing the appellant's agent and in preparing the bundle, in the case of the former that is a hazard of litigation and in regard to the latter that obligation was assumed voluntarily.

26. HMRC could have sought an Unless Order at any stage. They could have applied for strike out. I observe in the substantive Decision that at a late stage the appellant did instruct Counsel and Counsel did lodge a Skeleton Argument and appear. There was engagement latterly.

27. In all these circumstances I am not minded to make any award of costs in relation to the conduct of the proceedings prior to the hearing.

[3] [2018] UKUT 155 (TCC)

28. There is no doubt that it was the appellant's failure to attend the hearing that triggered the costs application. HMRC argue that in *NM Consultants (Logistics) Ltd v HMRC*[4] the Tribunal allowed an application for costs in terms of Rule 10(1)(b) of the Rules where the appellant failed to attend the hearing. The appellant did fail to attend but the facts were very different in that that appellant had applied to reinstate an appeal but wholly failed to provide any substantial grounds for the application. It is of no application in this instance.

29. Although it was dealing with the higher threshold of wholly unreasonable conduct, I agree with Sir Stephen Oliver in *Bird v HMRC*[5] that unexplained absence *per se* does not amount to unreasonable conduct. His reasoning was that "The matter still had to come to the Tribunal to enable the facts and the legal arguments to be presented."

30. However, he went on to point out that no significant additional costs had been incurred by HMRC due to the unexpected absence of the appellants and that another factor was that the appeal had been partially successful. Of course this appeal certainly was not successful and as I pointed out in the set aside Decision at paragraph 35 "Put at its highest the appellant's case is not strong."

31. The difference in this instance is that I find that, had HMRC been told that there was not only no challenge to the evidence about the interview but indeed that the appellant relied upon it and viewed it as being tantamount to his witness statement, there could have been no dispute about the primary facts. Accordingly it is possible that the cost of instructing Counsel rather than relying on a Presenting Officer might have been awarded with a significant saving in costs.

32. However, since the appellant was known to have instructed Counsel and that Counsel was expected to attend and, of course did so, on the balance of probability HMRC would still have instructed Counsel and incurred those costs. I am not bound by but I agree with the quotation from Sir Steven Oliver. The hearing would have proceeded even if HMRC had known that the appellant was not going to attend. Even, *in absentia,* particularly when represented the appellant had the right to challenge the reasonableness of the discretionary decision not to restore the seized goods.

Decisions

33. Whilst I have no sympathy with the appellant, and I do find that his failure to appear wasted everyone's time, nevertheless looking at all of the relevant circumstances I find that:

(a) Although there were repeated failures in compliance with Directions, nevertheless the employment of Counsel, production of a Skeleton Argument and Authorities and arranging Counsel's attendance at the hearing mean that his conduct of the proceedings prior to his absence from the hearing was not unreasonable, and

(b) Given that he was represented at the hearing and the Skeleton Argument was considered in full, for the reasons given, his non-attendance, whilst reprehensible was not unreasonable conduct.

34. The application is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. This document contains full findings of fact and reasons for the decision. 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

[4] [2018] UKFTT 0144 (TC)
[5] (2008) SpC 720

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 SCOTT
TRIBUNAL JUDGE

Release date: 27 January 2020