



[2022] UKFTT 00050 (TC)

TC 08402

*Procedure - application to set aside strike out -
continuing non-compliance with direction - refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/09447

**DECISION
ON AN APPLICATION FOR REINSTATEMENT
IN THE CASE OF**

BRITISH INSTITUTE OF TECHNOLOGY LIMITED Appellant

-and-

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

Application dealt with on the papers in chambers on 9 February 2022, without a hearing under Rule 29(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 having first read three separate electronic bundles of papers containing 116 pages, 112 pages and 78 pages.

1. This is an application by the British Institute of Technology Limited (the Company) to reinstate an appeal originally dated 18 December 2019.

BACKGROUND

2. The Company lodged an appeal to this Tribunal on 18 December 2019 in respect of a decision by HMRC to change a claimed repayment of VAT for the 06/14 period of £580,143.69 to a payment liability of £6,856.31. HMRC's Review Conclusion Letter was dated 28 November 2019. The appeal to this Tribunal was therefore within time but was subject to the Company either paying the VAT liability of £6,856.31 or making a successful hardship application to HMRC.

3. The Tribunal wrote to Professor Mohammad Farmer a director of the Company on 14 January 2020 to advise that the appeal may not proceed unless the tax in dispute was paid to or deposited with HMRC or a hardship application was made within 14 days. The Tribunal followed up this letter with an email addressed to Professor Farmer dated 3 February 2020 advising that HMRC had not yet received a hardship application.

4. On 24 February 2020 Judge Jane Bayley made an Unless Order (the Unless Order) stating:

(1) **UNLESS** the Appellant no later than 13 March 2020 confirms in writing to the Tribunal an intention to proceed with the appeal then these proceedings **WILL** be **STRUCK OUT** without further reference to the parties; and

(2) **UNLESS** the Appellant no later than the same date and time complies with the Directions issued on 14 January 2020 to confirm in writing to the Tribunal that it has

made a hardship application to the respondents so the appeal can proceed without payment of tax, then these proceedings **MAY** be **STRUCK OUT** without further reference to the parties.

5. The Unless Order dated 24 February 2020 was sent by this Tribunal by email to Professor Farmer together with a covering letter of the same date.

6. HMRC sent an email to this Tribunal and to Professor Farmer on 16 March 2020 attaching a copy of the Unless Order and advising that HMRC had not received a hardship application. Professor Farmer replied by email to HMRC and to this Tribunal on the same day in which he stated:

“This is the first time I am seeing the letter. I have made our case to the tribunal with all the information.

I do not understand how a decision can be taken without our involvement.

I request that our appeal is heard on the documents we have provided.”

7. By email dated 17 March 2020 this Tribunal informed Professor Farmer that the file was now with a judge. Once a response was received the Tribunal would write to him.

8. Judge Kevin Poole issued a Direction on 23 June 2020 (the Directions) in which he stated that as the Company had not confirmed to the Tribunal by 5pm on 13 March 2020 its intention to continue with the appeal, Direction (1) of the Unless Order had taken effect and the appeal had been struck out. Judge Poole continued by stating that the Tribunal had a discretion to reinstate the appeal but would not consider doing so unless the Company complied with the Unless Order promptly. Judge Poole made it clear that the Company did not have to pay the disputed repayment amount of £580,143.69 but did have to pay or deposit £6,856.31 with HMRC or obtain a certificate that doing so would cause hardship.

9. The Directions were similar to those contained in the Unless Order but required the Company to comply within 14 days. These Directions were sent to Professor Farmer together with a covering letter by email on 23 June 2020.

10. The Tribunal wrote to Professor Farmer on 2 November 2020 as follows:

“As the Tribunal has heard nothing from you in response to its letter and Directions dated 23 June 2020 (copy attached), Judge Poole has instructed that the Tribunal should now close its file and destroy the papers as there has been no indication of any application to reinstate the appeal which was struck out in March of this year.”

11. The letter was sent by email on 2 November 2020.

12. Professor Farmer by email dated 10 September 2021 replied to an email from the Tribunal dated 17 March 2020 stating:

“I have not received any communication in regards to the judge’s decision in regards to opening the case. We informed you that we did not receive the correspondence in regards to the appeal that was sent.

You kindly sent this to us on 17/03/2020 1:16 and we sent a request to the judge that we should be given the right to appeal. I have not received any response to this.

I would be grateful if you can update us in this matter.”

13. By a further email dated 16 September 2021 sent to this Tribunal Professor Farmer asked for the appeal to be reinstated.

14. By letter dated 13 October 2021 HMRC objected to the appeal being reinstated. After referring to the Unless Order and the Directions HMRC stated their objections as follows:

“The appeal has been struck out 19 months ago and this is the Appellant’s second attempt at reinstatement and in the intervening period he still has not complied with the directions issued on 24 February 2020.

In *Viking Enterprises Ltd* Judge Sinfield wrote

“30. The application of *Martland* to an application to reinstate an appeal was considered by the Upper Tribunal in *Dominic Chappell v the Pensions Regulator* [2019] UKUT 209 (TCC). In that case, the Upper Tribunal held that a Tribunal should not take the merits of an appellant’s case into account when considering an application for reinstatement following striking out for failure to comply with an unless order, unless the appellant has an unanswerable case (see [86] and [93]). The Upper Tribunal also held at [95] that, in assessing the seriousness of the breach of an unless order, the Tribunal should consider the underlying breach and the failure to carry out the obligation which was imposed by the original direction or rule and extended by the unless order when assessing the seriousness and significance of that breach. “

15. By email dated 22 October 2021 Birketts LLP, on behalf of the Company, requested 28 days to review the documents, take instructions and submit a response. By a further email dated 8 November Birketts LLP requested 28 days from the date the Tribunal granted permission. This was followed by a third email dated 22 November requesting a response as a matter of urgency. The Tribunal wrote to Professor Farmer on 7 December 2021 advising that Judge Cannon directed the Company to provide a written response to HMRC’s objection on or before 31 December 2021. The response was to set out all facts and matters on which the Company relied in support of its application, as well as dealing with the specific points raised by HMRC.

16. By email dated 31 December 2021 Professor Farmer sent to the Tribunal various documents including witness statements dated 29 December 2021 from himself and 30 December 2021 from the Company’s accountant Mr Mohammed Fattah.

17. In these witness statements the Company claimed that it had not received the Unless Order and the Directions. The statements also referred to various telephone conversations which Professor Farmer and Mr Fattah had made to HMRC and the Tribunal.

18. HMRC responded by letter dated 6 January 2022 stating that their only reaction was that the Company had still not complied with direction (2) of the Directions nor had the Company addressed this point in their ‘Case Summary’.

19. By letter dated 15 January 2022 Professor Farmer stated that the Company wished to continue with the appeal and was keen to pay/deposit £6,856.31 or make a hardship application. When Professor Farmer checked the Company’s HMRC online portal it showed “No payments dues right now”. When he spoke with HMRC by telephone on 12 January 2022 he was informed that there was an outstanding amount of £200.00 which was immediately paid. Professor Farmer attached an “HMRC Payment Confirmation” dated 12 January 2022 showing a payment of £200.00.

RELEVANT LEGISLATION

20. Rule 2 of the First-tier (Tax Chamber) Rules 2009 (the FTT Rules) provides:

“(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it-
- (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.”

21. Rule 8 of the FTT Rules relates to the striking out of a party’s case and provides as follows:

- “(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
- (2)...
- (3) The Tribunal may strike out the whole or a part of the proceedings if -
- (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
- (4) ...
- (5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.”

CASE LAW

22. Judge Sinfield in *Viking Enterprises Limited v The Commissioners for Her Majesty’s Revenue & Customs* TC/2017/04027 at paragraphs 27 and 28 stated:

“27. In *Martland v HMRC* [2018] UKUT 178 (TCC), the Upper Tribunal provided guidance on the correct approach to applications for permission to appeal out of time. The Upper Tribunal’s guidance is summarised at [44] of *Martland*:

“When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926]:

- (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT ‘is unlikely to need to spend much time on the second and third stages’ - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
- (2) The reason (or reasons) why the default occurred should be established.
- (3) The FTT can then move onto its evaluation of ‘all the circumstances of the case’. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.”

28. The Upper Tribunal observed at [45] that the balancing exercise in stage three of the *Denton v TH White Ltd* process should take into account the particular importance

of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.”

DISCUSSION

23. Professor Farmer and Mr Fattah maintain that they did not receive the Unless Order or the Directions. However, this statement is contradicted by Professor Farmer’s email dated 16 March 2020 referred to at paragraph 6 above where he states that this was “the first time I am seeing the letter.” His email was in response to an email of the same dated from HMRC which attached a copy of the Unless Order. He therefore was on notice on 16 March 2020 that he should have responded by 13 March 2020 but from the papers which I have seen he took no action apart from requesting that the appeal was “heard on the documents we have provided”. While this request could be taken to comply with Direction (1) of the Unless Order, albeit three days late, Professor Farmer did not comply with Direction (2) and has still not complied with it.

24. From the correspondence which I have seen in the three electronic bundles all emails sent to Professor Farmer by this Tribunal were sent to his correct email address which is the address he quoted on the original Notice of appeal dated 18 December 2019 and which he has used to send emails to both this Tribunal and HMRC.

25. When Professor Farmer emailed this Tribunal on 10 September 2021, he was replying to the email from this Tribunal dated 17 March 2020 referred to at paragraph 7 above. I have seen no correspondence from Professor Farmer of any attempt to get in touch with the Tribunal by email between 17 March 2020 and 10 September 2021. His witness statement claims that he telephoned the Tribunal in March 2020, April 2020, January 2021, March 2021, August 2021 and 16 September 2021 though only the last date is an actual date. While I am prepared to accept that Professor Farmer made these telephone calls there are significant gaps between April 2020 and January 2021 and between March 2021 and August 2021. Considering the amount of the VAT repayment which the Company would have received if the appeal was successful, this Tribunal considers Professor Farmer should have been more active in following up his enquiries especially as the period March 2020 to September 2021 covers a period when many people were working from home due to the Covid-19 pandemic. I have seen no evidence of any email from Professor Farmer seeking an update during this period.

26. HMRC’s objection letter dated 13 October 2021 makes it clear that in order to have the appeal reinstated the Company needed either to pay the amount in dispute or make a hardship application. Although Professor Farmer spoke with HMRC to ascertain the amount which the Company should pay and was informed £200.00 the Unless Order and the Directions made it quite clear that the Company had to pay or deposit £6,856.31 or make a hardship application.

27. Professor Farmer knew about the Unless Order by 16 March 2020 which was three days after the time limit had expired. While he requested the appeal to be heard he took no action with regard to the required payment of VAT or hardship application. While the request to proceed was only three days late the failure to deal with the VAT payment or hardship application was both serious and significant. Failure to comply with Direction (2) of the Unless Order is clearly a serious matter and significant in that it effectively prevents there being any substantive hearing as the legislation requires either the disputed VAT to be paid or HMRC to agree to a hardship application before the hearing of the appeal can proceed..

28. Dealing with the second reason in *Denton* no reason has been provided by Professor Farmer for his failure to deal with the payment of the disputed VAT or to make a hardship application yet he knew of this requirement by 16 March 2020 and according to the papers before this Tribunal the Company has only paid £200.00 towards the VAT liability.

29. In accordance with Judge Sinfield's statement at paragraph 30 of *Viking Enterprises Ltd* quoted at paragraph 14 above I have not considered the merits of the appeal as apart from the Review Conclusion Letter dated 28 November 2019 HMRC has not put forward any arguments as to why the appeal should be dismissed.

DECISION

30. Taking into account all the circumstances of this application I have decided that the application to reinstate the appeal should be dismissed. I am unable to accept that Professor Farmer did not receive any of the following emails: 14 January 2020, 3 February 2020, 24 February 2020, 23 June 2020 or 2 November 2020. All these emails were sent to the correct email address. Professor Farmer did receive a copy of the Unless Order attached to an email dated 16 March 2020 from HMRC yet, apart from asking for the appeal to be heard on the documents provided, appears to have taken no steps to deal with the payment of the VAT liability of £6,856.31 or to make a hardship application.

31. As the Company has still not complied with the Unless Order the application is dismissed.

32. 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.

ALASTAIR J RANKIN MBE
TRIBUNAL JUDGE
Release date: 11/02/2022