



Neutral Citation: [2024] UKFTT 00279 (TC)

Case Number: TC09125

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Decided on the papers

Appeal reference: TC/2022/12110

PROCEDURE – marketed avoidance scheme – late appeal to Tribunal against closure notice without grounds of appeal – HMRC objection to lateness of appeal – video hearing listed to decide lateness – lack of compliance by Appellant – Appellant automatically struck out for failure to comply with Unless Order – application for reinstatement – whether appeal should be reinstated

Judgment date: 27 March 2024

Decided by:

TRIBUNAL JUDGE BAILEY

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

JULIAN EDWARDS

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

DECISION

INTRODUCTION

1. This decision is in respect of the Appellant’s application for reinstatement of an appeal that was struck out automatically due to the Appellant’s for failure to comply with an Unless

Order. In this decision , I set out the background to this application, address the legal test to be applied, and then apply that legal test to the facts of this application to reach a decision about whether this appeal should be reinstated.

BACKGROUND

2. The appeal that the Appellant wishes to have reinstated was received by the Tribunal on 1 June 2022. Although the Appellant's Notice of Appeal stated that the dispute was about HMRC's decision that he owed £500, the review decision enclosed had upheld the conclusions in a closure notice that a capital loss should be removed following participation in a marketed tax avoidance scheme. The closure notice brought a further £500,000 into charge.

3. That review decision was issued on 21 December 2021. Therefore, the appeal was received by the Tribunal approximately four months and eleven days late. The Appellant's reason for being late was that he was CEO of an insurance broker and he was engaged in keeping the business continuing after an underwriter had been placed into administration.

4. No grounds of appeal were provided by the Appellant with his appeal. This was said to be on the basis that neither the Appellant nor his agent had received a letter dated 16 July 2021 from HMRC and so they could not "determine the validity" of HMRC's arguments.

5. The Notice of Appeal form was submitted by the Appellant's agent, Kreston Reeves LLP. The form was signed by the Appellant to authorise the Tribunal to communicate with Kreston Reeves LLP in respect of this appeal.

6. The appeal was notified to HMRC on 5 August 2022. On 3 October 2022, HMRC objected to the lateness of the appeal. With regard to the delay, HMRC noted that the Appellant had been able to deal with other aspects of his tax affairs during the period of delay. With regard to the absence of grounds, HMRC noted that the 16 July 2021 letter that the Appellant said had not been received was in fact the letter both setting out HMRC's view of the matter and offering a review, and that Kreston Reeves LLP had responded to that letter on 16 August 2021, to seek a review. HMRC stated that, if the Appellant was granted permission to make a late appeal, they would seek further and better particulars of his grounds of appeal.

7. On 1 December 2022, the Tribunal notified the parties that the contested application for permission to make a late appeal would be heard as a video hearing unless either party objected. Both parties were required to complete and return a Video Hearing Attendance Form and directions were issued regarding exchange of documents and composition of a hearing bundle.

8. On 20 December 2022, HMC uploaded a 928 page bundle of documents to the Tribunal's Documents Upload Centre. This was uploaded to Kreston Reeves LLP via their secure account on 21 December 2022.

9. On 27 March 2023, the parties were notified that the hearing would take place on 13 April 2023. The Tribunal again asked Kreston Reeves LLP to complete and return the Video Hearing Attendance Form.

10. On 28 March 2023, Kreston Reeves LLP applied for postponement of this hearing on the basis that the Appellant had appointed a specialist to assist him with the Tribunal but that person was away until 17 April 2023, and they had not expected the hearing to be so soon. HMRC did not object to this application.

11. On 30 March 2023, the Tribunal cancelled the hearing listed for 13 April 2023, and asked both parties to provide details of any dates to avoid in the period 1 May to 30

September 2023. HMRC responded on 6 April 2023; there was no response by or on behalf of the Appellant.

12. On 22 May 2023, the parties were notified that the hearing was re-listed for 16 August 2023. On the same date the Tribunal also wrote again to Kreston Reeves LLP, requiring the Appellant's completed Video Hearing Attendance Form.

13. On 1 June 2023, the Tribunal wrote again to Kreston Reeves LLP, again requiring the Appellant's completed Video Hearing Attendance Form. On 8 June 2023, Kreston Reeves LLP emailed the Tribunal apologising for the lack of response and stating they:

... currently do not have any instructions from our client as to who will attend the hearing... we will continue to attempt to contact our client and revert back at the earliest opportunity.

14. There was no further response by or on behalf of the Appellant.

15. On 7 July 2023, Judge Dean issued an Unless Order to the Appellant. The Order provided that unless the Appellant confirmed in writing that he wished to proceed with his appeal, then the proceedings would be struck out. The deadline for the Appellant to respond was 21 July 2023. This Unless Order was emailed to Kreston Reeves LLP, and also posted to the Appellant directly at the address given on his Notice of Appeal form. The covering letter to the Appellant stated:

You have not complied with the letter the Tribunal issued on 22 May 2023, a copy of which is enclosed, nor have you complied to the Tribunals letter dated 01 June 2023.

Do you wish to continue with your appeal? If the Tribunal hears nothing from you within 14 days from the date of this letter, your appeal will be STRUCK OUT. Please find enclosed Direction.

If you do wish to continue your appeal, please immediately write and tell the Tribunal this. You should also:

1. Reply to the Tribunals letter dated 01 June 2023 a copy of which is enclosed.

16. No response was received from either the Appellant or Kreston Reeves LLP.

17. On 1 August 2023, the Tribunal confirmed to the Appellant and to Kreston Reeves LLP that this appeal had been struck out. In the letter confirming this strike out, the Tribunal informed the Appellant and his agent that an application for reinstatement could be made within 28 days of that letter, i.e., 28 days from 1 August 2023.

18. On 29 August 2023, the Appellant emailed the Tribunal as follows:

Thank you for taking the time to read my application to reinstate and I sincerely hope you show leniency and reinstate based on the following reasons:

1. I have not received any details or a pack in relation to this hearing. I still do not have any details of what this hearing is about.
2. I have been under a huge amount of personal pressure and stress:
 - i. My business' which have been unable to recover due to a terminal downturn in trade, placing the business' into administration earlier this month.
 - ii. Separating from my long term partner and fiancée.

iii. I am a single father, my youngest daughter lives with me 85% of the time and I am her soul (sic) provider financially.

3. I believed my accountants Qubic (sic) have been dealing with this and I have not heard from them in this respect. They were working for my business and are no longer contracted to me re my tax affairs.

4. My mental health has seriously suffered I have been working on looking after my mental health which is not great due to the reasons above. I am only recently, the past 7 days or so making really good progress on my mental health, however, I am having to manage this very carefully.

If you do grant me leniency I will fully comply with timeline and attendance personally, not through my accountants.

19. On 13 September 2023, HMRC were asked for their representation on the Appellant's application for reinstatement. On 28 September 2023, HMRC opposed the reinstatement, for reasons which are discussed in more detail below. HMRC also noted that on 3 August 2023, the Appellant had telephoned HMRC and had not made any reference to any of the circumstances set out in his email to the Tribunal but instead had said that he had not been able to deal with matters because he had broken his back.

20. On 23 October 2023, the Appellant emailed HMRC, copying in the Tribunal, and asked for HMRC for a call back as he was struggling with his mental health. The HMRC litigator responded on 25 October 2023, agreeing to a telephone call and asking the Appellant to provide details of when he would be available. The litigator also suggested that the Appellant re-engage Kreston Reeves LLP or seek new representation, and signposted services which would assist the Appellant with his mental health.

21. On 2 November 2023, the HMRC litigator noted that the Appellant had not responded to her email, and asked again when he would be available. The Appellant replied and a telephone call was arranged for 6 November 2023. Following that telephone call, the Appellant emailed the Tribunal stating he understood that he needed to have approval of his reinstatement application, then approval of his late appeal application, and then he would provide grounds of appeal to HMRC. The Appellant stated that he had not seen a trial bundle.

22. HMRC also emailed the Appellant, copying in the Tribunal, making clear that their position on reinstatement remained unchanged, and suggesting that the Appellant provide medical evidence to support his application. HMRC also noted that the late appeal bundle had been sent to the Appellant's previous agent, and explained how the Appellant could apply for a Secure Data Exchange Service account if he was not able to contact Kreston Reeves LLP to obtain a copy of the bundle. HMRC also asked the Appellant when his grounds of appeal would be provided.

23. The Tribunal file was referred back to Judge Dean who directed that the reinstatement application should be heard on the papers, and required HMRC to provide a further copy of the document bundle. On 14 November 2023, HMRC uploaded a further copy of the bundle relating to the Appellant's application to make a late appeal to the Secure Document Centre.

24. On 28 November 2023, HMRC emailed the Appellant to say that they had not heard further from him and, in particular, he:

- had not provided any medical evidence to support his application for reinstatement,
- had not provided a date for when grounds of appeal would be provided, and

- had not notified HMRC that a secure account had been created so he could receive a copy of the late appeal application bundle.

25. HMRC reminded the Appellant of his assurance that, if his appeal was reinstated, he would comply with the timeline. HMRC also reminded the Appellant that they still opposed the reinstatement.

26. On 14 December 2023, HMRC emailed the Tribunal asking that the reinstatement application be decided on the papers.

27. On 15 January 2024, the appeal was referred to me and I dictated a letter to be sent to both parties. I noted the background to this appeal and pointed out to the parties that this appeal should not have been accepted by the Tribunal without any grounds of appeal, and that the appeal would not be able to proceed without grounds of appeal. I also issued directions to progress the reinstatement application. Those directions required the Appellant to provide the Tribunal with:

- any evidence, including any medical evidence, that he wished to have taken into account in support of his application for reinstatement, and

- his grounds of appeal against the closure notice issued by HMRC.

28. The parties were informed that once the deadline for the Appellant to provide that information had passed, then the reinstatement application would be decided on the papers.

29. Although a further two months have passed since the expiry of that deadline, nothing has been received from the Appellant. Therefore, I now proceed to decide the Appellant's application for reinstatement, based on the material before the Tribunal.

DECISION

30. The appropriate way for the Tribunal to approach an application to reinstate an appeal that has been struck out automatically for failure to comply with an Unless Order is set out in *Chappell v The Pension Regulator* [2019] UKUT 209 (TCC). In *Chappell*, the Upper Tribunal held that it was appropriate to follow the three stage approach set out in *Martland v HMRC* [2018] UKUT 178 (TCC) but with relevant revisions. This approach has recently been re-approved by the Upper Tribunal in *Breen v HMRC* [2023] UKUT 00252 (TCC).

31. I remind myself that the three stage approach of *Martland* is as follows:

(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.

45. That balancing exercise 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. By approaching matters in this way, it can readily be seen that, to the extent they

are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice - there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal.

32. From paragraph 86 of *Chappell* onwards, the Upper Tribunal considered whether it was appropriate in a reinstatement application for the Tribunal to take into account the underlying merits of the appeal which the applicant sought to have reinstated. Judge Timothy Herrington stated:

86. In my view when considering a reinstatement application which is made following the making of an unless order, the Upper Tribunal should, consistently with what was said by the Supreme Court in *Global Torch*, generally take no account of the strength of the applicant's case. It is helpful to set out in more detail what Lord Neuberger said at [29] of the judgment in that case:

In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject of the decisions of Vos, Norris and Mann JJ in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment....

33. As the Upper Tribunal then explained, with further reference to *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Limited* [2014] UKSC 64 ("*Global Torch*"), the general principle is that the merits of a party's case are not taken into account when a tribunal or court makes a case management decision. The exception, noted by Lord Neuberger, is where an applicant's case is so weak that the other party would succeed in summary judgment. The Upper Tribunal considered the analogous test in the Upper Tribunal was an application to strike out on the basis that there was no prospect of the applicant's case succeeding. In *Chappell*, the Upper Tribunal concluded:

94. It follows from what I have said that I should not take account of the merits of the case to the extent laid down by Proudman J in *Pierhead Purchasing*. In that context, I observe that *Global Torch* was decided after *Pierhead Purchasing* and as it is a judgment of the Supreme Court I am of course bound to follow it, again applying the principle that the tribunals should adopt by analogy the approach taken in the courts to matters of this kind.

34. The Upper Tribunal then concluded:

99. In the light of the analysis set out above, in applying the overriding objective when considering the reinstatement application, I will follow the three stage approach set out at [44] of *Martland* as quoted above, adapted so as to take account of the fact that this is a reinstatement application rather than an application to make a late appeal. In that regard, at stage one, I will consider the seriousness and significance of the breach of the Unless Order,

taking account also of the previous breaches of the Rules that led to the making of the Unless Order.

100. In conducting the balancing exercise at the third stage of the process, I will give particular importance to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

101. I shall only consider the merits of Mr Chappell's reference to the extent that it appears that TPR's case has any feature such as those that I have described at [93] above.

35. Therefore, in considering the application for reinstatement that it before me, I should apply the three stage approach set out in *Martland*, but I should only take into account the merits of the Appellant's appeal if I conclude that those merits are so weak that HMRC would succeed in striking out the appeal.

36. Therefore, the first stage is for me to consider the seriousness and significance of the breaches by the Appellant. I take into account all of the breaches by the Appellant prior to the striking out, not merely the final breach of the Unless Order.

37. As can be seen by the background set out above, the Appellant has consistently failed to comply with the Tribunal Directions. The Tribunal was required to write to the Appellant four times for the return and completion of the Video Hearing Attendance Form, and still no form was returned. Although the Appellant sought the postponement of the first hearing because the specialist he had appointed was not available, the Appellant did not subsequently provide the Tribunal with dates to avoid to ensure that the listing of the second hearing would be on date that was convenient to him and his appointed specialist and that he would not need to ask for a further postponement. The Unless Order required the Appellant to reply stating that he wished to proceed but, even though a copy of the Order was sent directly to him, the Appellant still did not comply.

38. Although not all of those breaches led to the making of the Unless Order, I consider it is appropriate that they all be taken into account as those earlier breaches, taken cumulatively, led to the making of the Unless Order. The Appellant's history with regard to these proceedings is that he has repeatedly ignored Tribunal directions and he has repeatedly failed to comply or engage with the Tribunal.

39. The Tribunal's approach when listing a video hearing of an application for permission to make a late appeal is to keep matters as simple as possible. In that context and viewed against the very limited obligations imposed, I view the Appellant's breaches to be serious and – given that they prevented the Tribunal from having the information required to ensure that the late appeal application hearing could proceed smoothly – those breaches are also significant.

40. The second stage is to consider the reasons for the breaches. The Appellant has explained that he:

- has not received sufficient details to know what the appeal is about,
- had heavy work responsibilities and is a single parent,
- believed his accountants were dealing with matters for him, and
- is suffering from poor mental health.

41. As HMRC's have noted in their opposition to the reinstatement, the Appellant – via his appointed agent – has received all correspondence and directions sent by the Tribunal, and the bundle compiled by HMRC for use at the hearing of his application for permission to

make a late appeal (the hearing that would have taken place had this appeal not been struck out). Therefore, I do not consider that the Appellant's first reason, his personal lack of knowledge, can provide a good explanation for the breaches that have taken place. I agree with HMRC that all relevant information was provided to the Appellant's authorised agent. If the Appellant does lack knowledge about his own appeal, that can only be as a result of his failure to fully engage with either these proceedings or his representatives.

42. With regard to the Appellant's second reason, I accept that the Appellant's work and personal life are both busy, as he states. However, that is also the case for many other appellants before the Tribunal, the majority of whom do not have the benefit of professional representation. Appellants before this Tribunal are expected to balance other responsibilities with the obligation to progress their appeal. In this case the obligations imposed upon the Appellant by the Tribunal were far from onerous, they simply required that some attention be given to the proceedings. The Appellant had appointed an accountant and a specialist to assist him. It should have been a simple matter for him to give instructions to complete the Video Hearing Attendance Form, and to confirm that he wished to continue. I do not accept that the second reason provides a good explanation for the breaches that have taken place.

43. The Appellant's third reason is that he believed his accountants were dealing with matters for him. It is odd that the Appellant should name an accountant who is not the accountant he authorised the Tribunal and HMRC to correspond with in respect of these proceedings and his appeal to HMRC; it may possibly be that when the Appellant had referred to appointing a specialist, that he was referring to Qubic. Irrespective of that oddity, I do not consider that the Appellant's reliance on an agent gives the Appellant a good reason for failing to comply with the Tribunal Directions. The higher courts have previously considered the position where a party argues that a representative is to blame. In *Hytex Information Systems v Coventry City Council* [1997] 1 WLR 666, Ward LJ, giving the leading judgment, said at page 1675:

Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent...

44. At paragraph 49 of *HMRC v Katib* [2019] UKUT 0189 (TCC), the Upper Tribunal, commenting on this principle, stated:

... in most cases, a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers. It will often be impossible to give the requisite full account without waiving privilege.

45. There has been no reason advanced in this application as to any special reason or circumstance which would make it appropriate to distinguish between the Appellant and his agents in this case. No correspondence has been disclosed to suggest that the Appellant was chasing his agents or that they were ignoring his instructions. The only relevant document available to the Tribunal seems to suggest that Kreston Reeves LLP were having difficulties in making contact with the Appellant, rather than the other way around. In addition, the Unless Order in this appeal was sent to the Appellant directly so he was aware at that stage, if not before, that immediate action was required of him. However, he still failed to comply.

Therefore, for both of these reasons I do not accept that the Appellant's third reason provides a good explanation for his breaches.

46. Finally, I consider the Appellant's fourth reason of poor health. The Appellant did not respond to HMRC's invitation to provide medical evidence to support this ground, or to the Tribunal's direction to provide any evidence he relied upon in support of his application for reinstatement. As Judge Mosedale explained in *Banerjee v HMRC* [2015] UKFTT 0085 (TC), medical evidence is required due to the difficulties for a non-medically trained person in appreciating the severity of his or her own illness and how this affects his or her capacity. Without medical evidence explaining the state of Appellant's health in mid-2023, it is difficult for me to assess to what extent the Appellant's health may have prevented him from giving instructions to his agent or the specialist, or from responding directly to the Tribunal. In the absence of medical evidence, I am not persuaded that the Appellant was so unwell that poor health provides a good explanation for the breaches that have taken place.

47. I bear in mind that throughout these proceedings the Appellant has been represented by an accountant. For (at least) part of the time, it seems, the Appellant also had the benefit of an appointed specialist to assist him (whether that is Qubic or otherwise). I have concluded that the Appellant's application for reinstatement, unsupported by evidence, does not adequately explain either why he was not able to notify the Tribunal that he wished to proceed with his appeal, or why he was unable to complete a form providing the details of the people who would attend a hearing on his behalf.

48. The third stage is the balancing exercise. However, before I can weigh the various factors, I need first to consider whether the Appellant's case is so weak that HMRC would succeed in an application to strike it out. I have concluded that this is the case here. I reach this conclusion because, as matters currently stand, the Appellant has no grounds of appeal. When, on 15 January 2024, I directed the Appellant to provide his grounds of appeal, the Appellant did not respond. Therefore, even if this appeal was to be reinstated, it could not proceed. Without grounds, this appeal is effectively hopeless.

49. Having reached that conclusion, I can conduct the balancing exercise.

50. In conducting this exercise, I bear in mind the over-riding objective to deal with matters fairly and justly. With that objective in mind, I start by considering the prejudice each side would suffer as a consequence of my decision. Even though the amount at stake for the Appellant is £500,000, I consider that the Appellant would suffer very little prejudice if his appeal was not reinstated because an appeal against a closure notice without any grounds of appeal is exceptionally unlikely to succeed. On the other hand, HMRC would suffer prejudice if they were required to divert resources to defend this appeal. Other taxpayers and tribunal litigants would also suffer prejudice through the time and resources of HMRC and the Tribunal being diverted away from their own disputes in favour of this appeal. Reinstatement would cause additional delay.

51. I am reminded by *Martland* and *Chappell* that I should give particular importance to the need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules, practice directions and orders. In this regard, I consider it is relevant to consider the further breach that has occurred since the reinstatement application was made as this indicates the Appellant's likely approach to compliance if this appeal was to be reinstated. Despite asserting in his reinstatement application that he would comply timeously if his appeal was reinstated, the Appellant did not respond at all to the Tribunal directions of 15 January 2024. I cannot rule out further non-compliance by the Appellant if this appeal is reinstated.

52. Weighing all of these matters together I have concluded that this appeal should not be reinstated. The Appellant has not adequately explained his breaches, the appeal has extremely limited chances of success and the very limited prejudice that the Appellant will suffer from the appeal not being reinstated is far outweighed by the prejudice that HMRC and other tribunal users would suffer if the appeal was to be reinstated.

CONCLUSION

53. The Appellant's application for reinstatement is refused. This appeal remains struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. 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 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.

**JANE BAILEY
TRIBUNAL JUDGE**

Release date: 27th MARCH 2024