

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case Nos. CH/2839/2016, CH/2840/2016,
CH/2841/2016, CH/2842/2016

Before E A L BANO

Decision: My decision is that the decisions of the tribunal made on 8 June 2016 striking out the claimant's appeals involved the making of an error on a point of law. I set those decisions aside and remit these cases to the First-tier Tribunal for it to continue dealing with these appeals.

REASONS FOR DECISION

1. Although the point in issue in these appeals is a narrow one, they have a somewhat complex procedural history.

2. The claimant was in receipt of housing benefit until 5 December 2013, when benefit was terminated after it was discovered that he was the sole director and shareholder of a company with assets in excess of £100,000.00. The claimant's appeal against that decision was dismissed by a tribunal on 3 April 2014, but on 6 March 2015 Judge West allowed an appeal by the claimant against the tribunal's decision, on the basis that the tribunal had erred in law in treating the claimant's sole control of his company as sufficient for a finding that the company's assets constituted capital owned by the claimant himself.

3. Between the date of the tribunal decision and the date of the Upper Tribunal decision, the claimant made further claims for housing benefit on 21 April 2014, 29 June 2014, 22 August 2014, 14 October 2014 and 12 December 2014. The respondent housing authority refused the first two claims, but deferred making decisions on the other claims pending the outcome of an appeal by the claimant against the refusal decisions, and on 19 June 2014 the claimant transferred £103,000.00 from his company to an account in his son's name. On 18 March 2015, following the Upper Tribunal's decision of 6 March, the claimant made a further claim for housing benefit, and on 6 April 2015 the claimant transferred the funds previously transferred to his son back to the company.

4. On 18 November 2015 the First-tier Tribunal re-heard the appeal which had been remitted by the Upper Tribunal, together with the appeals against the refusal of the claims made on 21 April 2014 and 29 June 2014. The tribunal found that the claimant possessed capital in excess of £55,000.00 and consequently it dismissed all three appeals. On 30 November 2015 the respondent housing authority refused the four outstanding housing benefit claims.

4. The claimant applied for permission to appeal against the tribunal's decision of 19 November 2015, but permission to appeal was refused by Judge Jacobs on 23 March 2016. The claimant's application to set aside that refusal was refused by Judge Jacobs on 10 May 2016. Judge Jacobs also refused permission to appeal to the Court of Appeal against his refusal of permission to appeal.

5. The claimant appealed against the decisions made on 30 November 2015, and on 3 February 2016 a First-tier Tribunal judge gave directions in respect of those appeals, which are the appeals with which I am now concerned. Having set out the history, the judge continued:

“There appear to be three options before me.

Firstly, I could allow the appeals to proceed and for the First-tier Tribunal to consider them in the normal way’. The Council maintains that all issues in these appeals have been exhaustively canvassed before the First-tier Tribunal and there is nothing new to add.

Rule 8(3) of the Tribunal Procedure Rules 2008 empowers me to strike out the appeals where I consider that there is no realistic prospect of the appellant’s case or part of it succeeding.

Finally, I may simply stay these appeals pending the result of any appeal that [the claimant] may make to the Upper tribunal in relation to the proceedings already concluded in this Tribunal.

The parties are invited to respond and make representations in relation to the options set out above.

Any representations should be received by HMCTS no later than 28 days after issue of these directions.

The file is to be referred back to me for decision or for further directions on receipt of replies from both parties or after 28 days from the date of issue of these directions.”

The tribunal judge also issued a separate decision notice refusing the claimant permission to appeal against the tribunal’s decision of 19 November 2015.

6. On 16 March 2016 the respondent housing authority replied to those directions pointing out that the claimant’s application for permission to appeal to the Upper Tribunal had been refused and asking for the appeals to be struck out. On 20 April 2016 the claimant sent the tribunal an email enclosing various documents and asking for his appeal to be heard urgently. He also submitted ‘Grounds of Appeal’ asserting that he had become entitled to housing benefit because of the provisions in the housing benefit legislation relating to diminishing capital.

7. On 8 June 2016 the tribunal judge issued a further decision notice, informing the claimant that his appeals were being struck out because they had no prospect of success. The judge dealt with the claimant’s arguments concerning diminishing capital as follows:

“...The Council has responded in detail stating that the application of the diminishing notional capital rule would be of no assistance to [the claimant]. It

applied the rule from 4 November 2013, (the date of his housing benefit award was ended on account of excess capital) up until 26 October 2015.,(the Monday following his eviction from his home). Even after applying these rules, the Council found that his capital would still be £35,707.00.”

8. Permission to appeal against the strike-out was refused by the First-tier Tribunal judge on 31 August 2016, but on 22 November 2016 I gave permission to appeal because I considered it arguable that there was a failure to comply with rule 8(4) of the Tribunal Procedure (First-tier Tribunal) Rules 2008, in that the claimant did not have an opportunity to make representations before the proceedings were struck out on the ground that they had no reasonable prospect of success. The respondent housing authority has opposed the appeal in a letter dated 1 February 2017, but has not dealt specifically with the point raised in my grant of permission to appeal.

9. Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) Rules 2008 empowers the First-tier Tribunal to strike out the whole or part of a party’s case if “the Tribunal considers that there is no real prospect of the appellant’s case, or part of it, succeeding”. However, rule 8(4) stipulates that the Tribunal must not exercise that power “without first giving the appellant an opportunity to make representations in relation to the proposed striking out”.

10. The power under rule 8 of the Procedure Rules to strike out a case which has no real prospect of success confers on tribunals powers similar to those possessed by the courts to dispose of cases summarily if the prospects of a case succeeding are so small that to allow it to proceed would be tantamount to an abuse of process. In his decision of 6 March 2015, Judge West held that the assets owned by the claimant’s company could be treated as notional capital under regulation 49(2) of the Housing Benefit Regulations 2006. As Judge Jacobs pointed out in his determination of 23 March 2016, the tribunal applied 49(2) correctly in its decision of 18 November 2015 and, if the respondent housing authority had determined the four outstanding benefit claims made by the claimant between April 2014 and March 2015 prior to that hearing, the tribunal could have dealt with all the claims at the same time.. To the extent that the claimant is attempting to re-litigate issues which have already been fully investigated and decided against him, his conduct clearly falls within the ambit of what rule 8(3)(c) of the Procedure Rules is designed to prevent.

11. On the other hand, the power to strike out is a Draconian remedy, because once it has been exercised an appellant has no further opportunity to advance his or her case. In order to avoid the risk of a breach of the right to procedural fairness guaranteed by Article 6 of the European Convention of Human Rights, it is therefore in my judgment necessary for there to be strict compliance with the procedural requirements of rule 8 which are designed to ensure that appellants have a full and proper opportunity of putting their case before a decision is made which prevents them from taking any further part in the proceedings.

12. The tribunal’s direction of 3 February 2016 invited the parties to make representations with regard to three possible options which had been identified by the judge for the future conduct of the appeals. Whilst it is true that the claimant’s

response to the direction did deal with the substantive merits of his appeals, the judge had not at that stage decided whether or not to exercise the tribunal's rule 8 powers. At that stage, striking out the appeal was only one of three possible options, and in my judgment the claimant should have been given a further opportunity of making representations in accordance with rule 8(4) if, after considering the parties' representations, the judge decided that the exercise of the tribunal's powers under rule 8 was the appropriate course of action. I therefore consider that the opportunity given to the claimant to make representations in response to the 3 February direction, but before the judge had decided how to proceed, did not comply with the requirement in rule 8(4) that the claimant should be given the opportunity of making representations "in relation to the proposed striking out".

13. I have considered whether to dismiss the appeal on the basis that the tribunal would inevitably have struck out the appeals even if there had been no breach of the procedural requirements of rule 8. However, the effect of the strike-out was to prevent the claimant from making representations with regard to the company's assets at the date of each of the relevant claims. I consider that the claimant should have had that opportunity, particularly in the light of the transfer of capital from the company in June 2014. I am therefore setting aside the strike-out decisions, although it will of course be open to the tribunal to exercise its powers again under rule 8 again if it considers it appropriate to do so.

14. For those reasons, my decision is as set out above.

E A L BANO
20 March 2017