LW v Proprietor of Broughton Hall Catholic High School
[2023] UKUT 301 (AAC)

IN THE UPPER TRIBUNAL **Appeal No.** UA-2023-001361-HS
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Health Education and Social Care Chamber)

Between:

LW

Appellant

- v –

Proprietor of Broughton Hall Catholic High School

Respondent

Before: Upper Tribunal Judge Ward

Decision date: 11 December 2023
Decided on consideration of the papers

Representation:
Appellant: In person
Respondent: Kieran Whelan, Liverpool City Council Legal Services

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 28 April 2023 under number EH341/22/00153 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

The application for reinstatement of the struck-out claim was not out of time and must be considered by the First-tier Tribunal on its merits.

The file must be referred to a salaried judge of the FtT for a ruling as soon as possible.

REASONS FOR DECISION

1. The First-tier Tribunal (FtT) had directed the appellant (who is alternatively referred to as the claimant when I am quoting the FtT) to file a completed attendance form by

06/01/2023. When this was not complied with, an order was issued on 14/02/2023 directing her to submit

> "so that it is received by 12 noon on 21/02/2023 a completed attendance form setting out the names and details of the person who will attend the final hearing of the claim."

It went on to indicate (emphasis in the original) that

> "If the Claimants (*sic*) do not comply with the order under rule 8 of the Tribunal Rules, this **will** result in the claim being Struck Out pursuant to Rule 8(2)."

There was no compliance; the appellant says she did not receive the order.

2. The hearing had been set for 28 April. On 13 March a Ms Maguire had written in asking to be put on record as the appellant's representative and enclosing the attendance form in anticipation of the 28 April hearing.

3. On 19 April, the appellant was sent an email from the FtT saying:

> "Please note this claim was struck out for noncompliance with the attached order issued 14/02/2023 as per Direction 2. If you wish to request the reinstatement of the claim please complete the attached Request for Change and the Judge will rule if this can be done."

Ms Maguire submitted a completed Request for Change form that day.

4. On 28 April Judge McCarthy took the decision under appeal. The central part of the decision for present purposes is contained in the following paragraphs:

> "I am satisfied that the order issued on 14/02/2023 accurately notified the Claimant that failure to comply would result in her claim being automatically struck out at 12 noon on 21/02/2023. This is when the 28 day period started irrespective of the fact the Tribunal confirmed the strike out in an email dated 19/04/2023.
>
> …
>
> As the claimant did not apply within the statutory 28 days for the claim to be reinstated, and because she has not provided a reasonable explanation why she failed to do so, there is no good reason to either extend time or reinstate the claim."

5. On 09/08/2023 the Deputy Chamber President refused permission to appeal.

6. On 25/10/2023 I extended time so as to admit a late application in view of the appellant's difficult personal circumstances and gave permission to appeal on the basis that, in barest summary, it appeared arguable that Judge McCarthy had misapplied rule 8(7) of the First-tier Tribunal (HESC Chamber) Rules (set out below).

7. The respondent takes no position "regarding the appeal or the terms of any decision". It adds, with rather unclear meaning, that "the Upper Tribunal should itself remake the decision to remake the claim."

8. The appellant has been given the chance to make a submission in reply if she wished but has not done so and the time for doing so has passed.

9. Under rule 8 of the FtT's Rules:

> "(2) The proceedings, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction would lead to the striking out of the proceedings or that part of them.
>
> (6) If the proceedings, or part of them, have been struck out under paragraph (2) or (4)(a), the applicant may apply for the proceedings, or part of them, to be reinstated.
>
> (7) An application under paragraph (6) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to that party."

10. The power to strike cases out is to be exercised in accordance with the overriding objective, which is set out in rule 2.

> "(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.
>
> (4) Parties must—
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally."

11. I indicated in my grant of permission that subject to further submissions, it appeared to me that the scheme of rule 8 in an automatic strike-out case is as follows:

> a. Under rule 8(2) there must be a direction, accompanied by the relevant warning if it is not complied with.
> b. If there is a failure to comply, then the automatic strike out takes effect at the point of non-compliance.
> c. There is then a right under rule 8(6) to apply for reinstatement.

> d. The time for such an application is set by rule 8(7) ("28 days after the date on which the Tribunal sent notification of the striking out to that party").

12. I further indicated that my view at that stage was that rule 8(7) refers to a notification of a striking out that has occurred.

13. Although admittedly the extent of participation by both parties has been limited, neither has expressed disagreement with those views.

14. In the present case, Judge McCarthy considered that the 28 day period started from when the automatic strike out took effect, even though the fact that it had done so was not notified until 19 April. I do not consider that "notification of the striking out" in rule 8(7) can be read so as to apply to a notification (in this case, the order of 14 February) of a striking-out which had not yet happened at that point and which if there was compliance never would.

15. Although various other matters are canvassed in it, Judge McCarthy's reasoning for refusing reinstatement appears in the final paragraph of the first page of his Order:

> "As the claimant did not apply within the statutory 28 days for the claim to be reinstated, and because she has not provided a reasonable explanation why she failed to do so, there is no good reason to either extend time or reinstate the claim."

16. As I consider that the judge has misconstrued rule 8 in finding that time ran from the earlier date, the reasoning quoted above, which stands or falls on the date from which time runs, cannot stand.

17. It follows on what I consider to be the correct view of the law that the application for reinstatement was made in time and plainly I should remake the decision at least to that effect.

18. I did consider whether I should also remake it in terms of the substantive reinstatement application. I decided not to, firstly because the central point of Judge McCarthy's reasoning was the time point, not the merits (or the lack of them in his view); secondly, because neither party has asked me to do so; and thirdly because the decision whether to reinstate is an aspect of the FtT's case management processes, which the FtT is better placed to carry out than the Upper Tribunal is.

19. (UTJ) Edward Jacobs, writing extra-judicially in *Tribunal Practice and Procedure* (5th Edition) at p491 notes how in *Gaydamak v UBS Bahamas Ltd* [2006] 1 WLR 1097, the Privy Council, applying the earlier case of *Grimshaw v Dunbar* [1953] 1QB 408, identified three relevant factors in connection with a decision whether to reinstate, namely (i) the reason for the failure that led to the striking out of the case; (ii) whether there was undue delay in applying for reinstatement; and (iii) whether the other party would be prejudiced by the reinstatement.

20. The learned author also noted, by reference to *Synergy Child Services Ltd v Ofste*d [2009] UKUT 125 (AAC) (a case concerning the same rule as the present) that:

> "When considering whether an appeal should be reinstated under rule 8(6), a Tribunal should have regard to the broad justice of the case, in the light of all the circumstances obtaining at the time the application for reinstatement is being considered."

21. The FtT will be required to apply the overriding objective, set out above. In doing so in the present case, the FtT may wish to consider, among other matters, what detriment to case management of this case and to the administration of justice more generally arises when an attendance form is submitted late but nonetheless some 6½ weeks before the hearing date; the promptness with which the application for reinstatement was made; and the neutral position of the respondent on the reinstatement application (as set out in the headteacher's short letter dated 20/04/2023).

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 11 December 2023