



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

RULING in relation to a late appeal from

**The Information Commissioner's
Decision Notice No: FS 50263353
Dated: 10 May 2010**

Appellant: Brian Thomas Fairclough

Respondent: Information Commissioner

RULING

1. In this case the notice of appeal was lodged with the First-tier Tribunal ("FTT") out of time. Mr Fairclough asks the FTT to accept the late notice.
2. The FTT's powers to deal with such applications can be found in the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 as amended ("the 2009 Rules"). Rule 22(4) states that

"if the appellant provides the notice of appeal to the Tribunal later than the time required by paragraph (1) or by any extension of time under rule 5(3)(a) (power to extend time) –

 - (a) the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time: and
 - (b) unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Tribunal must not admit the notice of appeal."
3. Under paragraph (1) "the appellant must start proceedings before the Tribunal by sending or delivering to the Tribunal a notice of appeal so that it is received –
 - (b) ...within 28 days of the date on which notice of the act or decision to which the proceedings relate was sent to the appellant."

4. The Tribunal is given case management powers under rule 5. Under rule 5(3)(a) “..the Tribunal may ...extend or shorten the time for complying with any rule ..., unless such extension or shortening would conflict with a provision of another enactment containing a time limit.”
5. The Tribunal’s discretion under rule 22(4) to accept out of time claims provided there is a satisfactory reason must be considered in the light of the overriding objective of enabling the Tribunal to deal with cases fairly and justly under rule 2. Rule 2(2) provides examples of how the Tribunal can deal with cases fairly and justly. None of these appear to relate to out of time applications as such. However in my view that does not restrict the Tribunal from considering the overall objective when exercising its powers under rules 22 and 5.
6. In this case the Information Commissioner (IC) issued a Decision Notice dated 10 May 2010 (“the DN”). At paragraph 48 of the DN the IC sets out the right of appeal to this Tribunal and the time limit for appealing.
7. Mr Fairclough lodged a Notice of Appeal (NOA) with the Tribunal on 13 August 2010. This was 60 days out of time.
8. In the NOA Mr Fairclough requested that the Tribunal accepted the appeal out of time because he had been away in South Africa since January 2010 and only returned to the UK on 20 July 2010.
9. The Tribunal sought clarification of his absence from the UK and what attempts had been made during his absence to consider the DN.
10. On 23 August 2010 Mr Fairclough wrote to the Tribunal explaining that his neighbour was monitoring his mail while he was away. The neighbour received notification that there was a special delivery letter which could not be delivered due to Mr Fairclough’s absence on 11 May 2010. The neighbour advised him by email the following day. Mr Fairclough provided his neighbour with a letter of authority dated 14 May 2010 to collect the letter which was finally received by the neighbour on 31 May 2010. The neighbour emailed brief details of the letter to Mr Fairclough soon after which informed Mr Fairclough that he had to appeal to the Tribunal within 28 days of the date of the DN giving a postal address for the Tribunal and its web site. Mr Fairclough asked the neighbour to send it to him by recorded delivery post, which he sent on 4 June 2010 but it took over a month to be delivered, sometime in early July.
11. Mr Fairclough visited the Tribunal’s web site and downloaded the appropriate forms to appeal but did not consider he could complete the forms until he returned to the UK.
12. From this evidence I have concluded that Mr Fairclough became aware of the time limit for appealing in early June and from that moment he was able to access the Tribunal’s web site even from South Africa. He would therefore have known that the appeal had to be lodged with the Tribunal by 7 June 2010. Despite this he made no attempt to contact the Tribunal which he could easily have done by way of email, as an email contact address is provided on

the web site. Instead he waited until his return to the UK on 20 July 2010 and even then did not attempt to make contact with the Tribunal until lodging his appeal some 24 days later.

13. In late appeals the FTT will particularly consider:

- a. the time limit for the lodging of an appeal;
- b. whether a good reason has been shown for having failed to lodge the claim within time, and
- c. whether the appellant acted with reasonable expedition once the time limit had expired.

14. This appeal is well out of time. Although there was originally a good reason for lodging the claim out of time Mr Fairclough took no action to contact the Tribunal to explain his position or to apply for an extension of time under Rule 5(3) once he became aware of the time limit. Even when he returned to the UK he still took another 24 days to lodge his appeal.

15. I have considered all the circumstances surrounding this request and have decided not to allow this appeal to proceed. I therefore strike out the appeal under Rule 8(2).

16. Under rule 8(5) and (6) Mr Fairclough may apply for the proceedings or part of them to be reinstated provided the application is made in writing and received by the Tribunal within 28 days after the date which the Tribunal sent notification of this strike out.

Signed

**John Angel
Principal Judge
FTT(IR)
22 August 2010**



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RULING

1. Further to my ruling dated 22 August 2010 Mr Fairclough has applied under rule 8(5) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended (2009 Rules) for his appeal to be reinstated.
2. In his letter of the 29 August 2010 to the Tribunal he admits he did visit the Tribunal's web site to download the appropriate forms. He says "*this was a genuine attempt to expedite the process, but the lack of data was the limiting factor.*" By this I think he means that he did not have access to the information he needed to complete the appeal forms while in South Africa.
3. I have reviewed the Tribunal's web site at <http://www.informationtribunal.gov.uk/formsguidanceappeal.htm> and note that under the heading "How to Appeal" it states "*You should send your Notice of Appeal to us within 28 days of the date of the Commissioner's notice – see attachment below. If you wish to submit an appeal outside of this time limit, you can do so, but you must provide good reasons for the delay – there is a section in the appeal form to help you with this.*"
4. Also it explains "*Alternatively you can apply for an extension of time before lodging a formal appeal. Where you realise you need more time to consider whether or not to appeal or to draft the grounds of appeal because of the complexity of the decision notice or because you will be away say on holiday*

during the 28 day period then you should write to the Tribunal as soon as possible requesting an extension of time to lodge the appeal. In your request you should explain why you want extra time and the date by which you will be able to submit your appeal. For a further explanation of what is involved see the Ruling in Prof Sikka v Information Commissioner dated 9 April 2010.”

5. Later in the section the reader is provided with Guidance Notes for Unrepresented Litigants. The document contains a section

When and how can I appeal to the Tribunal?

*7. Once the Commissioner has made a decision about your complaint and has issued a Decision Notice, you can then appeal to the Tribunal. You should do this within **28 days** of receiving the Commissioner’s Decision Notice. If you put in your appeal any later than this, then you should include an explanation of why the appeal is late. The Tribunal will consider your explanation and decide whether the appeal can be accepted.*

6. The web site also contains a contacts page providing the address, telephone and fax numbers and email address of the Tribunal.
7. I can understand that not having ready access to his papers might be a “limiting factor”. However even while in South Africa it was still possible to make contact with the Tribunal and explain his situation and even apply for an extension of time to submit his Notice of Appeal outside the 28 day period.
8. Mr Fairclough did apply for an extension in his Notice of Appeal which was considered in my August ruling.
9. Mr Fairclough goes on to explain that *“the fact the subsequent submission was some time after my return to the United Kingdom is down to a necessity to re-establish certain services in my home and attend matters that required my immediate attention after having been absent for six months.”*
10. I can understand this submission but there is no recognition of the importance of complying with the 2009 Rules. He still had the option of contacting the Tribunal to explain his position and applying to be allowed to submit his appeal late, which he did not do.
11. Mr Fairclough then says *“As a layman and totally ignorant of Tribunal matters, I was unaware that I was required or even permitted to contact the Tribunal direct”*.
12. I understand that litigants in person may be unfamiliar with Tribunal processes but the web site is quite clear on the process and provides a number of easy ways to contact the Tribunal. The vast majority of litigants in person who appeal to the Tribunal seem to be able to follow the processes without difficulty and at least enquire of the Tribunal if they are in difficulty.

13. Finally Mr Fairclough says “*an additional contributing factor to the late submission was the necessity, in my mind, to construct an accurate and fully researched case.*”
14. Again if Mr Fairclough had read the accompanying notes to the Notice of Appeal (on the web site) or contacted the Tribunal he would have known that this was unnecessary and that he would have further time to prepare his case once proceedings had commenced.
15. For the above reasons I am not prepared to reinstate his appeal.
16. This decision can be appealed to the Upper Tribunal. A person seeking permission to appeal must first make a written application to the Tribunal for permission to appeal within 28 days of the date of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal’s website at www.informationtribunal.gov.uk.

Signed:

**John Angel
Principal Judge
FTT(IR)
13 September 2010**



**IN THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)**

RULING on an APPLICATION for PERMISSION TO APPEAL

**By
BRIAN FAIRCLOUGH**

1. This is a ruling concerning an application for permission to appeal to the Upper Tribunal. The application arises following two related decisions of Judge Angel, sitting alone in the First -tier Tribunal (Information Rights). The decisions are respectively dated 22 August and 13 September 2010. The Application for permission to appeal is dated 13 October 2010 and so is within time.

Background

2. The decisions of the First-tier Tribunal referred to are, firstly, a ruling (on 22 August) that an extension of time for filing an out-of-date appeal should not be granted so that the appeal must be struck out under rule 8(2) of the Rules; and secondly a ruling (on 13 September) that the Tribunal could not reinstate the appeal pursuant to rule 8(5) of the Rules.
3. It seems to me that there has been a procedural irregularity in relation to this matter, although not one that has disadvantaged the Appellant, for reasons I will explain. This is because rule 8(5) of the Rules provides for an appellant to apply for reinstatement of his or her appeal only if the appeal has been struck out under rules 8(1) or 8(3) (a) of the Rules (which relate to a failure to comply with the Tribunal's earlier directions) but does not apply in relation to a strike out under rule 8(2). As this appeal was struck out under rule 8(2), the correct remedy for the Appellant in relation to the 22 August ruling would have been to apply for permission to appeal to the Upper Tribunal (which he has now done in any event).
4. Rule 8(4) of the Rules provides that an Appellant must be given an opportunity to make representations prior to a strike out decision under rule 8(2). It does not seem to me that this happened in this case as there is no reference to it in the ruling of 22 August. The Appellant did, however, provide representations in relation to the application for reinstatement and so he has not been disadvantaged by the procedural error.

Setting Aside and Re-Making the Strike-Out Decision

5. I note that rules 41(1) and 41(2)(d) of the Rules allow the Tribunal to set aside and re-make a decision which disposes of proceedings where there has been a procedural irregularity in those proceedings.
6. In this matter, it seems to me that there has been a procedural irregularity which permits me to re-make the strike out decision in reliance on rules 41(1) and 41 (2)(d). This is because (i) the Appellant's proper remedy in relation to the rule 8(2) strike out decision was to seek permission to appeal rather than to seek reinstatement under rule 8(5) but he was misadvised about this by the Tribunal; and (ii) the Appellant was not given the opportunity required by rule 8(4) to make representations prior to the final ruling under rule 8(2) (although, as I have explained, he was afforded the opportunity to make representations under rule 8(5) and he took advantage of this opportunity, so he has not in fact been disadvantaged).
7. In all the circumstances I have concluded that I should set aside the decisions of 22 August and 13 September, relying on rules 41(1) and 41(2)(d) of the Rules. I have proceeded to consider the representations made in connection with the application for reinstatement as though they were made in response to a proposed strike-out under rule 8(2).
8. The Appellant provided representations in relation to the 22 August ruling by letter dated 29 August 2010. He argued that he did not have the information he needed to make his application at the relevant time because had been in South Africa and was unfamiliar with the Tribunal Rules. He stated that he had, however, visited the Tribunal's website whilst in South Africa and Judge Angel therefore concluded that the Appellant could have contacted the Tribunal administration for advice and to apply for a prospective extension of time because there was relevant information on the website which would have allowed him to do so.
9. Having considered all the papers in this matter, I have concluded that the strike out decision under rule 8(2) was correct and that it should now be re-made. I agree with Judge Angel that a retrospective extension of time was inappropriate in these circumstances and that the rule 8(2) strike-out was the right response to the retrospective application for an extension of time. I now accordingly re-make the rule 8(2) decision so that the appeal is struck out on the basis that the Tribunal had no jurisdiction in relation to it because it was out of time.

Ruling on Application for Permission to Appeal

10. Rule 42 (5) of the Rules provides that a person seeking permission to appeal against a decision of the First-tier Tribunal must make a written application which identifies the alleged error or errors of law in the decision and must state the result the party making the application is seeking.
11. In this matter, the Appellant has completed the relevant application form but the Grounds of Appeal relate to alleged discrepancies in the Information Commissioner's Decision Notice. They do not say why the strike-out decision is alleged to be wrong in law or what result the Appellant is seeking.

12. I have therefore concluded that the Application for permission to appeal is invalid and should not be admitted because it does not comply with rule 42(5) of the Rules. This is because it does not identify an error of law in the Tribunal's decision or state what result the Appellant is seeking.
13. The Appellant has a right to renew his application for permission to appeal to the Upper Tribunal itself under rule 21(2)(b) of The Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Upper Tribunal Rules") on the basis that his application for permission to appeal "*has not been admitted*" by the First-tier Tribunal. Under rule 21(3) of the Upper Tribunal Rules, the Appellant has one month from the date this ruling is sent to him to lodge an appeal with the Upper Tribunal (Administrative Appeals Chamber), 5th Floor, Chichester Rents, 81 Chancery Lane, London, WD2A 1DD. Further information about the appeal process is available on the Upper Tribunal's website at <http://www.osspsc.gov.uk/index.htm>.

Signed:

Dated: 1 November 2010

Alison McKenna
Tribunal Judge
First-tier Tribunal (Information Rights)