



TC07978

PROCEDURE – Appellant’s applications for barring order, summary judgment, costs and in the alternative, an amendment to the Tribunal’s direction – applications refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2017/04434

BETWEEN

DANIEL BUSSAU

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal decided the Appellant’s applications on the papers having taken into account the correspondence and submissions provided.

DECISION

Summary

1. In 2017, Mr Bussau appealed against HMRC's decision to refuse to allow input VAT of around £8,000. There have been two earlier interlocutory decisions, the first following a hearing before Judge Greenbank on 23 July 2018. He refused Mr Bussau's application to bar HMRC from proceedings and issued Directions. Mr Bussau made further applications to bar HMRC, and these were refused on 7 January 2020 by Judge Citron, see *Bussau v HMRC* [2020] UKFTT 38.

2. This decision considers Mr Bussau's subsequent applications for:

- (1) HMRC to be barred from the proceedings;
- (2) summary judgment in his favour;
- (3) costs; and
- (4) a change to the Tribunal's Directions issued on 4 November 2020.

3. For the reasons set out below, all of those applications are **refused** other than that the date for compliance with the Direction issued on 4 November 2020 is extended as set out at the end of this decision. The substantive appeal has been set down for hearing on 28 January 2021.

Findings of fact

4. Mr Bussau is currently a partner in a firm of paralegals called Outback Legal LLP. He was previously a sole trader. On 9 May 2017, HMRC issued a decision denying him credit for input tax of around £8,000. On 7 June 2017, Mr Bussau appealed to the Tribunal.

5. On 11 February 2018, Mr Bussau applied to the Tribunal for directions to bar HMRC from taking further part in proceedings and/or exclude HMRC's statement of case and/or summarily decide the appeal in Mr Bussau's favour. On 23 July 2018, Judge Greenbank refused those applications, and issued Directions. These are set out in Judge Citron's decision and it is not necessary to repeat them here.

6. On 17 August 2018, Mr Bussau asked HMRC to provide (a) copies of notes or minutes made by the HMRC officers who were involved in the decision which was under appeal, and (b) the documents considered by the Review Officer. Ms Donovan, HMRC's litigator in relation to this case, responded on 20 August 2018, refusing to disclose those documents because she understood them to be privileged and because they were not in her possession. She told Judge Citron that she was acting in good faith, this was accepted by Judge Citron (see [28(3) and [33(4)] of his judgment) and I find it to be a fact.

7. On 7 September 2018, Mr Bussau applied to the Tribunal for directions, including an order for specific disclosure of the documents, the debarring of HMRC by reason of non-compliance with Judge Greenbank's Directions, and/or a summary decision in his favour.

8. On 26 November 2018 the Tribunal directed HMRC to provide further and better particulars of their reasons for refusing disclosure. Ms Donovan took advice from senior lawyers within HMRC, and having received that advice, on 10 December 2018 told Mr Bussau and the Tribunal that HMRC no longer opposed disclosure of the documents. They were provided the same day and on the following day.

9. On 16 April 2019, the Tribunal directed an oral hearing to decide the applications, which took place on 7 January 2020 before Judge Citron. The details of Mr Bussau's applications are set out in the judgment, but in summary they were that:

- (1) HMRC should be barred from further participation in the proceedings under Rule 8(1), 8(3)(a), 8(3)(b) or 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules");
- (2) the Tribunal summarily determine the case in his favour under Tribunal Rule 8(8); and if not
- (3) HMRC provide further documents recording the internal HMRC meetings between the two officers who were involved in making the decision in his case.

10. Having heard the submissions of both parties, Judge Citron refused all the applications. He issued Directions for the ongoing progress of the appeal. Direction 2 read:

“Witness statements: Not later than 18 March 2020 each party shall send or deliver to the other party statements from all witnesses on whose evidence they intend to rely at the hearing setting out what that evidence will be and shall notify the Tribunal that they have done so.”

11. Direction 3 read:

“Bundles for hearing: Not later than 01 April 2020 the Respondents shall provide to the Appellant a paginated and bound bundle ("the bundle") of documents to include:

- (1) All documents on the Lists of Documents exchanged by the parties in August 2018;
- (2) any witness statements provided as directed above;
- (3) any returns related to the matters under appeal;
- (4) any notices, assessments or amendments under appeal;
- (5) any notices or letters of appeal under consideration;
- (6) copies of the correspondence relating to the matter under appeal.”

12. On 2 March 2020, Ms Donovan emailed Mr Bussau, saying that she was in the process of putting together the documents bundle in accordance with Direction 3; that she had referred to the list of documents provided in August 2018, and she did not have his witness statement dated 15 August 2018 or his exhibit EX-DB1 dated 15 August 2018, which had been referred to in that list of documents. She asked Mr Bussau to provide the witness statement and the exhibit by 9 March 2020, and that if he was not able to meet that deadline, she would prepare a bundle with the documents she already had, and would later prepare a supplementary bundle with the witness statement and the exhibit.

13. On 4 March 2020, Mr Bussau emailed the Tribunal with his dates to avoid, and said he would be providing oral evidence. He did not reply to Ms Donovan's email.

14. On 20 July 2020, the Tribunal sent a standard letter to both parties asking whether the case was ready for a hearing and if so, how they suggested it proceed given the restrictions imposed by the coronavirus. Ms Donovan responded by return, saying that she had prepared a bundle with 93 pages, which could be provided electronically, and that the case was ready for a hearing.

15. On 31 July 2020, Mr Bussau responded, saying *inter alia* that he intended to give oral evidence and that HMRC had “failed to include my witness statement (or the attached exhibit) in the bundle”. Under the heading “hearing bundle” he added:

“I further note significant concerns with respect to the bundle produced by the Respondent, including the failure to include my witness statement, exhibit or highly pertinent documents disclosed by the Respondent which contradict their own position. As such I propose to prepare an alternate electronic bundle, in compliance with the guidelines (including being searchable / index linked) which will be supplied to the Tribunal and the Respondent 7 days before any listed hearing. It is expected that this will be approximately 175-250 pages.”

16. On 3 August 2020, Ms Donovan responded to Mr Bussau, copying the Tribunal, saying that Mr Bussau had not provided a witness statement and that he had failed to respond to her email of 2 March 2020 asking for a copy of that statement and the exhibit. She ended by saying “hopefully this clarifies why there is no witness statement from you in the bundle”.

The Directions issued on 3 September 2020

17. The correspondence was referred to me, and on 3 September 2020 I issued Directions including the following:

(1) If Mr Bussau wanted his witness statement and exhibit EX-DB1 (dated 15 August 2018) to be considered at the hearing of his appeal, those documents must be sent to the Respondent by 17 September 2020, and that unless he did so he would be barred from giving oral evidence at the hearing, and his exhibits would not be admitted as evidence.

(2) Direction 4 read:

“If the Appellant has any further evidence which was not on the documents lists of either party, but which he considers to be relevant to the hearing of his appeal, by 17 September 2020, the Appellant is to send to the Respondents and copy the Tribunal:

- (1) a supplementary documents list;
- (2) in respect of each of the documents on that list, an explanation as to why in his submission it constitutes relevant evidence; and
- (3) in the light of the guidance provided by the relevant case law including *Denton v TH White Limited* [2014] EWCA Civ 906 and *BPP Holdings Limited v HMRC* [2017] UKSC 55, the reason why he failed to comply with the time limit set out in Direction 2 of Judge Citron’s directions.”

(3) Direction 5 to 7 said that, if Mr Bussau provided a supplementary documents list, HMRC were to inform Mr Bussau whether they agreed to include that evidence in the bundle, with reasons if they objected; if they agreed to include the evidence, Mr Bussau was to “provide that evidence electronically to the Respondents in a form suitable for inclusion in a supplementary documents bundle”.

(4) Direction 8 said that Mr Bussau did not have permission to provide a supplementary bundle for the hearing. Direction 9 asked both parties for information relating to the possible hearing of the case by video.

18. On 7 September 2020, Ms Donovan responded to Direction 9 and copied Mr Bussau. However, for whatever reason this email was not forwarded to me by the Tribunals Service.

19. On 16 September 2020, Mr Bussau provided a copy of his witness statement and exhibit EX-DB1 to Ms Donovan. The following day, Mr Bussau applied for directions, including the issuance of an unless order against HMRC, and “reserving the right to bring the Respondent’s repugnant behaviour” to the Tribunal’s attention in the context of a future costs application. By his application he also asked that the “reasons” part of the September Directions be amended to take into account the following:

- (1) his witness statement had been filed and served on 17 August 2018, although he accepted that this had not previously been drawn to my attention by either party;
- (2) Ms Donovan’s email stating that she did not have the witness statement was “mischievous”;
- (3) at para 10, that the documents which he had proposed would be included in his “alternate electronic bundle” were those which had been disclosed by HMRC ahead of the hearing before Judge Citron (“the further documents”).

20. Mr Bussau also asked that the Tribunal direct HMRC to provide an amended bundle including the witness statement, exhibit EX-DB1 and the documents disclosed before Judge Citron’s hearing, and that this direction should be accompanied by an unless order.

The October Directions

21. I considered Mr Bussau’s application and Judge Citron’s decision (which I had previously not seen) and his Directions. Because I had not been sent a copy of Ms Donovan’s email of 7 September, I was under the misapprehension that HMRC had not responded to the Direction to provide information as to a possible video hearing.

22. On 13 October 2020 I issued further Directions

1. By 27 October 2020, HMRC are to:

- (1) respond to Direction 9 of the September Directions;
- (2) give reasons for their failure to comply with Directions 5 and 9 by the date there specified;
- (3) confirm whether they agree with the Appellant’ statement at paragraphs 10 of the Application, and if not, why not;
- (4) and in any event, to confirm that the following are to be included in the Tribunal Bundle:
 - (a) the Appellant’s witness statement;
 - (b) the documents referred to in paragraph 10 of the Application;
and
 - (c) if different to (b) above, any documents included in Exhibit EX-DB1 to the Appellant’s witness statement.

2. HMRC are to note that UNLESS they comply with Direction 1 above in full by the date there specified, they will be barred from participating in the hearing, and the appeal will be summarily determined in the Appellant’s favour, see Rule 8(1), 7(a) and (8) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rule”).

3. Both parties are reminded of their duty to co-operate with each other, see Rule 2 of the Tribunal Rules.”

23. Ms Donovan responded the following day. She unreservedly apologised for not having responded to Direction 9 which she said was “an oversight” on her part. In fact, as I have now identified, there had been no failure to comply with that Direction and the oversight was that of the Tribunal.

24. Ms Donovan also provided (again) the information necessary for the case to be heard by video and some comments on paragraph 10 of Mr Bussau’s application. In relation to the Directions concerning the bundle, she said she had included Mr Bussau’s witness statement and exhibit EX-DB1 in the bundles for the hearing, but not the further documents, because HMRC were not relying on those documents, and because “the Appellant has not included them on his list of documents”.

The November correspondence

25. On 2 November 2020, Mr Bussau made applications for HMRC to be barred, for summary judgment and for costs. He submitted that Ms Donovan had failed to comply with the unless order in the October Directions because she had not included the further documents in the bundle. I set out his applications in more detail below.

26. On 4 November 2020, the Tribunal wrote to the parties at my direction, saying I had read Ms Donovan’s email of 14 October 2020 as including an application to amend the Directions in so far as they related to the further documents, and that:

“HMRC were correct to note that the Further Documents were not included in the Appellant’s document list, and Judge Redston notes that she had previously directed that if the Appellant wanted any documents not on that list to be before the Tribunal he was to provide an amended list and an explanation of their relevance, and that he has not done so.”

27. The letter asked HMRC to confirm whether Ms Donovan’s email of 14 October was a refusal to comply with my Directions, or whether it was a request for the Directions to be amended. It said that if HMRC gave that confirmation, Mr Bussau was to comply with the following Direction by 18 November 2020:

“the Appellant is to provide HMRC and the Tribunal with the Further Documents in the form of a supplementary pdf bundle of documents for the substantive hearing of his appeal. That supplementary bundle is to be indexed, paginated and searchable, in accordance with the guidance on pdf bundles given by Tribunal President Sinfield.”

28. The letter went on to say that:

“Judge Redston accepts that there may be unresolved issues of relevance in relation to the Further Documents, but (assuming her understanding of HMRC’s position in relation to compliance with her earlier directions is correct) it is not in the interests of justice for further time to be spent on this matter.”

29. Ms Donovan confirmed the following day that my understanding was correct and that HMRC were asking for the Direction about including the further documents in the bundle to be withdrawn because of Mr Bussau’s failure to provide a documents list as required by Direction 4 of the September Directions..

30. On 8 November 2020, Mr Bussau repeated his earlier application and added that “Judge Redston’s suggestion [sic] that the Appellant should now be put to the further inconvenience

and expense of creating a supplementary bundle...is unjust to such an extent as to be Wednesbury Unreasonable". I have taken this to be a further application from Mr Bussau that I reverse my Direction that he provide the further documents in the form of a supplementary bundle.

The Tribunal Rules

31. Rule 2 of the Tribunal Rules is headed "Overriding objective and parties' obligation to co-operate with the Tribunal" and it reads:

- "(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."

32. Rule 5 of the Tribunal Rules is headed "Case management powers" and it includes the following paragraphs:

- "(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
- (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
- (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
 - (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;
 - (b)-(c)...
 - (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

(e)-(h)...

(i) require a party to produce a bundle for a hearing;...”

33. Rule 6 of the Tribunal Rules is headed “Procedure for applying for and giving directions” and reads:

“(1) The Tribunal may give a direction on the application of one or more of the parties or on its own initiative.

(2) An application for a direction may be made—

(a) by sending or delivering a written application to the Tribunal; or

(b) orally during the course of a hearing.

(3) An application for a direction must include the reasons for making that application.

(4) Unless the Tribunal considers that there is good reason not to do so, the Tribunal must send written notice of any direction to every party and to any other person affected by the direction.

(5) If a party or other person sent notice of the direction under paragraph (4) wishes to challenge a direction which the Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction.”

34. Rule 8 of the Tribunal Rules is headed “Striking out a party’s case” and, again so far as relevant to this decision, reads:

“(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...

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings;...

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent.”

35. Rule 10 of the Tribunal Rules is headed “Orders for costs” and so far as relevant to this case reads:

“(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—

(a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;...

(2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

- (3) A person making an application for an order under paragraph (1) must—
 - (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
 - (b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.
- (4) An application for an order under paragraph (1) may be made at any time during the proceedings...”

The applications

36. By his two letters dated 2 November 2020 and 9 November 2020, Mr Bussau applied for the following:

- (1) that HMRC be barred from the proceedings and that in consequence summary judgment be given in his favour;
- (2) costs, on the basis of HMRC’s unreasonable behaviour, or a wasted costs order; and
- (3) a change to the Tribunal’s Directions issued on 4 November 2020 to remove the requirement that he provide the further documents in an electronic bundle for the hearing.

37. Each of these is considered and discussed below.

Barring order

38. Mr Bussau submitted that by failing to include the further documents in the bundles for the hearing, HMRC had breached the Tribunal’s unless order in the September Directions. He said “it is hard to imagine a more egregious and contemptuous failure to comply with a judicial instruction”.

39. In reliance on *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, he submitted that the order took effect automatically following the failure, and in reliance on *Thevarajah v Riordan* [2015] UKSC 78 that an unless order could not be changed after it had been breached. He said that:

- (1) HMRC had been directed by Judge Citron to produce a bundle which, *inter alia*, included the further documents, but HMRC produced a bundle which excluded the further documents.
- (2) The September Directions required HMRC to include the further documents; HMRC produced a supplementary bundle, but excluded the further documents .
- (3) The October Directions required HMRC to confirm that the further documents would be included in the bundles, but HMRC failed to comply with the unless order in full.

40. Ms Donovan’s position was that HMRC had not failed to comply with the unless order, but that, before the deadline for compliance, had asked for the related Directions to be amended because Mr Bussau had not included the further documents in the list of documents which he had been required by the Tribunal to provide.

Discussion: Judge Citron's Directions

41. Mr Bussau said, first, that HMRC were required by Judge Citron's Directions to include the further documents in the bundle and referred to Direction 3(1) which read "All documents on the Lists of Documents exchanged by the parties in August 2018" and to Direction 3(5), which read "copies of the correspondence relating to the matter under appeal".

42. Direction 3(1) refers to the original document list, which could not have included the further documents, as they were not disclosed until December 2018. I considered what was meant by Direction 3(5). Judge Citron used the Tribunal's standard directions for cases of this category, slightly amended. The wording of Directions 1 and 3 in those standard directions is as follows:

1. **List of documents:** Not later than [date] each party shall send or deliver to the other party and the Tribunal a list of documents in its possession or control on which that party intends to rely in connection with the appeal and provide to the other party copies of any documents on that list which have not already been provided to the other party;
2. **Bundles for hearing:** Not later than [date] the Respondents shall provide to the Appellant a paginated and bound bundle ("the bundle") of documents to include:
 - (1) All documents on the Lists of Documents referred to above;
 - (2) any returns relating to the matters under appeal;
 - (3) any notices, assessments or amendments under appeal;
 - (4) any notices or letters of appeal under consideration;
 - (5) copies of the correspondence relating to the matter under appeal.

43. In more complex cases, the Tribunal's standard directions say:

- Bundles for hearing:** Not later than [date] the appellant shall send or deliver to the respondents an indexed, paginated and bound bundle of documents ("documents bundle") to include:
- (1) the notice of appeal provided under Tribunal Procedure Rule 20;
 - (2) the statement of case provided under Tribunal Procedure Rule 25;
 - (3) all documents on the lists of documents provided;
 - (4) the witness statements provided as directed above;
 - (5) all directions issued by the Tribunal in the appeal; and
 - (6) correspondence with the Tribunal which is to be referred to in the hearing.

44. My understanding is that is that the phrase "copies of the correspondence relating to the matter under appeal" does not refer to correspondence between the parties before the hearing: that is set out in the list of documents. Standard direction 3(5) is a instead reference to correspondence with the Tribunal after the appeal has been made, and in more complex cases that requirement is split into "directions issued by the Tribunal" and "correspondence with the Tribunal which is to be referred to in the hearing". However, even if direction 3(5) were read as referring to correspondence between the parties about the substantive issue before the appeal was made, the further documents were not correspondence with Mr Bussau about the appeal, they were internal minutes and notes generated by HMRC.

45. Moreover, Ms Donovan contacted Mr Bussau on 2 March 2020 to say she was making up the bundle, but did not have his witness statement and exhibits. Mr Bussau failed to reply to that email. Had he done so, and had he specified that he wanted the further documents included in the bundle, all the later problems would have been avoided.

46. I thus cannot see any basis on which HMRC failed to comply with Judge Citron's Directions, or that Ms Donovan should be criticised for not including the further documents in the original bundle.

Discussion: the September Directions

47. Mr Bussau also says that HMRC breached the September Directions. However, Direction 4 of those Directions required *Mr Bussau* to provide HMRC with a documents list setting out any extra documents he wanted to be included in the bundle, and also "in respect of each of the documents on that list, an explanation as to why in his submission it constitutes relevant evidence". Mr Bussau has never complied with that Direction.

48. It was only if Mr Bussau had complied with Direction 4 that HMRC had to inform Mr Bussau and the Tribunal whether they agreed or objected to the extra documents being included in the bundle. Ms Donovan says, entirely correctly, that as Mr Bussau did not comply with Direction 4, HMRC had no obligations as the result of Direction 5.

Discussion: the October Directions

49. When I issued the October Directions I was unaware of the material fact that HMRC had provided the information necessary for the appeal to go forward to be heard by video, and so had complied with Direction 9 of the September Directions. I understood, wrongly, that there had been no compliance by HMRC with any of those Directions.

50. The day after the October Directions were issued, Ms Donovan confirmed that she had complied with all the stipulated requirements. However, she said she had not included the further documents in the bundle because they were not on the original documents list, and because Mr Bussau had not produced a further documents list as directed by me in September. I read this as an application to amend the Directions to withdraw that requirement that the further documents be included in the bundle, and Ms Donovan has confirmed that this was HMRC's intention.

51. Ms Donovan's application was made before the expiry of the time limit for the unless order, and as a result, there is no failure to comply with that order. Instead, the Tribunal must consider whether or not to amend the directions, as to which see further below. The position is similar to that considered in *Hallam Estates Ltd v Baker* [2014] EWCA Civ 661 where the Court of Appeal (Jackson, Lewison and Christopher Clarke LJJ) held that a person who has been issued with an unless order, but who applies for an extension of time before deadline for compliance with that order, has not failed to comply.

Decision on the first application

52. It follows from the above that HMRC are not barred for failing to comply with the unless order in the October Directions. Mr Bussau's application for summary judgment is therefore also refused.

Costs

53. Mr Bussau claimed costs of £3,645.65 on the alternative bases that HMRC had acted unreasonably, but he said that if that was deemed "disproportionate" by the Tribunal, that the

Tribunal should make a wasted costs order on an indemnity basis. It is clear from the wording of the application and the details in the attached costs schedule that he is asking for all the costs of the proceedings from the filing of his appeal until the date of this application, and that his application therefore covers that entire period. .

54. Tribunal Rule 10(4) states that a costs application “may be made at any time during the proceedings”, and Mr Bussau is therefore not prevented from making his application simply because the substantive appeal has not yet been heard.

Unreasonable behaviour?

55. The intention behind Rule 10 is “that the First-tier Tribunal is designed in general to be a ‘no costs shifting’ jurisdiction...Rule 10 should therefore be regarded as an exception to this general expectation that both sides will bear their own costs, whatever the result of the appeal”, see *Distinctive Care v HMRC* [2019] EWCA Civ 1010 per Rose LJ at [7] with whom Lewison and Floyd LJJ agreed.

56. In *Market & Opinion Research International Limited v HMRC* [2015] UKUT 0012 (TCC) the Upper Tribunal said that the Tribunal should “consider what a reasonable person in the position of the party concerned would reasonably have done, or not done”, which was a value judgment.

57. Mr Bussau submitted that:

“HMRC/their representative had already been found to have acted unreasonably by Employment Judge Citron, prior to their failure to comply with Judge Redston’s Unless Order. That their behaviour has been totally unreasonable is obvious and indisputable.”

58. Mr Bussau cites two reasons why he considers HMRC behaved unreasonably; first in relation to the period before the hearing before Judge Citron, and then in relation to compliance with the October Directions.

59. Contrary to Mr Bussau’s assertion, I could find no statement in Judge Citron’s decision where he said HMRC had behaved unreasonably. The closest he came was this passage:

“I find that HMRC caused a delay of approximately three and a half months in the progress of this appeal to a hearing, by changing their position between 20 August and 10 December 2018 as to whether certain documents were privileged. This was unfortunate and below the standard expected of HMRC as an organisation well experienced in tax litigation. I find this to have been caused by human error and not to have been deliberate; it was put right very quickly after the correct internal communication channels within HMRC had been engaged.”

60. I have made findings of fact about this delay earlier in this decision. In summary, Mr Bussau had asked for the documents on 17 August 2018, and Ms Donovan replied only three days later, saying she understood that internal communications between the officers involved in making the decision under appeal were privileged. Mr Bussau applied to the Tribunal on 7 September 2018. Almost three months later, on 26 November 2018, the Tribunal asked HMRC for further and better particulars. Ms Donovan then obtained specialist legal assistance from within HMRC, and the documents were disclosed on 10 and 11 December 2018. I find that it was not unreasonable for Ms Donovan to believe that these documents were privileged, and neither was it unreasonable for her to wait to hear the result of Mr

Bussau's application to the Tribunal before taking specialist advice. It was the Tribunal which was the direct cause of the delay.

61. In relation to the second, it was Mr Bussau who failed to comply with the September Directions by failing to provide HMRC with a supplementary documents list setting out the further documents, and the reasons why he considered them to be relevant. Had he complied, HMRC were directed to consider his list and either accept the documents or explain their reasons why not. But he did not comply. HMRC therefore did not act unreasonably by failing to include the further documents in the bundle, and neither did they act unreasonably by applying for the October Directions to be amended because Mr Bussau had not included the further documents on a documents list, as he had been directed to do.

62. Looking at the parties' behaviour more widely to see whether HMRC acted unreasonably during the proceedings to the date of Mr Bussau's application, the following facts are also relevant:

(1) At the first case management hearing, Mr Bussau's applications to bar HMRC taking further part in proceedings and/or exclude HMRC's statement of case and/or summarily decide the appeal in Mr Bussau's favour were all refused by Judge Greenbank.

(2) During the hearing before Judge Citron, Mr Bussau again submitted that HMRC should be barred from further participation in the proceedings under Rule 8(1), 8(3)(a), 8(3)(b) or 8(3)(c) of the Tribunal Rules. None of his submissions were accepted.

(3) HMRC had already provided Mr Bussau with the documents he had required to be disclosed by the date of that hearing.

(4) The tone in his correspondence has been aggressive, describing HMRC's behaviour as "repugnant" and "mischievous", in contrast Ms Donovan has been entirely professional.

(5) Ms Donovan told Mr Bussau on 2 March 2020 that she was making up the bundle and inviting him to provide documents, but Mr Bussau did not reply to that invitation. Had he responded and asked for the witness statement, the exhibits and the further documents to be included, the case might have progressed to a hearing without any further problems.

63. I have no hesitation in finding that HMRC have not behaved unreasonably in their conduct of these proceedings.

Wasted costs

64. Wasted costs can be awarded under Rule 10(1)(c) and s 29(4) of the Tribunal Courts and Enforcement Act 2007 if costs have been incurred "as a result of any improper, unreasonable or negligent act or omission" by a representative.

65. In that context, the word "unreasonable" means "conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case", see *Ridehalgh v Horsefield* [1994] Ch 205, followed in *Bedale* [2014] UKUT 99 (TCC).

66. Although Mr Bussau did not name Ms Donovan, a wasted costs order can only be made against a representative, and I have assumed therefore that he is asking for an award on the basis of her behaviour. However, Ms Donovan clearly did not act in a way which even approaches the relevant threshold. The delay in disclosing the documents to Mr Bussau was

in part caused by her genuine understanding of the legal position, and in part by the Tribunal's own tardiness in considering the parties' correspondence. As already noted above, in March 2020 Ms Donovan offered Mr Bussau the opportunity to provide documents for the bundle before it was finalised, and to make up a supplementary bundle if he could not meet her deadline. That is the very opposite of unreasonable behaviour.

Quantum

67. Mr Bussau's cost schedule shows that until October 2018 he claimed his own time at £19 an hour as a lay person, and at £62.50 from that date on the basis that he was a paralegal, plus travel costs for the hearings before Judge Greenbank and Judge Citron of £70.35. Given my conclusion on this application I have not thought it necessary to comment on these matters of quantum.

Conclusion

68. I refuse Mr Bussau's application for costs. As already noted at §53, this refusal decision relates to the period from June 2017, when Mr Bussau submitted his Notice of Appeal to the Tribunal, through to 2 November 2020, the date on which he submitted his costs application.

Amendment to the Directions

69. On 4 November 2020 I directed that Mr Bussau, and not HMRC, was to provide a supplementary bundle containing the further documents, and that if Mr Bussau did not do so by 18 November 2020, the Tribunal might refuse to allow him to rely on them at the hearing.

70. Mr Bussau has applied for that Direction to be amended. I refuse that application, for the following reasons:

- (1) These are documents which Mr Bussau wants to be placed before the Tribunal.
- (2) Given the litigious nature of the proceedings so far, if Ms Donovan puts together a bundle, there is a risk that Mr Bussau will find fault with it, leading to yet more satellite litigation.
- (3) The normal practice in this Tribunal is that the appellant is responsible for the production of the bundles. However, that normal position is not followed when the appellant is a litigant in person without legal experience, or is represented by a firm without the necessary experience. When Mr Bussau filed his appeal, he was treated as a litigant in person and HMRC were directed to produce the bundles. However, it is abundantly clear from the nature and extent of Mr Bussau's communications and his role as a partner in Outback Legal LLP that he is capable of producing a supplementary bundle for the hearing.
- (4) On 31 July 2020, Mr Bussau offered to produce a supplementary bundle, saying "I propose to prepare an alternate electronic bundle, in compliance with the guidelines (including being searchable / index linked) which will be supplied to the Tribunal and the Respondent 7 days before any listed hearing", see §15.

The Tribunal's power to amend the Directions

71. Rule 5(2) of the Tribunal Rules gives the Tribunal the power to amend an earlier direction. In reliance on that power I have amended the earlier Directions which placed the burden of providing all the bundles on HMRC. I have also amended the September Directions which made the provision of the further documents conditional on Mr Bussau explaining why each of them was relevant.

72. In *Tibbles v SIG plc* [2012] EWCA Civ 518 (“*Tibbles*”) at [39]-[41] the Court of Appeal considered whether the court could revoke an earlier order. The relevant rule was CPR r 3.1(7), which is similar to Rule 5(2) in that it reads: “a power of the court under these Rules to make an order includes a power to vary or revoke the order”. The leading judgment was given by Rix LJ, who said:

“[CPR r 3.1(7)] is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion.”

73. Rix LJ continued by noting that the authorities “all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise” but that nevertheless those authorities had “laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised”. One of situations when orders can be changed is when there has been “a change of circumstances”.

74. I am doubtful whether the *Tibbles* criteria are properly applicable to a case management direction such as that in issue in here. Its purpose is only to decide which of two parties should provide a supplementary bundle for a hearing. In contrast, in *Tibbles* the parties were arguing over a costs order, and when *Tibbles* was considered by the Supreme Court in *Thevarajah v Riordan* [2015] UKSC 78, that dispute was about a debaring order. In those contexts, it is entirely appropriate to talk about “considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal”. The same is not true of a case management direction for the provision of a supplementary bundle of documents for a hearing.

75. Even if *Tibbles* were applicable:

(1) the starting point is that the Court of Appeal warned “against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise”, and this is a case where it is entirely appropriate for the directions to be amended for the reasons set out at §70 above. It is also in the interests of justice to set aside the earlier requirement that Mr Bussau show that the documents were each relevant, because it is not in accordance with the overriding objective to spend more time on this matter; and

(2) the circumstances of the case have in any event changed since the original Directions placed the responsibility for preparing all the bundles on HMRC (later Directions about bundles simply adopted that approach). However, Mr Bussau has subsequently become legally qualified, so is capable of preparing his supplementary bundle.

The Direction

76. If Mr Bussau wishes to rely on the further documents, he is to file and serve them in the form of a supplementary bundle which is to be indexed, paginated and searchable, in accordance with the guidance on pdf bundles given by President Sinfield.

77. The time limit for complying with this Direction is extended to 14 days after the date of issue of this decision. If Mr Bussau does not comply with this Direction, he may be barred from relying on the further documents at the substantive hearing.

Decision and appeal rights

78. For the reasons set out above, Mr Bussau's applications are refused.

79. 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.

ANNE REDSTON
TRIBUNAL JUDGE
Release date: 21 December 2020