



Neutral Citation No. [2022] EWHC 3429 (SCCO)

Case No: T20200461

SCCO Reference: SC-2022-CRI-000092

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 28 December 2022

Before:

COSTS JUDGE LEONARD

R

v

FIRTH

**Judgment on Application under Regulation 31 of the Criminal Legal Aid
(Remuneration) Regulations 2013**

Applicant: Ashcott Solicitors

This Application has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. This is an application for an extension of time to file an appeal under regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013. It is one of two such applications heard together by me. The other is *R v Chambers*, reference SC-2022-CRI-000094. Although the relevant regulations and principles are the same in each case, the facts differ. For the sake of clarity and ease of reference I have produced a separate judgment for each case, although the two judgments will cover much of the same ground.
2. The Applicant represented Jake Firth before the Crown Court at Manchester. The Applicant's right to payment for that work is governed by the Litigators Graduated Fee provisions in Schedule 2 to the 2013 Regulations.
3. The Applicant wishes to appeal, under regulation 29 of the 2013 Regulations, from a decision of the Legal Aid Agency ("LAA")'s Determining Officer. Regulations 28 and 29 of the 2013 Regulations set out the process for reviewing and appeal the decisions of Costs Officers.
4. In short, the process is this. Under regulation 28 the litigator may apply to the Determining officer, within 21 days of receiving payment, for a redetermination of the Graduated Fee payable. Within 21 days of notification of the redetermination the litigator may require that the Determining Officer give written reasons for the redetermination.
5. Within 21 days of receiving the written reasons under regulation 28, the litigator may file at the Senior Courts Costs Office (SCCO) a notice of appeal against the Determining Officer's decision.
6. Those time limits may "for good reason" be extended under regulation 31. The decision as to whether to extend the time limit for filing a notice of appeal at the SCCO will be made by a Costs Judge. At sub-paragraph (2), regulation 31 says:

“(2) Where a representative without good reason has failed (or, if an extension were not granted, would fail) to comply with a time limit, the appropriate officer, a Costs Judge or the High Court, as the case may be, may, in exceptional circumstances, extend the time limit and must consider whether it is reasonable in the circumstances to reduce the fees payable to the representative... provided that the fees must not be reduced unless the representative has been allowed a reasonable opportunity to show cause orally or in writing why the fees should not be reduced.”
7. In this case, the Determining Officer's written reasons were dated 7 June 2021. The Applicant's appeal notice was filed on 11 August 2022, about 13 months late. The appeal notice does not, as it should, state the date of the Determining Officer's written reasons but it does confirm that an extension of time is needed and gives these grounds:

“Appellant Litigator seek an extension of time - because of the Covid Pandemic resulting in severe staff shortages within a state funded legal aid practice. The LAA are not prejudiced by the Delay as the Grounds relied upon are well known to them having been cited in previous correspondence.”

8. There had been no previous request for an extension of time.
9. The appeal was referred to me and I had the SCCO's Criminal Costs Appeals clerk notify the Applicant that I was not prepared to grant a retrospective 13-month extension of time on the vague grounds given in the appeal notice.
10. The Applicant requested an oral hearing as provided for by Paragraph 5.4.3 of the Practice Direction (Costs In Criminal Proceedings) 2015. Part 5 of the 2015 Practice Direction has to do with costs from central funds and to my mind has no application to an appeal under the 2013 Regulations, but I did arrange an oral hearing for which the Applicant filed two witness statements and was ably represented by Mr Colin Wells of counsel. The Lord Chancellor was not represented on the application, being content to leave the decision to the court.
11. The first of the witness statements filed by the Applicant is from Mrs Susan Mager, the Applicant's Practice Manager.
12. Mrs Mager says that in March 2020 she was identified as being clinically extremely vulnerable and was required to shield. Prior to the first lockdown there had been two members of staff in the Applicant's administration department but once lockdown came into force, the Applicant only had one member of administrative staff who did not have the use of a computer or the internet. She was accordingly not able to work at home during the pandemic and informed the Applicant that she would not come into the office as she needed to look after her mother. This meant that no one was in the office to answer calls or deal with administrative matters.
13. During the whole of lockdown, Mrs Mager worked at home, having tapes and work delivered to her home address. When restrictions were first relaxed, she was still advised to work from home. Mrs Mager returned to work at the office in November 2020, but due to the fact that the Applicant is located in the centre of Manchester and in serviced offices, she only went in at weekend when no one else was in.
14. During this period Mrs Mager did contract Covid-19, which severely affected her breathing. This was followed by another National Lockdown in January 2021 when she again had to shield and was advised to do so until 31 March 2021. It was extremely difficult for her to keep on top of administrative matters due to not being in the office and having no member of staff to assist.
15. Mrs Mager returned to working in the office 3 days per week from July 2021, gradually increasing her hours. She is now back in the office full time, but since her return to the office the Applicant has had extreme difficulty in recruiting and maintaining staff.
16. In September and November 2021 the Applicant had two Legal Aid Contract Review Audits and in April 2022 had to prepare for a Peer Review. In October 2021 Mrs Mager suffered a further episode of Covid-19. All of this and the pandemic, says Mrs Mager, put the Applicant under extreme pressure which resulted in the Appellant missing some important deadlines.

17. The second statement filed in support of the application is from Mr Safdar Ashraf, whom I understand to be the head and founder of the Applicant firm. Mr Ashraf says that since the start of the Covid-19 Pandemic, he has been ill a number of times. Since October 2021 he has had three episodes of Covid-19, the side-effects of which have been extremely severe and still continue. (This is supported by medical evidence, which does not mention “extremely” severe” symptoms but certainly unpleasant and continuing symptoms). He has had to take time off work. Mrs Mager, as her statement shows, has had similar problems and as a small criminal law practice where the culture is to work face to face, it has been extremely difficult for the Applicant to recruit staff.
18. Mr Ashraf says that the need, in the last two years, to complete Legal Aid Audits and Peer Reviews has put the practice under extreme pressure and has caused the Applicant to miss the time limit for this appeal.

Crown Court Fee Guidance

19. Mr Wells has referred me to the Crown Court Fee Guidance as published on the date of the Representation Order in this case (15 October 2020). Appendix A deals with late claims for payment under the Graduated Fee Scheme. Regulation 5(3) of the 2013 Regulations provides that a claim by a litigator for payment must not be entertained unless the litigator submits it within three months of the conclusion of the proceedings to which it relates. That time limit, like the time limits for reviews and appeal to which I have referred, is subject to Regulation 31 and may be extended by reference to the same criteria.
20. Mr Wells points out that Appendix A makes reference to a Costs Judge’s judgment. The judgment refers to the fact that the National Taxing Team (“NTT”), under the Criminal Defence Service (Funding) Order 2001, applied as at January 2007 a sliding scale under which claims submitted over twelve months out of time would incur a 20% penalty but not complete disallowance. He suggests that there is scope for accepting this very late appeal.

The Principles

21. Appendix A to the Crown Court Fee Guidance refers (without specifying) to the general observations of Costs Judge Campbell in *R v Grigoropolou & Others* (SCCO 76/12, 77/12, 78/12 and 79/12, 10 August 2012) on whether time should be extended for the submission to the LAA of claims for payment, and the appropriate deduction if any to be applied under given circumstances.
22. In my view *R v Grigoropolou & Others* is not of assistance to the Applicant. That is primarily for three reasons. The first is Costs Judge Campbell’s observation that the “ex post facto” payment system under the 2001 Order had imposed a much heavier burden on litigators preparing claims for payment (including the preparation of a detailed bill and a full supporting file of papers) than does the Graduated Fee Scheme.
23. The second reason is Costs Judge Campbell’s conclusion (with which I respectfully agree) that the Graduated Fee Scheme

“is stand alone and... it is not permissible to “hark back to the old regime”... comparing the way in which late claims were dealt with under the ex post facto regime, is not a proper exercise to undertake when addressing such claims...”

24. Each case, as Costs Judge Campbell put it, must instead turn on its own facts and must be looked at on an individual basis.
25. The third reason is that this is not an application for payment of a Graduated Fee, for which three months is allowed. It is an application to this court for a Costs Judge to hear an appeal, for which 21 days is allowed. I am not asked to increase the time limit by a factor of about four, as would be the case with a 3-month limit, but by a factor of about 20.
26. In short, there is no proper basis for applying an outdated NTT policy designed for a burdensome 3-month administrative process to the relatively straightforward process of filing, within 21 days of receiving written reasons, a three-page appeal notice with supporting materials that will already have been deployed during the process of redetermination.

Conclusions

27. If there is good reason for the late filing of this appeal, it may be heard without penalty. I do not think however that it can be said that there was good reason. I would need much more detailed and cogent evidence from the Appellant to come to that conclusion.
28. Much of the evidence given by Mrs Mager and Mr Ashraf concerns events before the delivery of the Determining Officer’s written reasons on 7 June 2021, and for that reason is of limited if any assistance. There is nothing to explain how the Applicant was able to take the case through the redetermination and written reasons process but was unable to take the fairly straightforward step of filing what would have largely been the same material for an appeal. I can see some explanation for delay between September and November 2021 and in April 2022, but nothing adequate to explain the entire period of delay.
29. As to facts specific to this case, for example when and how the Applicant came to make the decision to file the appeal notice, and why an extension of time was not requested earlier, I have no real evidence. The prospective appeal seems to have been overlooked, or given a lower priority than other matters, for months on end. That cannot furnish good reason for such a long delay.
30. In the absence of good reason, I can still extend time in exceptional circumstances, though that might leave the Applicant open to a reduction, by way of penalty, of anything found due on appeal.

31. The Applicant's case, as Mr Wells put it, is that the effect of the Covid pandemic upon a small criminal practice can properly be characterised as an exceptional circumstance. I can accept of course that the pandemic made life difficult for both Mr Ashraf and Mrs Mager but as I have said the evidence does not address more than a fraction of the period of delay.
32. As I have indicated, in the absence of more specific evidence I can only conclude that the very late filing of this appeal was either an administrative oversight or the Applicant gave priority to other matters such as Legal Aid Audits. I appreciate that this may have happened in difficult times but neither could, in my view, justify a finding of exceptional circumstances.
33. To put this in perspective, one only has to consider what would have happened if a request for extension had been made in good time, as it should have been. To do so, it is only necessary to send an email to the Criminal Costs Appeals clerk. No doubt some extension, if requested, would have been granted but extensions, when granted, are granted over a period of weeks. An extension of 13 months would never have been granted even if it had been requested in good time. It is not open to the Applicant to attempt to improve on that by filing a retrospective request for extension 13 months late.
34. For those reasons, the application for an extension is refused. The appeal has not been filed in time and will not be heard.