



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0037

Information Commissioner's Ref: FS50157444

BEFORE

John Angel

Chairman

And

Marion Saunders and David Wilkinson

Lay Members

Between

DR PETER KELWAY

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

CHIEF CONSTABLE OF NORTHUMBRIA POLICE

Additional Party

Decision

The Tribunal awards Dr Kelway £1000 in costs to be paid by the Chief Constable of Northumbria Police to him within 28 days of this decision.

Reasons for Decision

1. On 26th April 2009 Dr. Kelway made a written costs application to the Tribunal. He is seeking costs from both the Information Commissioner (IC) and the Northumbria Police (the Police). Dr Kelway is a litigant in person (LIP) in this case. The Tribunal hearing lasted for 1 ½ days. He claims £26,539.00 in costs.
2. Dr. Kelway puts the application on three bases, alleging:
 - unreasonable action;
 - failure to comply with the Tribunal's directions; and
 - delays which with diligence could have been avoided.He makes these complaints against both of the other parties.
3. The other parties were given the opportunity to provide written responses to the application for costs which they did. Dr Kelway was given a final right of reply to these submissions which he provided on 26 May. The Tribunal then considered the cost application on the papers before it.

The Tribunal's power to award costs

4. The Tribunal has power to award costs under rule 29(1) of the *Information Tribunal (Enforcement Appeal) Rules 2005*, which provides as follows:

- (1) *In any appeal before the Tribunal, including one withdrawn under rule 12 above, the Tribunal may make an order awarding costs –*
- (a) *against the Appellant and in favour of the Commissioner where it considers that the appeal was manifestly unreasonable ;*
 - (b) *against the Commissioner and in favour of the appellant where it considers that the disputed decision was manifestly unreasonable; and*
 - (c) *where it considers that a party has been responsible for frivolous, vexatious, improper or unreasonable action, or for any failure to comply with a direction or any delay which with diligence could have been avoided, against that party and in favour of any other.*

The term “costs” includes fees, charges, disbursements, expenses, and remuneration: rule 3(2).

5. Clearly rules 29 (1) (a) and (b) do not apply in this case. The IC is not claiming costs against Dr Kelway and even if he was the fact we have found that Dr Kelway's appeal is partly allowed would make it difficult to envisage a situation where his appeal could be regarded as “manifestly unreasonable”.
6. Dr Kelway is not alleging that the IC's Decision Notice is “manifestly unreasonable” and even if he was the fact that we have partly upheld the Notice would again make it difficult for us to envisage awarding costs under rule 29 (1)(b).
7. Therefore the only ground we need to consider is under rule 29(1) (c).
8. The Tribunal can only award costs against a "party". Party is defined in rule 3(3) of the IT Rules to mean '*the appellant, or the Commissioner, or a person joined to an appeal in accordance with Rule 7 ...*'. The Police have been a party to the appeal proceedings following the Tribunal's rule 7 Joinder Notice at the outset of the proceedings. The Tribunal is therefore authorised to make a costs award against it as well as any other party.

9. The Tribunal's power to award costs under rule 29 is discretionary. The Information Tribunal rarely awards costs. This is not only because of the limited powers under rule 29 but because of the overriding objective of tribunals to provide low cost, prompt and informal justice and that costs should not be seen as a deterrent to parties using tribunals.

10. The Tribunal's power to award costs in favour of a litigant in person, like Dr Kelway, was considered in *Bowbrick v Information Commissioner and Nottingham City Council* EA/2005/0006 at paragraphs 71-102. The Tribunal ordered the Council to pay the whole of Dr. Bowbrick's costs, and ordered those costs to be assessed by the court under Part 47 of the Civil Procedure Rules (*Bowbrick*, paragraphs 93-94).

11. This Tribunal has taken into account the findings in *Bowbrick*. In particular we have found helpful the decisions of other tribunals referred to in *Bowbrick* in relation to analogous situations to the first circumstance under rule 29(1)(c) so far as it related to *unreasonable action*. The Financial Services and Markets Tribunal (FSMT), in a written decision in *Baldwin v FSA, Case Number Fin/2005/0011*, stressed that it could and should be distinguished from an administrative court charged with applying the Wednesbury unreasonableness test (that is the test formulated for the purpose of determining whether a public authority has acted outside its statutory powers). According to Andrew Bartlett QC, Chairman of the FSMT, "*the Tribunal, unlike the court in the Wednesbury case, is expressly directed by paragraph 13 to make its own judgment of what is reasonable: "(1) If the Tribunal considers that a party ... has ... acted unreasonably"*. The FSMT, following a review of the facts, concluded that, in its opinion, the investigation at issue in the proceedings had not been unreasonable and made no order for costs against the FSA. Its approach to the application of its power to award costs contained in the Financial Services and Markets Act 2000 Schedule 13 paragraph 13 is summed up in its conclusion at paragraph 27 of the decision: "*Taken analytically item by item, and with the benefit of hindsight, it might be possible to characterise some of the elements of*

conduct ... as unreasonable. But we think it important in this case to keep in mind also the broader picture and not to over-emphasize the significance of any individual feature of the investigation. We also remind ourselves that a wrong view or approach is not necessarily an unreasonable view or approach ..."

12. In an earlier case, a differently constituted FSMT appeared to have been guided by the principle of "fairness". In *Davidson v the FSA (30 July 2004)* (the notorious "Plumber case"), the FSMT, although recognising that it could only make a costs order if a party acted unreasonably, noted that "fairness" had been a consideration in its review of the facts and its decision of how much the party should be ordered to pay. In the case the tribunal made an order that the FSA pay 50% of the costs.

Background

13. Dr Kelway's notice of appeal was received by the Tribunal in April 2008. The case was originally set down for hearing in November 2008 but unfortunately due to the illness of a close relative of Dr Kelway the hearing was postponed and eventually held at the end of March 2009. During this time three sets of directions were issued by the Tribunal and there were several directions hearings/pre-hearing reviews conducted by way of telephone conference.
14. There was extensive communication between the parties most of which was copied in to the Tribunal and the Tribunal also received and responded to numerous emails. The Chairman of the Tribunal has extensive experience of sitting on Information Tribunal cases. He would comment that the case management required in this appeal was greater than any other case he has sat on despite the fact this was far from the most complicated case he has handled.
15. Why is this? The Tribunal believes this is partly because Dr Kelway is a litigant in person and does not have the benefit of being represented. However the Tribunal found Dr Kelway to be a very articulate person and more conversant with case processes than most such litigants. However what became clear to the Tribunal from the history of his case, as set out in the Tribunal's decision

dated 14 April 2009, that a certain amount of animosity existed between some of the parties before the commencement of this case. This animosity seems to have had an adverse effect on the preparation for the hearing in this case and can be appreciated from some of the expressions used by Dr Kelway about other parties in pre-hearing correspondence.

16. Unfortunately this seems to have resulted in a lack of co-operation at times between the parties that would not normally be expected in the preparation for a hearing before this Tribunal.

Conclusion and remedy

17. Rule 29(1)(3) authorises the Tribunal to make an award of costs against a party and in favour of any other in three circumstances:

(1) where "*it considers*" that the party has been "*responsible for frivolous, vexatious, improper or unreasonable action*" or;

(2) for "*any failure to comply with a direction*" or;

(3) for "*any delay which with diligence could have been avoided*".

18. As to the first limb of rule 29(1)(3) we have considered all the circumstances of the case and do not find that any party has acted frivolously or vexatiously. However we do consider that the several hundred pages of Dr Kelway's emails and letter attachments that the Tribunal has seen in this case could amount to an improper or unreasonable way of conducting a case but we have taken into account the fact that Dr Kelway is a litigant in person and not represented as are the other parties. Also we note that part of the reason for so much correspondence was Dr Kelway's view that directions were not being complied with. Dr Keyway's occasional negative aspersions about other parties has not been helpful and although we do not find this is improper and unreasonable conduct in this case what we do find is that this conduct contributed to possible delays in the preparation for this case.

19. As to the second and third limbs of rule 29(1)(3) there were some delays by the Police in complying with directions notably the Tribunal's direction whether any

parts of the closed bundle should be in the open bundle. The explanation that we have had for this is not entirely satisfactory. There was much correspondence about missing documents which although clarified at the hearing could have been dealt with earlier. There was delay in holding a meeting which could have been avoided. These incidents caused Dr Kelway additional time in preparation of his case and meant he had limited time at the hearing to consider newly released material. However we do not consider that this affected the fairness of the proceedings. Ultimately directions were complied with, even if late.

20. We are mindful of the fact that due to the voluminous correspondence, parties may have lost sight of or become confused as to what matters were in issue and this may have contributed to the lack of diligence by the Police. We note the considerable amount of public money already expended on the various investigations undertaken by the Police before the freedom of information request.

21. The Tribunal has considered all the evidence and submissions by the parties and finds the delays in compliance with some directions could have been avoided by the Police with due diligence, but that ultimately this did not prejudice the proceedings. However it did cause Dr Kelway to expend additional time on the preparation of his case. We also find that to some extent Dr Kelway contributed to the delays because of the way he dealt with matters but we take into account that he is a litigant in person. What we find surprising is that the Police who are used to court proceedings and are represented by senior counsel in this case did not cope better with Dr Kelway and there was no real excuse in this case for not promptly complying with directions and co-operating more fully with all the parties.

22. It has been a difficult decision but on balance we have decided that it is justifiable to make an order for costs against the Police and in favour of Dr Kelway. Dr Kelway claims over £26,000. The Tribunal has considered Mr Pitt-Payne's written submissions on behalf of the Police in response to this figure. The Tribunal has decided in all the circumstances of this case to make an order

under rule 29(3) for the Police to pay the specified sum of £1000 to Dr Kelway in respect of his costs.

23. We make no order for costs against the IC.

24. Our decision is unanimous.

Signed:

John Angel

Chairman

Dated: 15 June 2009