UPPER TRIBUNAL CASE NOS: GIA/0649 and 1055/2016

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

GIA/0649/2016

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The costs decision of the First-tier Tribunal under reference EA/2015/0048, made on 2 February 2016, did not involve the making of an error on a point of law.

GIA/1055/2016

The application for a costs order in the Upper Tribunal is refused.

REASONS FOR DECISION

1. In 2014, Mr Kirkham (now Dr Kirkham) asked the University of Cambridge for information under the Freedom of Information Act 2000 (FOIA). The University refused his request and the Information Commissioner found that it had dealt with the request in accordance with FOIA. Dr Kirkham appealed to the First-tier Tribunal against the Commissioner's decision notice. The tribunal dismissed his appeal and refused his application for costs. Upper Tribunal Judge Turnbull gave Dr Kirkham permission to appeal against both decisions. *GIA/0649/2016* is the appeal on costs; *GIA/1055/2016* is the appeal on the substantive issue. I dismissed the appeal in *GIA/1055/2016* in *Reuben Kirkham v Information Commissioner (Section 12 of FOIA)*. [2018] UKUT (AAC). That leaves me to deal with the appeal in *GIA/0649/2016* and Dr Kirkham's application for costs in *GIA/1055/2016*.

A. What the legislation says about costs

2. Section 29 of the Tribunals, Courts and Enforcement Act 2007 provides:

> **29 Costs or expenses**
>
> (1) The costs of and incidental to-
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

3. Rule 10 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976) provide:

> **10 Orders for costs**
>
> (1) Subject to paragraph (1A) the Tribunal may make an order in respect of costs (or, in Scotland, expenses) only—
>
> (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 has acted unreasonably in bringing, defending or conducting the proceedings; or
>
> (c) where … the Information Commissioner is the respondent and a decision, direction or order of … the Commissioner is the subject of the proceedings, if the Tribunal considers that the decision, direction or order was unreasonable.

4. Rules 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698) provides:

> **10 Orders for costs**
>
> (1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings transferred or referred by, or on appeal from, another tribunal except—
>
> …
>
> (b) to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs (or, in Scotland, expenses).
>
> …
>
> (3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except—
>
> (d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings; …

B. How can Dr Kirkham have costs if he lost in both the First-tier Tribunal and the Upper Tribunal?

5. To start at the very beginning is, as someone once said, a very good place to start. In the case of costs in FOIA proceedings before the First-tier and Upper Tribunals, that place is the legislation. The combined effect of the Act and the rules of procedure is that the tribunals have power to make a costs order only in the circumstances specified. Dr Kirkham has not relied on the tribunals' wasted costs jurisdiction. His argument is that the Information Commissioner or her counsel acted unreasonably in defending or conducting the proceedings. That is the correct starting point (*Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC) at [27]).

6. The fact that Dr Kirkham lost in the First-tier Tribunal and in the Upper Tribunal is not a slam dunk for the Information Commissioner. The wording of rule 10(1)(b) of the First-tier Tribunal's Rules and rule 10(3)(d) of the Upper Tribunal's Rules is wide enough to cover a successful party who brought proceedings unnecessarily or prolonged them unduly. There is no mention in the legislation of the loser being the one to pay the costs. It is not a rule, a presumption, or even a principle. It may, though, be relevant to the application of the concepts in the legislation in at least two ways. It may be relevant to whether the Commissioner acted unreasonably and, if that is shown, it will be relevant to the exercise of the discretion to make an order.

C. Dr Kirkham's appeal in *GIA/0649/2016*

7. The First-tier Tribunal refused Dr Kirkham's application for costs. The tribunal's decision is the subject of the appeal to the Upper Tribunal. I have to decide whether 'the making of the decision concerned involved the making of an error on a point of law' (section 12(1) of the Tribunals, Courts and Enforcement Act 2007). I have found no error.

The tribunal's reasons

8. Here is a summary of why the tribunal refused the application. After some preliminaries, the tribunal noted that 'rule 10 is usually regarded as a modification of the "costs follow the event" rule'. It then dealt with Dr Kirkham's six grounds:

- First: criticisms of the Commissioner's decision notice. The tribunal rejected this argument as it had found the notice to be in accordance with the law.
- Second: criticisms of the conduct of the Commissioner's counsel. The tribunal rejected this argument as the tribunal had accepted counsel's submissions.
- Third: the Commissioner should have conceded the appeal. The tribunal rejected this argument as it could not be unreasonable for a party who ultimately won to pursue their case.
- Fourth: criticisms about the preparation and content of the bundle. The tribunal rejected this argument as the problem had been resolved by the panel accessing all relevant documents electronically at the hearing. The tribunal could see no fault in either side.
- Fifth: criticism of the Commissioner for failure to refer to another case. The tribunal rejected this argument as Dr Kirkham had not needed assistance to conduct his caselaw search.
- Sixth: criticism of the Commissioner for effectively starting the appeal by giving an inadequate decision notice and failing to make appropriate submissions, and then disengaging as the proceedings progressed. The tribunal rejected this argument as Dr Kirkham was the one who had begun the proceedings, the Commissioner's submissions had persuaded the tribunal to dismiss the appeal, and the Commissioner had remained sufficiently involved to win.

Why there was no error of law

9. Dr Kirkham has criticised the tribunal's reasoning for being 'overly fixated on who won and who lost, rather than applying the proper test of unreasonableness.' I don't accept that. The tribunal mentioned 'costs follow the event' in order to distinguish it from the rule that it had to apply. The language it used in explaining why it rejected Dr Kirkham's criticisms shows that it was applying the correct test. It did mentioned, time and again, that Dr Kirkham had lost. It did so in order to point out the flaws in his arguments. Just to take one example, how could an allegation of errors in the Commissioner's decision notice show unreasonableness when the tribunal had confirmed the notice? The fact that Dr Kirkham had lost was directly relevant to the reasonableness of the Commissioner's conduct.

10. Dr Kirkham has presented several pages of arguments to show that the tribunal's reasoning was defective. As usual, they are detailed, rely extensively on authorities, and seek to demonstrate the fundamental flaws in the tribunal's approach. I do not accept the criticisms. The simple truth is that Dr Kirkham's argument for costs was flawed and the tribunal's reasons demonstrate sufficiently and cogently what those flaws were. It was not necessary to undertake an analysis of the nature of objectivity and its relationship with intuition, to take just one of Dr Kirkham's detailed points.

D. Dr Kirkham's application in GIA/1055/2016

The application was not late

11. The Information Commissioner's response to Dr Kirkham's application was that it had been made late. As Dr Kirkham has pointed out, that is wrong. His application was in time because I extended time. The Commissioner did not make any submissions on the substance of the application. If I had thought that a costs order might be appropriate, I would have given her time to add to her submission. As I decided not to make an order, that was not necessary.

Dr Kirkham's arguments

12. As usual, at least in my experience, Dr Kirkham has looked at the wider picture and sought to persuade the Upper Tribunal to make rulings in the interests of the tribunal system as a whole. A theme of his argument here is that the Upper Tribunal has failed to discipline lawyers and the Information Commissioner through the exercise of its costs jurisdiction. He explained:

> 'the problem is essentially with lawyers who mislead and lie or present themselves as having knowledge and expertise that they simply do not hold in order to gain an unfair advantage in the Tribunal system. This needs to stop. Making a costs award in this case is this Tribunal's opportunity to correct for this ongoing and serious injustice.'

13. A three-judge panel might have been appropriate if this had been a suitable case for that discussion. Dr Kirkham left it me to decide whether to ask the Acting Chamber President to appoint a three-judge panel. I did not do so, because

this case is not an appropriate one to explore the ways that costs can be used 'to improve conduct in the Tribunal system', as Dr Kirkham put it.

14. Dr Kirkham summed up his argument in this passage:

> 'The complaint is essentially that the Commissioner, through Mr Paines [her counsel], prepared a set of deliberately misleading and/or seriously incompetent submissions in respect of this case, which contained direct misstatements of the law and multiple instances of pseudoscience. There are also examples of what one would call lawyers games.'

He went on to give examples of misrepresentations of authorities, omission of authorities, counsel's lack of scientific expertise, playing games with timetables and ambushing Dr Kirkham, and failing to act in the disinterested manner expected of a public body. This, he said, amounted to unprofessional conduct for a barrister.

Why I have rejected Dr Kirkham's arguments

15. I accept that the Information Commissioner is a public official who should take a disinterested stance in appeals against her decisions. One of her roles is to decide whether 'a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I' of FOIA (section 50(1)). On an appeal against her decision notice, she has no personal interest in the litigation. Her only interest is to ensure that FOIA is correctly interpreted and applied by public authorities. There are authorities that have made that point in a variety of contexts dating back at least as early as *Commissioners of Inland Revenue v Sneath* [1932] 2 KB 362 at 382; and that case built on earlier authority. That means that she is not defending a personal interest. But she is entitled to have a view on what the law is or how it should be applied. She may even argue that her decision was right. And in an appropriate case she should help the tribunal make a decision by ensuring that all arguments are identified and explored. Nothing that the Commissioner or her counsel did was inappropriate for the conduct of litigation by a public body. Dr Kirkham disagrees with the way she and her counsel conducted themselves, but that is not the same as unreasonable conduct.

16. Dr Kirkham has talked about tricks and games. I did not notice any. It may be that the proceedings were not as smooth as they could have been, but they seldom are. Problems arise for all sorts of reasons, but that is just a fact of life in litigation; it does not indicate or amount to unreasonable conduct.

17. What's more, the proposition for which a decision is an authority is often open to argument. It could even be argued that a decision derives its meaning and authority from how it is used in later decisions. Caselaw is not like the laws of physics; there is scope for disagreement. Using authorities in a particular way or arguing for a particular interpretation are not of themselves unreasonable.

18. All counsel owe a duty to the court to ensure that the relevant law is put to the judge. In that sense, a failure to cite a case may be unreasonable conduct. As it turned out, I relied on few authorities in my decision. That reflects the fact that

Dr Kirkham's argument was a novel one. The answer was derived from an analysis of his argument and the legislation rather than caselaw. Extensive citation was not necessary. If anything, there may have been too much citation, a common fault.

19. Coming to counsel's understanding of the scientific issues, Dr Kirkham was able to explain his view of how section 12 of FOIA should work. What I had to decide was whether 'estimate' in section 12 was to interpreted and applied in the way he suggested. What counsel did was to argue that the approach described by Dr Kirkham was not the right one as a matter of interpretation of the legislation. He did not need any special knowledge or understanding of science. Dr Kirkham was able to provide that. I do not know what knowledge or understanding of science counsel had, but it was not unreasonable conduct on his part. Nor was it unreasonable conduct for the Commissioner to instruct him.

Signed on original
on 31 October 2018

Edward Jacobs
Upper Tribunal Judge