IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Upper Tribunal case No. UA-2020-000853-HS

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber)

Between:

JJ & EE

Appellants

vs.

Buckinghamshire Council

Respondent

Before: Upper Tribunal Judge Mitchell

Decision on consideration of the papers

Representation:

For the Appellants, Aidan Wills of counsel, instructed by IPSEA Legal (Independent Provider of Special Education Advice).

For the Respondent local authority, Emma Waldron of counsel, instructed by Buckinghamshire Legal Services.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal taken on 2 July 2020 (tribunal ref. CA20-26) involved an error on a point of law. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal sets aside the Tribunal's decision. Under section 12(2)(b)(i) of the 2007 Act, the Upper Tribunal remits this case to the First-tier Tribunal so that it may

redetermine the Appellants' application for a costs order against the Respondent local authority. I direct that the case file is to be put before a salaried judge of that Tribunal as soon as possible, so that the judge may consider whether further case management directions are required.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 the Upper Tribunal hereby makes an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the child of the Appellants with whom the First-tier Tribunal proceedings were concerned. This order does not apply to (a) the child's parents; (b) any person to whom a parent discloses or publishes such a matter, in the due exercise of parental responsibility for the child (c) the disclosure or publication of such a matter by any person in the exercise of statutory (including judicial) functions in relation to the child.

REASONS FOR DECISION

Background

The substantive tribunal proceedings

1. On 5 November 2019, the Appellants appealed to the First-tier Tribunal (FtT) against the contents of an Education, Health and Care Plan (EHC Plan), issued under the Children and Families Act 2014 by the Respondent local authority, in respect of their daughter. In February 2020, the local authority conceded the appeal but later that month withdrew the concession. The proceedings concluded on 14 April 2020 when the FtT allowed the Appellants' appeal following which the Appellants applied for a costs order against the local authority.

Tribunal's decision on the costs application

2. The FtT described the Appellants' costs application as relying on (a) the local authority's failure to meet its EHC Plan-related legal duties both before and during the proceedings, and (b) that "the level of email exchanges was designed to harass them during the appeal proceedings".

3. The FtT found (paragraph 12 of its statement of reasons) that certain factors "wholly undermined" the argument that the local authority had acted unreasonably:

(a) the FtT could not take into account behaviour that occurred before commencement of the appeal proceedings;

(b) errors made by the local authority "in preparing bundles and other administrative failings" may have been due to incompetence or inefficiency but did not establish unreasonable conduct "particularly when there is evidence the respondent did try to put things right although not managing to do so";

(c) it is not unreasonable conduct for a party to defend a weak case;

(d) while the authority could have presented its case differently, "it is not unreasonable to permit a party to present its case as it sees fit";

(e) withdrawing a concession is not unreasonable conduct (*Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 0290 (AAC)). The authority's withdrawal could not be regarded as unreasonable, especially if email exchanges between the parties were taken into account and once "the level of the dispute became known to the [local authority]";

(f) the authority's behaviour did not undermine the overriding objective of the FtT's procedure rules, namely enabling cases to be dealt with fairly and justly;

(g) conduct may only be regarded as unreasonable "where it does not permit a reasonable explanation". The authority had provided a reasonable explanation for its actions throughout the proceedings.

Legal framework

Legal framework

4. Rule 10(1) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 provides as follows:

> "(1) …the Tribunal may make an order in respect of costs only--
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> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs; or
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> (b) if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings."

5. In this case, a costs order was sought under rule 10(1)(b).

6. Rule 10(4) provides as follows:

> "(4) A person making an application for an order under this rule 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 a schedule of the costs claimed with the application."

7. Rules 10(7) and (8) deal with the amount of any costs order:

"(7) The amount of costs to be paid under an order under paragraph (1) may be ascertained by –

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs ("the receiving person"); or

(c) assessment of the whole or a specified part of the costs, including the costs of the assessment, incurred by the receiving person, if not agreed.

(8) Following an order for assessment under paragraph (7)(c), the paying person or the receiving person may apply to a county court for a detailed assessment of costs in accordance with the Civil Procedure Rules 1998 on the standard basis or, if specified in the order, on the indemnity basis."

Grounds of appeal

8. The Appellants' application for permission to appeal was dismissed on paper by both the FtT and a judge of the Upper Tribunal. The Appellants' requested oral reconsideration of their application at which permission was granted. The grounds on which the Appellants were granted permission to appeal were described as follows in the Upper Tribunal's permission determination:

"23. The Appellants relied before the First-tier Tribunal on a wide range of criticisms of the authority's conduct of its case on the EHC Plan appeal proceedings. Generally, costs order applications that rely on such an extensive range of arguments are to be discouraged. Costs applications should not be used simply to ventilate grievances about a local authority's conduct of proceedings or to reargue issues that arose on the substantive appeal proceedings. They should be properly focussed on those aspects of an authority's conduct that might realistically attain the high standard of deficient conduct necessary in order for a costs order to be made. Despite those observations, I have nevertheless decided to grant the Appellants permission to appeal. Arguably, the tribunal erred in law by failing to address or, alternatively,

failing to explain why it rejected certain aspects of the Appellants' case on costs, for the reasons set out below.

24. Paragraph 11 of the tribunal's reasons described the Appellants' case as being that the authority had failed to meet its EHC Plan-related duties, both before and during the proceedings, and that the volume of local authority emails sent to the Appellants disclosed an intention to harass them. Paragraph 12 shows that the tribunal also understood the Appellants' case to rely on local authority actions in relation to the tribunal bundle and their withdrawal of the concession made in February 2020. Other than those specific aspects of the Appellants' case, the tribunal's findings also referred to it not being unreasonable for a party to defend a weak case nor present a case as it sees fit, that the authority's conduct did not undermine the overriding objective of dealing with a case fairly and justly, and it had shown that its actions admitted of a reasonable explanation.

25. The aspects of the Appellants' case which the tribunal arguably failed adequately to deal with were in my judgment:

(a) the argument that the authority's withdrawal of their concession of the appeal was unreasonable because it relied on omissions from the EHC Plan, relating to STS and OT provision, that had arisen because the authority had previously failed properly to address these matters as well as the authority's misconceived position that it could decide for itself, outside the EHC Plan, the level of STS and OT provision required;

(b) the argument that the authority had brought improper pressure to bear on their OT not to recommend EHC Plan provision; and

(c) the arguments relating to consent for a STS observation, which was a major part of the Appellants' costs arguments.

That is the first ground of appeal.

26. The second ground on which I grant permission to appeal is that the First-tier Tribunal arguably misdirected itself in law in finding that anything that happened before the Appellants lodged their notice of appeal was irrelevant. The Appellants' arguments included a submission that the authority had failed to comply with the May 2019 Mediation Action Plan insofar as it concerned SALT assessment. Since statutory mediation is intended to promote resolution of disputes without recourse to the tribunal, arguably a party's compliance with mediation agreements may be relevant in determining whether a party's conduct of proceedings was unreasonable. This is an issue that may be of

relevance more widely which further justifies granting permission on this ground."

Arguments

Respondent local authority

9. The local authority rely on Upper Tribunal Judge Rowley's decision in *MG v Cambridgeshire County Council* [2017] UKUT 172 (AAC), where she said:

> "26…nothing in this decision should be taken as encouraging applications for costs. The general rule in this jurisdiction is that there should be no order as to costs. There are good and obvious reasons for the rule. Tribunal proceedings should be as brief, straightforward and informal as possible. And it is crucial that parties should not be deterred from bringing or defending appeals through fear of an application for costs.
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> 27. Furthermore, tribunals should apply considerable restraint when considering an application under rule 10, and should make an order only in the most obvious cases. In other words, an order for costs will be very much the exception rather than the rule."

10. The local authority submit that the following general principles apply in considering whether a party's conduct of proceedings was unreasonable:

(a) the fact that one party establishes their case does not mean the other party was unreasonable to oppose it;

(b) the reasonableness of a party's conduct must take into account the ongoing and evolving nature of proceedings (*HJ v London Borough of Brent* [2011] UKUT 191 (AAC));

(c) withdrawal or concession at a late stage is not in itself unreasonable conduct (*Willow Court Management Company Ltd v Alexander* [2016] UKUT 0290 (AAC)).

11. The meaning of 'unreasonable', argue the local authority, should be construed in accordance with *Ridealgh v Horsefield* [1994] EWCA Civ 40, in particular the Court of

Appeal's finding that "the acid test is whether the conduct permits of a reasonable explanation". It follows that rule 10(1)(b) imposes a 'high threshold test', which is not easily satisfied "especially where the applicant's conduct of the proceedings was itself in some respects remiss" (*A v Durham County Council* HS/231/2016).

12. The local authority also rely on Upper Tribunal Judge West's decision in *NS & KS v Kent County Council* [2021] UKUT 311 (AAC), in which he said:

> "149. Applications for costs should be pithy, succinct and focussed. They should not be prolix, meandering and difficult to follow. The basis of the application should be clearly set out at the outset. It should not be necessary to embark on an elaborate textual exegesis in order to work out what the basis of the application is…The onus is on the applicant to make out the case. If such applications do not make it clear what is being sought and on what basis, it should come as no surprise if they are dismissed in short order.
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> 150. In providing reasons for a decision on a costs application, Judges should bear in mind the guidance of the Court of Appeal in *English v Emery Reimbold & Strick* [2002] EWCA Civ 605, [2002] 1 WLR 2409 at [14] and [27-30]. The reason for an award of costs (or a refusal of an award) should be apparent.
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> 151. Nevertheless, such decisions should not be extensive judicial disquisitions into the minutiae of the case in hand. Whilst the reason for an award of costs (or a refusal of an award) should be apparent, it does not need to be (and should not be) elaborate."

13. The Court of Appeal's findings in *English* regarding the adequacy of reasons should be heeded, argue the local authority. At paragraph 19, Phillips LJ said:

> "…if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was

> preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

14. The local authority draw attention to what Judge West said in *NS & KS* concerning the merits of challenges to tribunal costs orders:

> "153…unless the Judge's discretion has been exercised contrary to principle, in disregard of the principle of relevance or is just plainly wrong, an appeal against a Tribunal costs order made in the exercise of its discretion will be likely to fail."

15. The final authority relied on by the local authority is the Court of Appeal's decision in *McPherson v BNP Paribas (London Branch)* [2004] EWCA Civ 569, in which Mummery LJ said:

> "26. When a costs order made by an employment tribunal is appealed to the employment appeal tribunal or to this court the prospects of success are substantially reduced by the restriction of the right of appeal to questions of law and by the respect properly paid by appellate courts to the exercise of discretion by lower courts and tribunals in accordance with legal principle and relevant considerations. Unless the discretion has been exercised contrary to principle in disregard of the principle of relevance or is just plainly wrong, an appeal against a tribunal's costs order will fail."

16. The authority submit that there was nothing unjust or perverse in the FtT's decision. It properly directed itself to the applicable law and gave adequate reasons, which were not required to be elaborate. The Appellants "seek to appeal a discretionary power exercised by a judge". As a matter of principle, the Upper Tribunal should be very slow to interfere with the exercise of judicial discretion.

17. The first ground of appeal runs counter to the injunction in *English* that reasons are not required to identify and explain "every factor which weighed with the judge in his appraisal of the evidence". The FtT clearly considered all the evidence and arguments, because it said it had done so, and identified seven factors which "wholly undermined" the Appellants' case. It would have been "utterly disproportionate" for the FtT to have identified and explained every factor weighed in its appraisal of the evidence.

18. Since the Appellants do not pursue ground 2, I need not deal with the local authority's arguments in respect of that ground.

19. If the appeal succeeds, the local authority submit that this matter should be remitted to the FtT for it to redetermine the Appellants' application for a costs order.

Appellants

20. The Appellants inform the Upper Tribunal that they do not wish to pursue the second ground of appeal. This is a little unfortunate since only that ground raised issues of potentially wider significance. But the Appellants are represented by competent counsel, and no doubt their decision has been taken advisedly. There would be no point in this case in requiring the Appellants to provide submissions on ground two. If it is necessary for me to do so, I consent to the Appellants' withdrawal of ground two.

21. The Appellants do not dispute the relevance of the authorities relied on by the local authority concerning the adequacy of reasons for a judicial decision, but submit that the key requirement is that reasons must "tell the parties in broad terms why they lose or, as the case may be, win" (*GC and JC v Tameside Metropolitan Borough Council* [2011] UKUT 292 (AAC)). As Lawrence Collins LJ said in *Bassano v Battista* [2007] EWCA Civ 370:

> "21…justice will not be done if it is not apparent to the parties why one has lost and the other has won. Fairness requires that the parties, especially the losing party, should be left in no doubt why they have won or lost."

22. The Appellants also rely on what Lord Brown said in *South Bucks DC v Porter (No 2)* [2004] 1 WLR:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision…The reasons need refer only to the main issues in the dispute, not to every material consideration."

23. It follows, submit the Appellants, that a FtT which fails to address one of the primary actions, or areas of conduct, alleged to constitute unreasonable conduct will not give adequate reasons for its decision.

24. The Appellants submit that the FtT's reasons were manifestly inadequate failing, as they did, to address central points in the costs order application. The FtT neither determined, nor made findings of fact on, the three key areas of conduct relied on as constituting unreasonable conduct. It is impossible for the Appellants to understand how those matters were determined or even whether they were determined at all.

25. This is not, submit the Appellants, a borderline case in which some reasons were provided on a central point and the dispute concerns their adequacy. Judged by the FtT's statement of reasons, it simply failed to consider core aspects of the Appellants' case.

26. The Appellants submit that the local authority's response to this appeal says "very little by way of an attempt to defend the adequacy of the reasons". Insofar as they are defended, the Appellants reply that:

(a) the assertion that all evidence and arguments were considered is "nothing to the point" since the statement of reasons contains no indication that the arguments were in fact considered;

(b) the 'seven factors' relied on by the FtT did not address the key allegations of unreasonable conduct made by the Appellants;

(c) the costs arguments that the FtT failed to address were, on any view, central planks of the Appellants' application.

27. If the appeal succeeds, the Appellants ask the Upper Tribunal to remake the FtT's decision (i.e. determine their application for a costs order) rather than remit the matter to the FtT. This case is suitable for redetermination by the Upper Tribunal. All relevant evidence is contained in the Upper Tribunal, as is the Appellants' schedule of costs claimed.

Conclusions

28. Neither party has asked the Upper Tribunal to hold a hearing before deciding this appeal. I consider a hearing unnecessary. Both parties' written submissions were drafted by counsel and I do not consider it likely that oral argument would provide me with further material assistance.

29. It is not the local authority's case that any deficiencies in the FtT's reasons were immaterial. They do not, for instance, argue that there was no evidence on which the Tribunal could have made a sound finding that the local authority improperly put pressure on their occupational therapist not to recommend provision for inclusion in the child's EHC Plan. The local authority's case is that the reasons given by the FtT properly performed their task of explaining to the Appellants why their costs application failed.

30. This appeal concerns the FtT's treatment of three aspects of the Appellants' case. Firstly, that the local authority, in withdrawing their concession of the appeal, acted unreasonably. Secondly, that the authority's occupational therapist was placed under improper pressure not to recommend provision in the child's EHC Plan. Thirdly, arguments concerning parental consent to a STS observation. I shall refer to these as the disputed aspects of the Appellants' costs case.

31. The FtT's statement of reasons described the Appellants' costs application as relying on two matters, the local authority's supposed failure to meet its EHC Plan-related legal duties and that the volume of email exchanges between the parties was inflated by the local authority as a means of harassing the Appellants. The statement also shows that the FtT was aware that the application relied on the authority's withdrawal of their concession. While these parts of the statement of reasons may be said to relate the first aspect of the Appellant's costs case, the other disputed aspects were not expressly identified.

32. Of the seven matters identified by the FtT as undermining the Appellants' case, some had a degree of connection to the first disputed aspect of the Appellants' costs case. These were the findings that it is not unreasonable for a party to defend a weak case, it is not unreasonable for a party to conduct its case as it sees fit, and that withdrawing a concession is not unreasonable conduct.

33. The FtT also made general findings that the local authority's behaviour did not undermine the overriding objective of the FtT's procedure rules, and that the authority had provided a reasonable explanation for its actions throughout the proceedings. If made out, these findings would have despatched each of the disputed aspects of the costs case. But the problem with the authority's submissions on this appeal is that they do not explain why these general findings properly explained to the Appellants why their case was rejected, in particular as regard the second and third disputed aspects. On their own, these general findings were in my judgment inadequate to explain why the second and third disputed aspects of the Appellants' case were rejected. They were not, for instance, accompanied by a finding that there was no evidence to suggest that the authority brought improper pressure to bear on their occupational therapist, nor a finding that the local authority acted reasonably in seeking parental consent to a STS observation. On their own, these general findings were inadequate to the task of explaining to the Appellants why they had lost.

34. For the above reasons, I decide that the FtT's decision involved an error on a point of law in that it gave inadequate reasons for its decision. I set aside the FtT's decision.

35. I shall deal with the remaining arguments briefly. The local authority rely on case law about the standard to be expected of costs order applications. I fully endorse those authorities. However, the authority do not argue that the Appellants' costs order application fell below the expected standard and so this point goes nowhere. The authority emphasise that the Upper Tribunal should be slow to interfere with the exercise of judicial discretion by the FtT, which is correct but this appeal does not involve a challenge to the exercise of a judge's discretion. It is a challenge to a FtT's determination that a local authority's conduct of proceedings was not unreasonable. The discretionary stage of the rule 10 process had not been reached and would only have arisen had the FtT found unreasonable conduct.

Disposal

36. I decline to take the course suggested by the Appellants, that is to decide for myself the application for a costs order against the local authority. If I were to do so, I would first require the Appellants to redraft their application in order to conform with the guidance given by Upper Tribunal Judge West in *NS & KS*. In other words, my determination of the costs order application would be unlikely to be any speedier than determination by the FtT. In addition, it is preferable, as a matter of general principle, for the FtT to determine whether a party's conduct of proceedings has been

unreasonable. It is the tribunal that deals with proceedings of this type day in and day out. The Upper Tribunal does not do so and, when it does deal with education cases, restricts itself to matters of law. The FtT is much better placed to make evaluative judgements about the way in which proceedings were conducted. I therefore remit this matter to the FtT for it to redetermine the Appellants' application for a costs order against the local authority.

37. I have not given a direction that the Appellants' costs order application is to be redetermined by a different judge of the FtT. I consider that the constitution of the next FtT is a matter for that tribunal to decide (presumably, it will be decided by the Health and Social Care Chamber's Deputy President or its President).

38. Finally, I apologise to the parties for the delay in deciding this appeal. Shortly after the case was referred to me for decision in June of this year, I became unwell and have only recently returned to my duties.

(Authorised for issue)
E Mitchell
Judge of the Upper Tribunal
30 November 2022