IN THE UPPER TRIBUNAL **Case No.UA-2022-000758-HS**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 89 (AAC)**

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

Between:

KM & DM

Appellants

- v –

Cheshire West and Chester Council

Respondent

Before: Upper Tribunal Judge Mitchell

Decided on consideration of the papers.

DECISION

The decision of the First-tier Tribunal taken on 30 March 2022, under case ref. CA22-012, did not involve an error on a point of law. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal DISMISSES this appeal.

Representation

For the Appellants, Mr Stephen Broach of counsel (direct access instruction).

For the Respondents, Cheshire West and Chester Council's Legal Department.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the child with whom this appeal is concerned. This order (a) does not apply to the child's parents acting in the due exercise of their

parental responsibility for the child, (b) does not prevent identification of the child by any person for the purposes of exercising statutory (including judicial) functions in relation to the child.

REASONS FOR DECISION

Background

1. The Appellants appealed to the First-tier Tribunal against the contents of an Education Health and Care Plan issued by the Respondent Council under Part 3 of the Children and Families Act 2014 in respect of their son. The plan was issued on 3 March 2021 and the appeal was received by the Tribunal on 17 March 2021.

2. The First-tier Tribunal issued its decision on the Appellants' appeal on 23 December 2021. The Appellants applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. The Tribunal refused permission and its determination was issued on 24 February 2022.

3. On 10 March 2022, the First-tier Tribunal received the Appellants' application for a costs order against the Council. The Tribunal sought the Appellant's observations on its preliminary view that the costs application was out-of-time because it was not received within 14 days of the date on which the decision notice was issued on 23 December 2021. In response, the Appellant's representative argued that the time for making an application for a costs order did not begin to run until proceedings on the appeal had come to an end, which did not occur until the First-tier Tribunal refused permission to appeal to the Upper Tribunal. On that basis, time began to run on 24 February 2022 and the Appellants had until 10 March 2022 to apply for a costs order. Hence, the application for a costs order was made in time.

4. The First-tier Tribunal disagreed with the Appellants and ruled that time for making a costs order began to run on 23 December 2021. The application received by the Tribunal on 10 March 2022 was therefore out-of-time. The Tribunal then considered whether to extend time and admit the Appellants' late application. It refused to extend time. The application was made 55 days late and "to resurrect issues so late after the event needs good reason". The Appellants' reason was that they misunderstood the time limits for applying for permission to appeal. The Tribunal rejected the Appellants' argument and found, "it is not conscionable that [the Appellants' experienced legal advisers] would not have properly advised the parents". Finally, the Tribunal asked itself, "what is required in terms of fairness and justice".

In answering this question, the Tribunal rejected the submission that the Council would suffer no prejudice because "the LA can expect litigation to be conducted efficiently and in compliance with the rules". The Tribunal accepted that refusing to extend time might cause the Appellants "real prejudice" but, having reviewed the proceedings, thought there was little prospect of the Appellants establishing unreasonable conduct on the part of the Council.

Legislative framework

5. Proceedings before the Health, Education and Social Care Chamber of the First-tier Tribunal are governed by the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") and Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the 2008 Rules"). The 2008 Rules are made under the 2007 Act by the Tribunal Procedure Committee.

6. Section 22(4) of the 2007 Act provides as follows:

> "(4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing –
>
> …(c) that proceedings before the First-tier Tribunal…are handled quickly and efficiently…".

7. Section 29 of the 2007 Act, headed Costs or Expenses, provides as follows:

> "(1) The costs of and incidental to –
>
> (a) all proceedings in the First-tier 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.
>
> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may –
>
> (a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet,

the whole of any wasted costs or such part of them as may be determined in accordance with the Tribunal Procedure Rules.

(5) In subsection (4) "wasted costs" means any costs incurred by a party –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it unreasonable to expect that party to pay."

8. Part 1 of Schedule 5 to the 2007 Act provides as follows:

"4. Rules may make provision for time limits as respects initiating, or taking any step in, proceedings before the First-tier Tribunal…

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12. (1) Rules may make provision for matters regulating matters relating to costs…of proceedings before the First-tier Tribunal…".

9. Rule 10 of the 2008 Rules, headed Orders for costs, provides as follows:

"(1)…the Tribunal may make an order in respect of costs only –

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

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

…(5) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 14 days after the date on which the Tribunal sends:

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice under rule 17(6) that a withdrawal which ends the proceedings has taken effect."

10. Rule 30 regulates the giving of certain decisions by the Tribunal, and provides as follows:

"(2)…the Tribunal must provide to each party as soon as reasonably practicable after making a decision (other than a decision under Part 5) which finally disposes of all issues in the proceedings…

(a) a decision notice stating the Tribunal's decision;

(b) written reasons for the decision; and

(c) notification of any rights of review or appeal against the decision and the time within which, and the manner in which, such rights of review or appeal may be exercised."

11. Rule 46 governs the making of applications to the First-tier Tribunal for permission to appeal to the Upper Tribunal:

"(1) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.

(2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 28 days after the latest of the dates that the Tribunal sends to the person making the application –

(za) the relevant decision notice;

(a) written reasons for the decision, if the decision disposes of –

(i) all issues in the proceedings…".

12. Rule 47 sets out how the Tribunal is to deal with an application for permission to appeal, and includes the following:

"(3) The Tribunal must send a record of its decision to the parties as soon as practicable.

(4) If the Tribunal refuses permission to appeal it must send with the record of its decision –

(a) a statement of its reasons for such refusal; and

(b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the method by which, such application must be made."

Grounds of appeal

13. The first ground of appeal is that the First-tier Tribunal arguably misdirected itself in law when finding that its decision of 23 December 2021 "finally disposed" of all issues arising in the proceedings. The Tribunal should have directed itself that a decision finally disposing of all issues was not made until determination of the Appellants' application for permission to appeal. Accordingly, time for applying for a costs order, under rule 10(5), did not begin to run until the Tribunal issued its determination refusing permission to appeal to the Upper Tribunal.

14. The second ground of appeal only arises if the first ground fails. It is that the First-tier Tribunal arguably erred in law in refusing to exercise its discretion to admit the Appellants' late application for a costs order. The Tribunal's refusal was vitiated by the following:

(a) the Tribunal failed to acknowledge the absence of any authority on the construction of rule 10(5)(a). This was not a case in which the Appellants ignored clear authority or acted contrary to the only tenable construction of the legislation;

(b) the Tribunal failed to deal with, or understand, the nature of the arguments advanced in support of the costs application. Characterising the Appellant's case as simply unreasonable conduct through the Council refusing to concede any particular placement overlooked the principal argument which was that the Council unreasonably pursued a special school placement;

(c) in finding that the Tribunal's 'active case management' precluded, or rendered unlikely, unreasonable conduct on the part of the Council, the Tribunal took into account an irrelevant

consideration. The Tribunal's active case management did not go to the issue of whether the Council's underlying conduct was unreasonable.

Arguments

The Council

15. The Council's written submissions are drafted on the incorrect assumption that the Appellants have yet to be granted permission to appeal. This may explain why the Council's submissions are rather brief, but it should have been obvious to the Council that they were presenting arguments on an appeal rather than an application for permission to appeal. The Council's submissions were made in response to an Upper Tribunal determination that began with the words, "Decision – Permission to Appeal is Granted".

16. In relation to ground 1, the Council recite certain provisions of the 2008 Rules followed by the submission that:

> "the LA agrees with [the Tribunal's] Decision that the final decision of the FTT is the decision issued following the final hearing and making of the decision (i.e. the Decision of 23 December 2021). The clock started at that point for the purposes of Rule 30(2). The appeal process, whilst connected to the original decision, marks the commencement of new proceedings".

17. In relation to ground 2, the Council align themselves with the view expressed by the First-tier Tribunal judge who refused permission to appeal to the Upper Tribunal against the refusal to admit the costs application, namely "Judge McCarthy's discretionary decision to not extend time was reached very carefully, properly and without consideration of irrelevant matters". The Council go on to explain why they believe that their conduct during the appeal proceedings fell far short of unreasonable conduct.

The Appellants

18. The Appellants argue that the plain language of rule 10(5)(a) clearly supports the proposition that time does not begin to run, for the purposes of making a costs application, upon the Tribunal issuing its decision on the substantive appeal. The rule refers to a decision notice which "finally disposes of all issues in the proceedings". It is obvious that 'the proceedings' include any application for permission to appeal against the substantive appeal decision. Such an application cannot be considered made in separate proceedings.

19. The substantive appeal decision may only be treated as the decision which disposes of all issues in the proceedings if an Appellant decides not to apply for permission to appeal to the Upper Tribunal. The present Appellants did apply for permission to appeal and so the substantive appeal decision issued on 23 December 2021 did not dispose of all issues in the proceedings.

20. The Appellants submit that their construction of the 2008 Rules is supported by Upper Tribunal Jacobs' decision in *UA v London Borough of Haringey* (SEN) [2016] UKUT 0087 (AAC) in which he held, at [12], that "Looking at the design of the rules, it is clearly that rule 10(5) was designed to allow an application to be made within the 14 days after proceedings come to an end".

21. The Appellants also draw my attention to a decision of the Tax Chamber of the First-tier Tribunal, *Ritblat v HMRC* [2020] UKFTT 0453, which considered procedural rules analogous to the 2008 Rules. Judge Sinfield held:

> "21. Although rule 1(2) of the FTT Rules provides that the "[t]hese Rules apply to proceedings before the Tax Chamber of the First-tier Tribunal", that does not mean, in my opinion, that the FTT Rules do not continue to apply after the proceedings have ended (see rule 17). It is clear from rules 10 (costs), 38 (set aside) and 39 (permission to appeal) that the FTT retains jurisdiction in relation to applications under those rules after the issue of a decision that finally disposed of all issues in the proceedings…Where applications are made after a decision disposing of all issues in the proceedings has been issued that relate to the proceedings then and to that extent those proceedings continue until those applications have been determined or withdrawn."

22. The Appellants acknowledge that a decision of the First-tier Tribunal is not binding on me and go on to submit that Judge Sinfield's observation, or assumption, that applications for permission to appeal are made after the decision which finally disposes of all issues in the proceedings was in any event *obiter*. The decision is drawn to my attention because "there may be a common misunderstanding at the FtT level, that a Tribunal's substantive decision finally disposes of all issues in the proceedings" but, nevertheless, the decision is consistent with the Appellants' argument that 'proceedings' refers to the entirety of matters encompassed under a single notice of appeal.

23. In relation to ground 2, the Appellants repeat the arguments made in their application to the Upper Tribunal for permission to appeal and submit that the Council fail to engage with those argument. The Council simply express their agreement with the First-tier Tribunal's reasons for refusing permission to appeal against its ruling on the costs application.

Conclusions

24. Neither party requests that the Upper Tribunal holds a hearing before deciding this appeal. I do not consider a hearing necessary. The written submissions deal adequately with the issues arising on this appeal and I do not consider that oral submissions would be likely materially to improve on the arguments made in writing.

Ground 1

25. I do not consider that, in order to determine Ground 1, I should attempt a definitive analysis of what it means for all issues arising in proceedings before the First-tier Tribunal to be finally disposed of. As I shall now explain, the structure of the 2008 Rules renders that unnecessary.

26. Under rule 10(5) of the 2008 Rules, certain specified events start time running for making a costs application. The only one of relevance in this case is the sending by the Tribunal of a "decision notice recording the decision which finally disposes of all issues in the proceedings". I must construe rule 10(5) not in isolation, but in the light of the entirety of the Rules (*Secretary of State for Work & Pensions v Johnson* [2020] EWCA Civ 778; [2020] PTSR 1872). In that respect, I note:

(a) under rule 10(5), the event which starts the clock ticking is the sending of a "decision notice";

(b) it is to be presumed that a term used more than once in a single piece of legislation was intended to bear a consistent interpretation. If the legislator intended otherwise, one would expect that contrary intention to find expression in the legislation;

(c) under rule 30(2), the things that the Tribunal must provide, after making a decision which finally disposes of all issues, include a "decision notice" stating the Tribunal's decision;

(d) time for making an application to the First-tier Tribunal for permission to appeal runs from the date on which certain instruments are sent, one of which is "the relevant decision notice" (rule 46(2)(za));

(e) the Tribunal's determination of an application for permission to appeal is not required to be embodied in a decision notice. Rule 47(3) simply requires the Tribunal to send a "record of its decision" to the parties.

27. The Appellant's case must rest on the assumption that the First-tier Tribunal's determination of an application for permission to appeal is embodied in a decision notice. I say that because the Appellants accept that the sending of a 'decision notice' is the event which, under rule 10(5), causes time to begin to run for the purposes of making costs order application. But that analysis cannot be squared with the Tribunal Procedure Committee's avoidance of the term 'decision notice' when describing the instrument (record of its decision) that the Tribunal must provide to the parties upon its determination of an application for permission to appeal. This cannot have been done by accident. In my judgment, it was done advisedly in order to ensure that time for making an application for a costs order begins to run as from the date on which the decision notice for the substantive appeal, required by rule 30(2), is sent to the parties by the Tribunal (there may be other reasons why the term 'record of its decision' was used in rule 47 but it is not necessary for me to ponder those).

28. For the above reasons, I am satisfied that the term "decision notice recording the decision which finally disposes of all issues in the proceedings", as used in rule 10(5)(a), means a decision notice recording the decision which finally disposes of all issues arising in the substantive appeal proceedings.

29. I do not consider there to be any real doubt as to the intended meaning of rule 10(5)(a) but, if there were, I would note that the interpretation set out above accords with the injunction in section 22(4)(c) of the 2007 Act that power to make Tribunal Procedure Rules is to be exercised with a view to securing that proceedings before the First-tier Tribunal are handled quickly and efficiently. If there were genuine ambiguity as to the meaning of rule 10(5)(a), I would prefer the interpretation set out above to that advanced by the Appellant as one which better accords with section 22(4)(c).

30. A further reason why I do not accept the Appellants' construction of rule 10(5) is that it must involve the argument that, in relation to costs applications, time does not begin to run until the period for applying to the First-tier Tribunal for permission to appeal against the

substantive appeal decision expires. The Appellants argue that the issues in the proceedings could not have been considered finally disposed of once they had applied for permission to appeal. But it cannot be known for certain whether permission to appeal will be sought until the time for making an application expires. The Appellants' argument must therefore involve the argument that the time for applying for a costs order does not begin to run until the period for applying for permission to appeal expires. It is impossible to fit this within rule 10(5) without stretching the language used past its breaking point. Rule 10(5) starts the costs application clock ticking in response to some positive act done by the Tribunal. A positive act on the part of the Tribunal cannot be equated with a party's omission in the form of refraining from making an application for permission to appeal.

31. The Upper Tribunal's decision in *UA* is, in my opinion, neither here nor there. That case concerned the time limit for making a costs application in response to the Tribunal sending a notice of withdrawal and Upper Tribunal Judge Jacobs did not seek to provide an authoritative definition of what it means for all issues arising in proceedings to be disposed of. The decision of the Tax Chamber of the First-tier Tribunal in *Ritblat* is not binding on me (would not be binding even if it were a decision of the Upper Tribunal) but, in any event, did not purport to rule on time limits for applying for a costs order.

32. To conclude, for the purposes of making an application for a costs order, under rule 10(5)(a) of the 2008 Rules, time begins to run as from the date on which the decision notice disposing of all issues arising on the substantive appeal is sent to the parties. It does not begin to run as from the date on which the First-tier Tribunal sends its determination of an application for permission to appeal to the Upper Tribunal (or from the last date for applying for permission to appeal).

Ground 2

33. Since I have rejected the Appellants' case on ground 1, it follows that the First-tier Tribunal correctly ruled that the Appellants' costs order application was made out-of-time. I must therefore deal with ground 2.

34. I am satisfied that the First-tier Tribunal, in refusing to exercise its discretion to admit the Appellant's late application for a costs order, made no error on a point of law. None of the Appellant's arguments are made out:

(a) in my judgment, the Tribunal was not required to give weight, in the Appellants' favour, to their professed misunderstanding of the law. It cannot be said that the Appellants'

interpretation of the time limit was the most natural interpretation of rule 10(5) and only shown to be incorrect once some other provision, that might readily be overlooked, was taken into account. It should have been obvious to the Appellants, or their advisers, that their interpretation of the time limit provision was not free of doubt yet they did not put the Tribunal on notice that their application might, depending on how the time limit provision was construed, be made out-of-time nor did they ask the Council to waive any objection to the application being admitted if it proved to have been made late. Instead, the application was made on the very last date on which it would have been in time had the Appellants' interpretation of rule 10(5) been correct. It should also be remembered that the local authority was bound to have suffered prejudice, or at least inconvenience, through admission of a late application so that, even if the Appellants' legal misunderstanding might have been considered understandable, any credit flowing from that would have needed to be balanced against the prejudice, or inconvenience, to the local authority. Even if the Appellants should have been given credit because their misunderstanding of rule 10(5) was a reasonable mistake, I find it difficult to see how that could have been more than a neutral consideration given the inevitable prejudice, or inconvenience, caused to the Council by having to respond to a late costs order application;

(b) it should be remembered that the Tribunal's analysis of the merits of a late costs application, undertaken as part of its decision whether to extend time, is bound to involve less scrutiny than that given in determining an in-time application. The Tribunal is not required to determine, or conduct a mini-trial of, the question whether the application, if made in-time, would succeed. That would be an unnecessary waste of the limited resources available to the Tribunal. Bearing that in mind, a Tribunal's failure to set out, or address, each and every aspect of the grounds relied on in a costs order application does not necessarily demonstrate that, in assessing merits for the purposes of considering whether to extend time, the Tribunal fundamentally understood the basis of the costs application. The Appellants argue that the Tribunal mistakenly characterised the Council's alleged unreasonable conduct as its refusal to concede any placement, and thereby overlooked the 'actual case', which was unreasonable conduct in pursuing a special school placement. This argument accurately reflects neither the grounds relied on in the costs order application nor the Tribunal's understanding of those grounds. The Tribunal said that the costs application "focuses on concerns that the LA had failed to identify a school placement…starting in September 2021, and the failure to respect the Parents' right to mainstream education". The use of 'focus' shows that the Tribunal was not purporting to give an exhaustive description. The application itself included the allegation that the Council failed "to name a school at all at the outset" and advanced a special school without explaining why the right to mainstream education did not apply. The Tribunal did not mischaracterise the Appellants' reasons.

Failure to name a school was included amongst those reasons, as was the Council's alleged failure to give effect to the parental right to mainstream education. The Tribunal's reference to the alleged failure to respect the parental right to mainstream education was a perfectly reasonable way of summarising the Council's alleged unreasonable conduct regarding pursuit of a special school placement which, of course, is not a mainstream placement;

(c) if a Tribunal actively case manages proceedings, it is to be assumed that, in the absence of evidence to the contrary, it did so effectively. Effective case management necessarily involves ensuring proper conduct on the part of the parties. The Tribunal was therefore perfectly entitled to infer that the Tribunal's active case management minimised the scope for unreasonable conduct.

35. Finally, I apologise to the parties for not completing this decision in late 2023, as I had hoped to do. This was the combined result of illness, a subsequent backlog of work and the need to attend to other judicial responsibilities.

E Mitchell
Judge of the Upper Tribunal
Authorised for issue,
on 20 March 2024

Section 11 of the Tribunals, Courts and Enforcement Act 2007.