Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0090
Information Commissioner's Ref: FS50177136

Determined on the papers alone

Decision Promulgated
12 November 2009

BEFORE

DEPUTY CHAIRMAN

DAVID MARKS QC

Between

BOWDEN CONSULTING LIMITED

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE CABINET OFFICE

Additional Party

Subject matter:

FOIA 2000: Information Tribunal (Enforcement Appeals) Rules 2005 as amended: Rule 29: Costs: unreasonable action and/or avoidable delay

FOIA s.44 – Absolute exemption: prohibition on disclosure

Cases:

Her Majesty's Treasury v Information Commissioner and Times Newspapers Limited (EA/2006/0041); Re A Barrister (Wasted Costs Order) (No. 1 of 1999) [1993] QB 293, Attorney-General v Barker [2000] 1 FLR 750

Decision

The Tribunal grants the application of the Additional Party and awards costs against the Appellant in favour of the Additional Party in the sum of £4,353.00.
(Subject to the deduction referred to at the conclusion of the reasons for the decision)

Reasons for Decision

Introduction

1. This is an application for costs by the Additional Party against the Appellant. The Tribunal promulgated its decision as to the substance of appeal on 26 August 2009 under the present reference, namely EA/2008/0090. By a unanimous decision the Tribunal dismissed the Appellant's appeal.

2. In paragraph 3 of its decision the Tribunal noted that the Appellant was and/or is a company trading or operating under the name of Lobby and Law. The Tribunal noted that by its website it claimed to offer a wide range of legal services including but not limited to dealing with data protection and related issues. It described itself as headed by a Mr David Bowden who is a qualified practising solicitor. Mr Bowden conducted the Appeal. He told the Tribunal he conducted it "on behalf of an" unnamed "commercial client".

3. In paragraph 4 of its Decision the Tribunal said the following, namely:

> "Although the Tribunal is grateful to Mr Bowden for his submissions, matters were not helped by the excessive non legal and legal documentary materials which Mr Bowden put before the Tribunal. There may be exceptional cases where allowance can be made for such occurrences particularly where litigants in person appeared before the Tribunal. However, qualified advocates such as Mr Bowden who appeared before this Tribunal should expect that blanket references to documents which do not on further examination relate in any meaningful way to the specific issues on the Appeal and which are not properly distilled and cogently set out in written submissions, risk not being considered at all by the Tribunal. It is for advocates succinctly and clearly to set out their case. It is no for the Tribunal to divine it. In certain cases where irresponsible actions are taken before the Tribunal the penalty may well be one which sounds in costs: see generally the Tribunal's Enforcement (Appeals) Rules 2005 particularly at Rule 29."

4. In an email dated 1 September 2009 the Additional Party formally indicated by the Treasury Solicitor that it would make an application for costs.

5. The Tribunal has since the date of promulgation of its decision issued directions in order to seek to resolve the issues as to costs on paper. This is its decision. The Tribunal in this instance consists of a Deputy Chairman alone.

The Tribunal's rules

6. Rule 29 of the Tribunal's Rules 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-
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> (a) against the appellant and in favour of the Commissioner where it considers that the appeal was manifestly unreasonable;
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> (b) against the Commissioner and in favour of the appellant where it considers that the disputed decision was manifestly unreasonable;
>
> (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.
>
> …
>
> (3) An order under paragraph (1) above may be to the party or parties in question to pay to the other party or parties either a specified sum in respect of the costs incurred by that other party or parties in connection with the proceedings or the whole or part of such costs as taxed (if not otherwise agreed)."

7. In another Tribunal decision, namely Her Majesty's Treasury v Information Commissioner and Times Newspapers Limited (EA/2006/0041) a fully constituted Tribunal refused an application by the Additional Party in that case that the Appellant pay to the former the costs of the appeal. The Appellant was the public authority which, it was claimed, had acted unreasonably within the meaning and spirit of Rule

29(1)(c). This was on account of failing to disclose information after a request had been made in the light of the tenor and content of earlier Tribunal decisions. In the event the public authority disclosed the information sought in effect on the eve of the Appeal.

8. At paragraph 9 the Tribunal in that case said the following, namely:

> "This Tribunal's jurisdiction as to costs, like that of most other Tribunals, is much narrower than those of the High Court and the County Court. Costs do not "follow the event". They are awarded only where a party's conduct has been clearly blameworthy. No doubt, that reflects a desire that members of the public should not be deterred from challenging decisions in this Tribunal or others through fears of ruinous awards of costs, if they lose. Such a policy must, however, be applied even-handedly to the large corporation and the impecunious individual. Provided that any party, public authority, IC, national newspaper or private citizen has behaved sensibly and fairly, it, he or she will not be penalised in costs simply for being wrong. That applies to a government department as much as to a pensioner. That is the effect of Rule 29(1)."

9. The Tribunal duly found nothing unreasonable in the public authority's initial decision to invoke the appropriate exemption.

10. At paragraph 10 the same Tribunal went on as follows, namely:

> "We use the term "blameworthy" to embrace several opprobrious adjectives contained within the Rule. "Manifestly unreasonable", "frivolous", vexatious", "improper", "unreasonable" - these are strong words of condemnation clearly reserved for conduct going well beyond a simple misjudgement. They are coupled with disobedience to a direction and unnecessary delay."

11. The Tribunal here pauses to note that the Additional Party in this application points to the conduct of the Appellant in this case already outlined above as being "clearly blameworthy" in the sense described in paragraphs 9 and 10 of the earlier Tribunal's decision. This Tribunal is loath to adopt phraseology which does not find expression in terms in the relevant legislation or, here, the Rules. More will be said about this

beneath. But in any event to this Tribunal it seems unnecessary to go into such matters given the findings which this Tribunal has reached.

The Additional Party's contentions

12. There is no need to reiterate the terms of the full Tribunal's findings in this case. However, two principal matters stand out.

13. First, even prior to the hearing, the Appellant had chosen to prepare an inordinately large amount of irrelevant documentation. Not only did the Tribunal itself have to spend extra time prior to and during the hearing in an attempt to focus on the salient materials. More importantly:

    (1) the Additional Party represented by the Treasury Solicitor and Counsel had to incur unnecessary additional costs in preparing and copying the hearing bundles which were fairly extensive on account of the materials submitted by the Appellant; and

    (2) by virtue of the facts and matters set out in (1), the hearing of the appeal was extended from "roughly" (as it is put by the Additional Party) 1 day to 2 days.

14. In connection with the matters set out in the above paragraph, the Tribunal noted at paragraphs 36 and 37 of its principal decision that:

    (1) much of what the Appellant prepared and submitted to the Tribunal for the hearing consisted of an assortment of documentation ranging from newspaper articles to undated and unidentified publications of various sorts;

    (2) despite the efforts made by Mr Bowden as the Appellant's legal representative to distil the documentation into some form of cogent order in order to advance his client's case, the same was not done in any satisfactory manner on an invitation for him to do so, made on more than one occasion during the hearing.

15. At the conclusion of the 2 days, the Tribunal made what itself described as "something of an exceptional direction". This was in order to provide Mr Bowden with yet another opportunity to set out in some form of rational and ordered way some

clear and concise submissions regarding some additional materials he had produced. At paragraph 58 and 59 the Tribunal said the following, namely:

> "58. At the conclusion of this Appeal the Tribunal made what can be regarded as something of an exceptional direction. Mr Bowden had alleged in the course of his submissions that support for the Appellant's case could be found in the laws and principles of other Commonwealth jurisdictions as well as the Republic of Ireland. The Tribunal therefore granted permission to him to be able to address such submission in writing.
>
> 59. Regrettably the Tribunal was not helped by his further contentions as set out in writing. Nothing in the additional materials he produced constituted or reflected any kind of unequivocal provision or principle which corresponded to the exemption or exemptions in FOIA relating to Ministerial communications. Reliance was sought to be placed on Regulation (EC) No 1049/2001 as well as certain provisions in certain United States statutory materials. Quite apart from the fact that the direction made by the Tribunal did not extent to granting the Appellant leave to produce non-Commonwealth materials nothing drawn from such materials provided any form of assistance. The Tribunal therefore proposes to say nothing further on this point".

16. The costs which are being sought pertain both to the preparation of additional bundles prior to or in connection with the hearing itself and the estimated preparation time in relation thereto (coupled with the attendance of the parties on the 2 days instead of the 1 day or so which the appeal might have taken), together with the costs of addressing and dealing with the Supplemental bundle. The above shows that Mr Bowden was incapable of responding properly or at all throughout the course of the appeal and beyond, to requests by the Tribunal as well as by the Additional Party to organise his case in some form of more concise order so as to economise the time and effort spent by all parties in conducting the appeal.

General principles

17. Without in any way constituting an exhaustive list, the Tribunal finds that a number of general propositions can be advanced at this stage.

18. First Rule 29 makes a clear and logical distinction between costs attributable to the merits of the appeal including the making of any disputed decision (no doubt a reference to a decision notice) on the one hand and on the other costs attributable to conduct by any party in relation to the appeal as a whole.

19. Secondly, in relation to the latter form of costs, which could be called conduct-related costs, Rule 29(1)(c) appears in turn to cover:

    (a) steps taken in relation to the appeal which constitute "frivolous, vexatious, improper or unreasonable action" as well as a failure to comply with procedural requirements regarding directions and delays; and/or

    (b) conduct during the appeal (frivolous etc) as well as delay.

20. Thirdly, the use of such terms as "frivolous, vexatious … etc" connotes some degree of abuse of process. This is perhaps what the earlier Tribunal decision had in mind when it used the term "blameworthy". It is reasonably well established that it is not possible further to define the notion of "abuse of the court's process" as that expression might be translated into tribunal practice. It is perhaps enough to say that it addresses in general the use of the court, or here the tribunal process, "for a purpose or in a way significantly different from its ordinary or proper use". See eg Attorney-General v Barker [2000] 1 FLR 750 DC per Lord Bingham of Cornhill, LCJ.

21. Further, in relation to the third point articulated in the previous paragraph, care must be taken not to pursue the analogy with regard to abuse of process or indeed some form of blameworthiness too far. Resort to the notion of abuse of process is sometimes made with regard to applications to strike out. The basis for striking out even in the context of a tribunal hearing should not be fettered by the same considerations.

22. Fourthly, it follows from what is said with regard to the second general principle set out above that an application for costs under Rule 29(1)(c) can justifiably be based on a demonstration that any action or actions during the appeal process, including the hearing, was or were unreasonable as well as constituting a delay which with due diligence could have been avoided.

23. What constitutes unreasonable action will in most cases involve an objective as well as a subjective analysis. The same might not always be true in the case of actions which are frivolous, vexatious and/or improper although there may well be cases where the motives of the party against whom an order for costs is sought and may well be material.

24. With regard to the same general proposition some assistance might be had as to the meaning of the expressions “improper” and “unreasonable” by having recourse to the principles which apply in relation to wasted costs orders. In Re A Barrister (Wasted Costs Order) (No 1 of 1999) [1993] QB 293 it was stated that “improper” conduct was not confined to conduct which in the case of a member of the Bar, at least, would ordinarily be held to justify disbarment or being struck off or some other serious similar penalty. The court stated that whilst it covered any significant breach of a substantial duty imposed by the relevant code of professional conduct, it was not limited to that. Conduct might be improper if it was not in keeping with the consensus of professional opinion including judicial opinion and such could be the case whether it violated the letter of the relevant professional code or not.

25. The term “unreasonable” was apt to describe conduct which could also be described as vexatious in the sense of being designed intentionally or otherwise to harass or frustrate the other side rather than to advance the resolution of the case. In that sense, it did not matter whether the conduct was the product of excessive zeal as distinct from being based on improper motive. Conduct, it was suggested in the above decision would not be characterised as unreasonable simply because it led to an unsuccessful result because some other legal representative in the same situation would have acted differently. One test that was suggested in the above decision was to see whether the conduct permitted of a reasonable explanation.

26. The Tribunal pauses here to say the above observations are no more than that and must be tempered according to the facts of the case. On the one hand it might be said that Mr Bowden’s conduct might be said to smack of his excessive zeal and thus fall foul of the principles set out above. On the other hand it could be argued that his failure to distil his client’s case despite being asked to do so on a number of occasions did permit of some form of reasonable explanation, namely that he wanted rather longer to present the case than otherwise might be appropriate. This

is the matter of judgment based on the facts of the particular case and this will be referred to again below. As will be seen, however, Mr Bowden accepts there was justification for the Tribunal's published remarks. He, in effect, takes issue with the additional costs that can be said properly to be caused by his actions.

27. Sixthly, the above general propositions are no more than that. It is clear that the Tribunal retains an overall discretion to award costs under Rule 29 as a whole including but not limited to sub rule (1)(c). The Tribunal's present rule is couched in similar terms to the rules of at least one other important Tribunal, namely the Employment Appeal Tribunal. In that Tribunal regard is had to costs being awarded with regard to what are called "proceedings" which may have been "unnecessary, improper or vexatious" as well as where there has been unreasonable delay or some other unreasonable conduct in bringing or conducting such proceedings.

28. Finally, that this Tribunal respectfully adopts the comments made in the earlier Tribunal decision to the effect that in a Tribunal as a whole costs do not automatically or even generally follow the event. This reflects the fact that litigants should not be deterred from litigating in this Tribunal whoever or whatever they are. The Tribunal concludes by stating that it entirely accepts that the jurisdiction to award costs should be exercised with due care and only on a reasonably close examination of the facts and circumstances.

Mr Bowden's written submissions

29. Mr Bowden has provided the Tribunal with written submissions ranging to seven pages. There appear to be nine principal arguments which should be addressed. First, Mr Bowden claims that the Commissioner "has declined to support the Additional Party's application". In the Tribunal's view, this is totally irrelevant. This is and was entirely a matter for the Commissioner. The only issue is whether the Additional Party's claim can be properly allowed.

30. Second, the Tribunal's remarks in the substantive appeal constitute a significant "deterrent". That is as may be. The fact remains that this Tribunal must consider whether the Additional Party's claim is well founded.

31. Third, and in relation to the second argument, Mr Bowden claims that "he has suffered damage to his professional reputation." This again is not a material consideration apart from the fact that the Tribunal is in no position to assess the fact and extent of that statement. The Tribunal notes that Mr Bowden, and more particularly his company, was acting on behalf of a commercial client. The arrangements in that respect were not explained for obvious reasons.

32. Fourth, Mr Bowden claims that he submitted the extra material "in good faith" in the genuine belief that they would help the parties and the Tribunal. The fact remains that litigation, particularly when conducted by professional advocates, cannot properly be conducted on the basis that a legal representative charged with the obligation to put forward his client's case succinctly and clearly, can merely throw material at the other sides and the tribunal in question in the hope, however well intentioned, that some will "stick". To claim, as Mr Bowden now does, that "some materials were to substantiate a point if pressed by the parties or the Tribunal", continues to show that Mr Bowden seems unable to comprehend what the parties' obligations in relation to litigation conducted before a Tribunal of this sort consist of. Such a statement can only be seen as a clear admission that more material than was necessary was placed before the parties and the Tribunal. It is simply no answer to go on to say, as Mr Bowden does that:

> "The Appellant faced a double-edged sword because the materials needed were not in the hearing bundle, then the other parties would have cause to complain that they have not had notice of them."

33. Fifth, the Appellant takes issue with the fact that contrary to the terms of the Tribunal's earlier directions, the Commissioner was to provide an open hearing bundle and that the costs now claimed in that regard as to £896 by the Additional Party are unjustified. The fact remains that those costs were incurred by the Additional Party. Such is regularly the position where a public authority, particularly a government department, is party to an appeal before this Tribunal. In such a case, the Tribunal is duly grateful for the time and expense which the government department and, in particular, the Treasury Solicitor, brings to bear in respect of these matters and in undertaking that exercise. The Tribunal is simply not in a

position to query either the fact that the work was carried out, or that it was done so in the amount claimed, nor is it prepared to do so. This item is therefore allowed.

34. Sixth, Mr Bowden claims that the Additional Party would have been alive to "the lack of relevance of the materials" with regard to the bundles prepared for the hearing. The Appellant's position is that a claim in the sum of £207 is to be disputed. Not only is this yet another example of an admission of fault in effect by Mr Bowden, but it also fails to reflect any of the realities involved in preparing for a hearing of this sort. Any opposing legal representative would have failed in his or its duty to its or their client in preparing that client's case were those materials not perused in their entirety. The sum claimed in any event is modest, if not virtually insignificant, amounting to £207.

35. Seventh, issue is taken with the claim that the length of the hearing was needlessly protracted from what should have been a 1 day hearing to 2 days. As pointed out above, the Additional Party described the additional time taken up as having been extended for "roughly" 1 day to 2 days. The determination of costs claim of this sort, particularly with regard to the terms of the Rule under consideration, should not involve any nit-picking over the exact minutes or hours spent, or any other similar exercise. Mr Bowden accepts he was at fault. There should be finality to all litigation, particularly with regard to fights over costs. The matter is ultimately one for the decision of this Tribunal based on the particular facts involved. However, an overall balance may be struck in all the circumstances where appropriate.

36. The Additional Party has lodged a claim to the effect that the costs of the Treasury Solicitor and Counsel attending the extra day amounted to £2,794.50. In light of the Additional Party's own acceptance that no exact additional period can be computed, the Tribunal is minded to round this figure down to £2,500.

37. Eighth, Mr Bowden addressed a claim of £832 raised in connection with the Treasury Solicitor's and Counsel's response to the Supplemental material in the sum of £832.

38. Admittedly, these costs were generated after the hearing and, in effect, in consequence of the Tribunal's own direction.

39. Mr Bowden additionally claims that similar research was conducted in another Tribunal decision and that this should have been taken into account.

40. The Tribunal is mindful of the fact, not so much that in theory, a request had been made to examine materials that might already be considered (as to which there is no evidence), but rather more of the fact that the work undertaken by the Treasury Solicitor had to be done in the wake of the Tribunal's own "exceptional" direction. Nonetheless, the vice that permeated the whole of the Appellant's presentation persisted in relation to these matters. The Tribunal is minded to reflect to some extent those elements by effecting a minor reduction in the claim from £832 to £750.

Other Tribunal cases

41. Mr Bowden refers to 8 other tribunal decisions relating to costs. He points out that the Tribunal has never made an order for costs against the requester. The Tribunal finds the submission to be of no weight in the light of the overall acceptance by Mr Bowden that he did place, in effect, unnecessary materials before the Tribunal and before the other parties.

42. This Tribunal is minded, therefore, not to conduct a case-by-case comparison with the other decisions. As is perfectly obvious from what has been said in this judgment already, finality is to be achieved as expeditiously as possible based on the consideration of the elements in play in the particular appeal.

Conclusion

43. For all the above reasons, the Tribunal awards the Additional Party the total sum of £4,353 consisting of four elements, namely £896, £207, £2,500 and £750. in so doing, it grants the Additional Party's application.

44. During the preparation of this judgment the Additional Party notified the Tribunal that the sum of £486 was not properly chargeable and therefore this sum should be deducted from the total sum otherwise ordered to be paid as set out in the decision at the top of this judgment. The Tribunal directs that the sum now properly payable be paid within 28 days of the date of promulgation.

Signed

Deputy Chairman

DAVID MARKS QC

Date 12 November 2009