



Appeal No. EA/2015/0244

Date of decision: 8th November 2016

Date of promulgated: 18th November 2016

Appellant: Anthony Kell

First Respondent: The Information Commissioner (“the ICO”)

Second Respondent: Rothbury Parish Council (“RPC”)

**Before
David Farrer Q.C.**

Judge

and

Paul Taylor and

Jean Nelson

Tribunal Members

Order as to costs

1. Following the dismissal of this appeal Rothbury Parish Council, the Second Respondent ("RPC"), made a written application for costs, in accordance with Rule 10(3) of the 2009 Rules. It sought permission under Rule 5(3)(a) to make its application outside the fourteen – day time limit, which was granted, since the delay was minimal and explicable by the need to convene the appropriate RPC committee to authorize the application. Moreover, a consideration by the Tribunal of the issue of costs was consistent with the overriding objective (see Rule 2(2)(a)).
2. RPC applies for an order for costs in the sum of £40,137.91.
3. Following the issue of directions by the Tribunal, Mr. Kell submitted a response to this application, arguing that neither in bringing the appeal nor in his conduct of the appeal had he behaved unreasonably, so that the Tribunal could not make such an order. He also submitted what passed for a summary of his means.
4. Having considered the submissions from both sides, the Tribunal indicated that it found that this was a case for an award of costs but that Mr. Kell's evidence of means was insufficient and further evidence must be served in the manner prescribed by those directions. It stated that the reasons for the finding would be given in a written decision which dealt also with the amount to be awarded. This is that decision.
5. In response to those directions, Mr. Kell, through his solicitors, served further evidence. Much of that "evidence" consisted of a repetition of arguments already deployed at length in written and oral submissions at the substantive hearing and in his initial response to the application and quite irrelevant to the matters which the further directions required him to address. Furthermore, his further evidence as to means did not comply with the further directions in a number of respects, notably that his statement was not made on oath and that his alleged expenses were entirely unsubstantiated by documentary evidence, even large items such as

professional expenses and rent, which could be supported by tenancy agreement, fee notes or letters.

6. The Tribunal warned Mr. Kell in the further directions of its power to refer such failures to the Upper Tribunal and it has considered whether to do so. It has decided, notwithstanding that warning, to make an award on the basis of the available evidence, not because it regards Mr. Kell's failure to comply as excusable but in the interests of finality and because it is unwilling to countenance further delay and cost to the public. However, Mr. Kell should not suppose that the Tribunal takes his unsupported claims at face value. It views the figures provided with cautious scepticism, especially as to his expenses. It notes, moreover, that he omits any reference to his Rothbury home in the list of assets. If it is rented, he does not say so.

Is an order for costs justified ?

7. The test is familiar ; did Mr. Kell act unreasonably in bringing or conducting the appeal (Rule 10(1)(b))? "Unreasonably" requires no linguistic examination. It is a term in everyday use and each case turns on its own facts. Of course, losing an appeal or even pursuing a doomed appeal may not be unreasonable. The Tribunal must take every material factor into account, including the limited expertise of a litigant in person and the complexity of the subject matter. Awards of costs are rare because most tribunal litigants, even if they misjudge their case, do not behave unreasonably. The Tribunal will not lightly treat failure as indicating unreasonable conduct.
8. Here we find that the decision to launch this appeal was, of itself, unreasonable as were the plethora of requests described in the original decision. FOIA was not intended as a vehicle for the instruction of a local council in its duties. Moreover, as the decision indicates, we think it likely that Mr. Kell's "campaign" was driven more by his aggrieved reaction to the incident in 2012 than by an "altruistic" commitment to improve standards of governance. If such an improvement was indeed his sole

purpose in challenging RPC over its administrative and financial practices, FOIA was plainly not the route to adopt. It is also significant that he could not clearly identify, when cross – examined, just what requested information of substance had been withheld (see § 31 of the Decision). This was, of itself, a very strong pointer to an unreasonable appeal.

9. Furthermore, he had instructed solicitors to serve the formidable list of questions on which his requests were based and held himself out as well versed in the general purpose of FOIA.
10. Regardless of our finding as to the bringing of these proceedings, we have no doubt that Mr. Kell's subsequent conduct of them was grossly unreasonable. The Tribunal accepts each of the submissions of RPC on this issue (see §9 of the application). It does not intend to repeat here matters developed in some detail there and in the Decision. Suffice it to say that Mr. Kell's repetition in his most recent submissions on costs of his previous justification for his conduct have not in any way modified the views of the Tribunal set out at §§55, 56 and 60. It is particularly striking that the clear warning from the Chambers President in the context of a case management decision, was completely ignored. The Tribunal was inundated with irrelevant material and time was taken up with pointless questioning despite the Tribunal's attempts to point Mr. Kell towards more relevant areas of the case. Unfounded allegations of fraud were a further significant factor.
11. Any shortcomings in RPC's discharge of its duties have little relevance to the question whether Mr. Kell conducted this appeal unreasonably though his unrelenting determination to point them out, even in a submission which should have been devoted to the quantum of the order for costs, significantly increased time spent, hence costs incurred on this appeal.
12. Questions of mediation and an alleged unwillingness of RPC to "settle" the matter are neither here nor there. RPC's stance was shown by the Tribunal's decision to be

entirely justified. Moreover, Mr. Kell's aggressive posture throughout was plainly not conducive to a reasonable compromise.

The amount of the order

13. There is no agreement as to amount and this is a case, in our judgment, for summary assessment under Rule 10(6)(a). That involves a broad assessment of the recoverable costs then a consideration of Mr. Kell's financial means, in compliance with Rule 10(5)(b). Having regard to both those matters, the Tribunal must then assess a figure, which, if financial means should influence the order at all, involves a considerable element of judicial discretion.

14. We find that RPC behaved perfectly reasonably in instructing solicitors and, doubtless on their advice, counsel to conduct the oral hearing. We are unimpressed by the argument that a failure to comply with standing orders in the engagement of solicitors means that those solicitors' costs are irrecoverable, as against Mr. Kell. It may be that Mr. Kell, as an elector, could question the expenditure in breach of standing orders but such a breach (if such it was) does not assist him in the capacity of an adverse litigant, provided that the solicitors' charges, which RPC seeks to recover, are apparently reasonable. What items would have been disallowed or reduced on taxation, we cannot say. However, we are satisfied that the body of their claim is properly made out, even if some items would probably have been disallowed or cut down.

15. We assess a figure of £32,000 as appropriate.

16. As to Mr. Kell's statements of means, they have altered in a number of respects between his first and second estimates. Most notably, he has added professional expenses of £12,000, additional, as we understand it to the solicitors' fees of £6000 which have been met. As observed above, there is a complete dearth of evidence to support the main items of expenditure, although we accept that ordinary living

expenses are inevitably a matter of estimate. That does not apply to professional, medical or rental costs.

17. We are invited to proceed to an assessment on the basis of the very unsatisfactory evidence provided. We are not impressed by the excuse that Mr. Kell has been away. He has known perfectly well that he must provide a proper statement of means since soon after the application for costs was made on 19th. July, 2016. Paragraph 45 of his initial submission of 12th. September, 2016 was simply an attempt to brush off any proper investigation of his financial means without any solid information. His excuse echoes earlier attempts to impose his travel timetable on the Tribunal as regards the hearing and its resumption.
18. That said, inadequate as is his statement and plain as are the breaches of the further directions, the Tribunal does not believe that he can meet a bill for costs of £32,000. It thinks it likely that his financial outgoings have been inflated but not to the extent that an order of that magnitude would be appropriate.
19. His conduct of this application has done nothing to strengthen his position on costs as he persists in arguing a case which he knows to have failed rather than addressing the issue at stake. Nevertheless, that cannot justify an order that disregards his means, as we broadly assess them.
20. We order that Mr. Kell pay the costs of RPC in the sum of £7,500.

David Farrer Q.C.

Tribunal Judge,

8th. November, 2016