IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

BETWEEN:

ROYAL MAIL GROUP LTD **Appellant**

and

THE INFORMATION COMMISSIONER **Respondent**

Ruling on Respondent's Costs Application following Appellant's Withdrawal of Appeal

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Determined on the Papers by:

Alison McKenna
Tribunal Judge

On 8 September 2010

Subject Matter:

Tribunals Courts and Enforcement Act 2007
Section 29

The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended)
Rule 10 Orders for Costs
Rule 17 Withdrawal

Cases considered:

Nagendram Seevaratnam v Charity Commission for England and Wales
Ruling on costs by First-tier Tribunal (Charity) [2009] UKFTT 393;

European Environmental Controls Ltd v Office of Fair Trading
Ruling on Costs by First-tier Tribunal (Consumer Credit)
CCA/2009/0002 23 August 2010

***McPherson v BNP Paribas (London Branch)*)**
[2004] EWCA Civ 569

Dr C D'Silva v NATFHE (now known as UCU) and Others
Appeal No. UKEAT/0126/09/LA

Dr Peter Bowbrick v IC and Nottingham City Council EA/2005/0006

HM Treasury v IC and Times Newspaper EA/2006/004

***Milford Haven Port Authority v IC and Richard Buxton Environmental and Public Law and South Hook LNG Terminal Company Limited* EA/2007/0036**

DECISION: The Respondent's application for costs is hereby dismissed.

REASONS

Background

1. **The background to this matter is that the Appellant lodged an appeal to the First-tier Tribunal (Information Rights), appealing against the Respondent's Decision Notice FS50240406, which required the Appellant to provide certain information under the Freedom of Information Act 2000.**

2. **Following the usual case management procedures, the appeal was listed (in March) for a two day hearing to take place on 12 and 13 July 2010. The Appellant's witness evidence was served, in accordance with the Tribunal's directions, on 7 and 8 June 2010, however the hearing bundle was then materially altered by the Appellant (as to the parts of the bundle which were to be treated as "open" and "closed") and a replacement bundle was sent to the Respondent on 28 June. The bundle was sent to the Judge and members of the Tribunal for some 1000 pages of pre-reading.**

3. **On 5 July 2010 at 17.23, the Appellant e mailed the Tribunal seeking to withdraw its appeal. The Appellant stated that the reason for the withdrawal application was that it had learned at a late stage of its preparations that a key part of the requested information had entered the public domain by virtue of (unauthorised) disclosures by Postcomm. I am told that the Appellant advised the Respondent by telephone of its intention to withdraw shortly before the e mail was sent to the Tribunal.**

4. **The Tribunal accepted the withdrawal (as required by rule 17 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended) ("The Rules") on 7 July 2010. On 19 July, the Respondent made a costs application under rule 10(1)(b) of the Rules, on the basis that the Appellant had acted unreasonably in the period leading up to the withdrawal of its appeal. The application was limited to the costs of counsel's time in preparing a skeleton argument for the Tribunal hearing which (following an extension of time granted by the Tribunal on 2 July) was due to be filed and served the day after the withdrawal application was made. The Respondent points out that it made the application for the extension of time in which to file its skeleton and that that the application for an extension of time was supported by the Appellant, who was therefore on notice of the costs likely to be incurred by the Respondent during that period. The sum claimed (which is supported by counsel's fee note covering the period from 27 June to 5 July) is £3,254.76.**

5. **The Respondent's costs application was submitted to the Tribunal within 14 days of the Tribunal's decision to accept the Appellant's withdrawal. This was, the Respondent argued, the relevant date for the purposes of rule 10(4), although the Rules are not explicit on this point (see paragraph 15 below).**

6. **In accordance with the procedure adopted for the determination of this application (with the agreement of the parties), I have received and considered the following submissions:**

- **Application for costs on behalf of the Respondent, dated 19 July**

- **Submissions on behalf of the Appellant in response to the Respondent's application for costs, dated 3 August**

- **Response to Appellant's submissions to Respondent's costs application, dated 17 August**

- **Rejoinder to the Respondent's further submission on costs, dated 24 August.**

These submissions are considered at the relevant points in the body of this decision.

Procedure Adopted

7. The Rules do not establish a set procedure for the consideration of a costs application following the withdrawal of an appeal. On receipt of the Respondent's application in this matter, the Tribunal Administration wrote to the parties at my request, explaining that the application had been considered by the Judge who had been due to hear the appeal (myself) so was familiar with the background. The letter explained that (i) I was minded to rule that rule 10(4) should be interpreted as allowing a costs application to be made within the 14 days following the Tribunal's agreement to a withdrawal; (ii) I was inviting the Appellant (as the putative "paying party") to respond to the application for the purposes of rule 10 (5); (iii) that a decision on this costs application would be made on the papers only if the parties agreed and (iv) that the application could be determined by the Tribunal Judge sitting alone (with reference to the Senior President's Practice Statement as to the Composition of Tribunals in the General Regulatory Chamber). The letter invited the parties' submissions on any or all of these procedural proposals. The parties responded that they were content to adopt this approach to the determination of the application.

The Tribunal's Jurisdiction as to Costs

8. Prior to the transfer of the Information Tribunal's jurisdiction to the First-tier Tribunal (Information Rights), the relevant costs regime was contained in rule 29 of the Information Tribunal (Enforcement Appeals) Rules 2007. That rule contained two different criteria for the award of costs, with reference to the merits of an appeal (or the decision under appeal) on the one hand, and the conduct of the parties during the proceedings on the other. In relation to the conduct of proceedings, costs were within the discretion of the Tribunal where there had been "frivolous, vexatious, improper or unreasonable action" by a party.

9. Since January 2010, the award of costs in Information Rights cases has been governed by a new statutory and procedural regime, described below. In determining this application I have been guided by two judicial decisions under the present regime but also, where relevant, by determinations under the previous regime, albeit that I am mindful of the different test now to be applied.

10. The relevant statutory provision governing the award of costs in the First-tier Tribunal (Information Rights) is set out in section 29 of the Tribunals Courts and Enforcement Act 2007 ("TCEA") which provides that:

> ***"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 …".

11. The relevant procedural rule is contained in rule 10 of the Rules, which provides that:

"Orders for costs"

10.*—(1) 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);

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

(c) where the Charity Commission [or the Information Commissioner] is the respondent and a decision, direction or order of the Charity Commission [or the Information Commissioner] is the subject of the proceedings, if the Tribunal considers that the decision, direction or order was unreasonable.

(2) The Tribunal may make an order under paragraph (1) on an application or on its own initiative.

(3) 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 or expenses claimed with the application.

(4) 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 to the person making the application the decision notice recording the decision which finally disposes of all issues in the proceedings.

(5) The Tribunal may not make an order under paragraph (1) against a person ("the paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

…..."

12. The Respondent's application in this matter (as mentioned above) was for the Tribunal to award costs under rule 10(1)(b), on the basis that the Appellant had acted unreasonably in conducting the proceedings in the period leading up to the withdrawal of its appeal.

<u>Withdrawal of an Appeal</u>

13. As noted above, this is a case where the alleged unreasonableness of the Appellant relates to its conduct in the withdrawal of the appeal. The withdrawal of an appeal is now governed by rule 17 of the Rules, which provides that:

"Withdrawal"

> ***17.***—*(1) Subject to paragraph (2)[, and, in the case of a withdrawal of a reference from an ethical standards officer, to the provisions of regulation 5 of the Case Tribunals (England) Regulations 2008**(a)**], a party may give notice of the withdrawal of its case, or any part of it—*
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> *(a) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or*
>
> *(b) orally at a hearing.*
>
> *(2) Notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal.*
>
> *…..*
>
> *(5) The Tribunal must notify each party in writing of a withdrawal under this rule."*

14. In this case, the application to withdraw was made under rule 17(1)(a) of the Rules by written notice of withdrawal, which permits such an application "*at any time before a hearing*". The Tribunal consented to the withdrawal under rule 17(2) of the Rules. I note that rule 29(1) of the Information Tribunal (Enforcement Appeals) Rules 2007 (the costs regime applicable prior to January 2010) was explicit that costs could be awarded following the withdrawal of an appeal, but that rule 10 of the Rules is silent on the point. Rule 10(4) makes clear that the costs application and/or order can be made after the conclusion of proceedings, although it refers to the issuing of a decision notice and consequent disposal of proceedings, rather than to proceedings which are concluded because of a withdrawal.

15. I note that Judge Jacobs[1] cites the Court of Appeal's decision in *McPherson v BNP Paribas (London Branch)*)[2004] EWCA Civ 569 in asserting that a claimant who withdraws a claim may nevertheless have conducted proceedings unreasonably so as to be liable for costs if the proceedings had been conducted unreasonably prior to withdrawal. The approach of the Courts to this issue would therefore tend to support an interpretation of the Rules that considers a withdrawn appeal to fall within the scope of rule 10(4), as a case that has been "disposed of" for these purposes. The parties have helpfully indicated that they accept this proposition for the purposes of this ruling and I have therefore adopted this interpretation.

<u>Was the Appellant's Conduct "Unreasonable"?</u>

(i) What does "unreasonable" mean?

16. The jurisprudence in relation to the previous costs regime for Information Rights cases (see paragraph 8 above) makes it clear that it is a matter for the judgement of the Tribunal in each case whether any particular behaviour by a party is "*unreasonable*"(see, for example, *Dr Peter Bowbrick v IC and Nottingham City Council EA/2005/0006)*. In

1 Edward Jacobs, "Tribunal Practice and Procedure" LAG 2009 page 383.

decisions under the previous costs regime, the concept of "blameworthy" conduct by a party was introduced, (see for example *HM Treasury v IC and Times Newspaper EA/2006/004)* however, this concept covers the full range of opprobrious adjectives in rule 29, rather than only the current test of unreasonableness and I am not therefore assisted by it in the current context.

17. I am aware of only two decisions concerning costs in the relatively new regime of the First-tier Tribunal (General Regulatory Chamber). The first was in *Seevaratnam v Charity Commission for England and Wales*[2] (in which I presided). In that case the meaning of "*unreasonable*" in rule 10 was considered and applied as follows:

"*The Tribunal has adopted the ordinary meaning of the word "unreasonable" for the purpose of interpreting rule 10 (1) (c) of the Rules, being "not in accordance with reason, irrational" (as defined by the Oxford English Dictionary) as distinct from the precise administrative law definition of the word, connoted by Wednesbury unreasonableness***".**

18. In the second costs decision in the General Regulatory Chamber, *European Environmental Controls Ltd v The Office of Fair* Trading [3] the First-tier Tribunal (Consumer Credit) considered a costs application under rule 10 and commented that a judgement as to unreasonableness must depend on the facts of each case, there being no hard and fast principle applicable to every situation. It also commented that the Tribunal would not wish to discourage applicants from coming to the Tribunal for fear of a costs order. This point is considered further at paragraph 25 below.

19. Whilst the *Seevaratnam* decision is of persuasive authority only in the present context, both parties helpfully submitted that they regarded it as the correct approach to rule 10. Whilst adopting the "ordinary meaning" approach to the term "*unreasonable*", the Respondent sought also to refer me to some wider definitions of that word in other dictionaries, including that of "*going beyond what is…equitable*". I am not persuaded that any further definition is needed if one adopts the *Seevaratnam* formula and so do not propose to widen the definition of "*unreasonable*". I have adopted the *Seevaratnam* definition in this case.

(ii) How did the Appellant handle the process of withdrawal?

20. The fact that the alleged unreasonable conduct relates to a withdrawal of proceedings raises particular questions for the analysis of the Appellant's conduct. It has previously been accepted by the Tribunal that the time

2 [2009] UKFTT 393

3 CCA/2009/0002

taken to withdraw an appeal is a factor to be taken into account in assessing whether the conduct of the proceedings was unreasonable – see *Milford Haven Port Authority v IC and Richard Buxton Environmental and Public Law and South Hook LNG Terminal Company Limited* EA/2007/0036. The Respondent has accepted that certain internal processes would have to be undertaken by the Appellant in order to effect the withdrawal of the appeal, however its argument is that once the Appellant became aware that a withdrawal was likely, it could have taken steps to prevent work on the Respondent's skeleton argument, given the impending deadline for its submission. The Respondent argues that the Appellant delayed unreasonably in this regard so that its conduct of the proceedings should be regarded as "*unreasonable*" for the purposes of rule 10.

21. **The Respondent has argued in particular that, as the unauthorised disclosures by Postcomm were the reason given for the withdrawal, and as these are referred to in the Appellant's own witness statements (served in accordance with the Tribunal's directions on 7 and 8 June 2010) the Appellant should have been mindful of the costs associated with continuing preparation by the Respondent's counsel and therefore that the withdrawal on 5 July was (a) unreasonable within the meaning of the Rules and (b) a breach of the overriding objective under rule 2 of the Rules. The Appellant has explained that, although the unauthorised disclosures were indeed referred to in its witness statements, the second disclosure had only recently come to light at that point. After the witness statements were served, the Appellant continued to be in discussion with Postcomm about it withdrawing that information from the public domain. It also transpired that, contrary to what was initially thought, the disclosures did not cover all of the requested information so there needed to be a detailed consideration not only of the issue of withdrawal but also of whether to disclose the remainder of the information. The Appellant states that this consideration took place in the weeks between discovery of the second disclosure on 5 June and the application for withdrawal on 5 July. The Appellant states that during this period its Freedom of Information Board met twice, its external counsel was consulted and provided it with advice, discussions with Postcomm continued, and only then was the decision to withdraw the appeal taken by the Royal Mail's Head of Information Compliance and General Counsel on 1 July. The Appellant submitted that it acted with as much speed as the situation allowed but that the communication of its position prior to a formal decision being taken would have prejudiced its case before the Tribunal in the event that the matter proceeded to a hearing.**

22. **In responding to the Appellant's submissions, the Respondent suggested that, at the very least, the Respondent and the Tribunal should have been informed of the decision to withdraw on Thursday 1 July (when the final decision was made) rather than the following Monday, 5 July. The Respondent also argued that the Appellant could have sought a further extension of time for the filing of the skeleton arguments in view of the**

apparent on-going discussions about the basis of its case and the need for the Respondent to prepare its own arguments in response.

23. The Appellant argued in rejoinder that the lawyer with conduct of the case needed to carry out his or her own internal due diligence procedures on Friday 2nd July before informing the Tribunal on the following working day, 5 July, which was the earliest reasonable opportunity for them to do so. Furthermore, that the Appellant did not seek a further extension of time for the filing of skeleton arguments because it envisaged that a final decision as to withdrawal would have been made by the date for submission of skeletons. In any event the Appellant says that the Tribunal could not reasonably have pushed the 6 July deadline for submission of the skeletons back further, given that the hearing was listed to start on 12 July.

24. The Respondent has invited the Tribunal in this case to award costs in a specific sum, linked to a particular allegation of unreasonable conduct, i.e. the delay between the internal decision to withdraw the appeal and the communication of that decision, giving rise to unnecessary preparation by the Respondent's counsel. I have considered the EAT's relatively recent decision in *Dr C D'Silva v NATFHE (now known as UCU) and others*[4] in which it was said:

"The principle set out in McPherson v BNP Paribas, to which we have already referred, is that it is not necessary to establish a direct causal link between particular examples of unreasonable conduct and the costs incurred by the Respondent. Once a finding of unreasonable conduct or misconceived bringing of proceedings or another ground under Rule 14 [of the ET Rules] is made, the question of costs is then very much within the discretion of the Tribunal".

It follows that in exercising the discretion to award costs afforded by rule 10 of the Rules, it is not strictly necessary for the Tribunal to make a causal link between the conduct complained of and the costs arising therefrom. I conclude that if I were to find that the Appellant's conduct has been unreasonable, then any costs order need not be tied specifically to costs incurred over the withdrawal period.

25. I am reminded by the Appellant that the power to award costs in rule 10 of the Rules is discretionary. I note in this regard that frequent concern has been expressed by my fellow Tribunal Judges that members of the public should not be deterred from bringing proceedings in Tribunals through fear of costs, especially as the costs-neutral environment of Tribunals is one of the things that differentiates them from the Courts, where costs generally follow the event. The Appellant also makes the

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4 Before The Honourable Mr Justice Bean Mrs R Chapman Mr C Edwards; cited on WestLaw as 2009 WL 3447851; Appeal No. UKEAT/0126/09/LA Employment Appeal Tribunal, 29 July 2009.

point that a costs award in these proceedings might serve to discourage Appellants from withdrawing immediately prior to a hearing in future, so that unmeritorious appeals would be more likely to go to a full hearing and waste time and resources. I have been mindful of these arguments in exercising my discretion.

Conclusion

26. I have considered the arguments in this matter very carefully. It is of course regrettable that so much preparation time and cost had been expended (by the parties and by the Tribunal) prior to the appeal being withdrawn. However, I note that rule 17 of the Rules permits a party to apply to withdraw an appeal "*at any time before the hearing*" and then for the Tribunal to agree or not agree to that application. Nevertheless, I would hope that a decision to apply for a withdrawal would always be communicated to the other party and to the Tribunal at the earliest possible opportunity, and would moreover suggest that the overriding objective requires this. I am troubled by the delay in this case between the decision to withdraw the appeal on 1 July and the communication of it to the Tribunal and the Respondent on 5 July. I am concerned that the Appellant's duty to comply with the overriding objective may have been neglected over those two working days. However, I note that a breach of the overriding objective is not of itself "*unreasonable*" within the meaning of rule 10 and I must therefore consider all the circumstances of the case. I am mindful of the fact that the Appellant needed to deal with a complicated set of circumstances and to respond to a situation not of its own making. I also note that it needed to comply with its own internal governance arrangements, which, as noted at paragraph 20 above, is a legitimate factor to take into account in assessing its conduct. I have concluded in all the circumstances that the chronology of events which has now been explained by the Appellant is not such as to render its conduct "*unreasonable*" within the ordinary meaning of that word for the purposes of rule 10 of the Rules.

27. In reaching that conclusion, I am also mindful of the risk of discouraging future withdrawal applications under the Rules. If a last minute decision to withdraw an appeal were to be penalised in costs but if that party were to proceed to a full hearing it would bear no costs if unsuccessful, the Tribunal would clearly be sending out the wrong message to litigants. If an Appellant concludes, even at a late stage, that its appeal should be withdrawn, it must preferable for an application for withdrawal to be made than for that matter to proceed to a hearing. In all the circumstances of this case, I therefore dismiss the Respondent's application for costs.

28. Under rule 21(3) the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended, the Respondent has one month from the date this ruling was sent to it to lodge an appeal with the Upper Tribunal (Administrative Appeals Chamber), 5th Floor, Chichester Rents, 81 Chancery Lane,

London, WD2A 1DD. Further information is available on the Upper Tribunal's website at http://www.osscsc.gov.uk/index.htm.

Signed on the original

Alison McKenna
Tribunal Judge
8 September 2010