IN THE UPPER TRIBUNAL **Appeal No.** HS/773/2018
ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL AND COSTS ORDER ARISING FROM AN APPLICATION ARISING FROM AN APPEAL

Order

The Appellant LW is hereby ordered to pay the Respondent Local Authority's costs of £5245.

The tribunal notes that the appellant has the benefit of legal aid and is subject to costs protection in accordance with section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

REASONS

1 The respondent Local Authority has made this application for costs in an appeal by LW against the Education Health and Care Plan (EHC plan) ordered by the F-tT for LW's daughter, K. Neither party has indicated that they wish to have an oral hearing, and I consider that it would be a disproportionate step to hold one in all of the circumstances.

2 The sequence of events surrounding the application that impact upon the costs in question are these:

- 28/1/18 The F-tT made its decision confirming that KW was to attend RF (state funded alternative provision) as named by the LA.

- 23/2/18 The Appellant's counsel, David Wolfe, QC, sought permission to appeal to the Upper Tribunal. He did not appear before the F-tT. The application states that the appellant's representative, Mr R O'Donovan (of Simpson Millar, solicitors), asked to make closing submissions specifically regarding an alternative placement for K at a mainstream school if the parent's choice of school was not adopted (p21, § 26). He says that this was rejected because of time constraints and he was not permitted to make closing submissions.

- 19/3/18 Judge Plimmer granted permission to appeal to the Upper Tribunal mainly on the basis of possible procedural unfairness (p22) arising from the F-tT's decision not to allow a final submission on this matter.

- 11/4/18 I directed Mr O'Donovan to provide his notes of the submissions he prepared on the final day of the hearing in respect of an alternative placement at a mainstream school if LW did not succeed on her first choice. (p115).

- 1/5/18 Mr O'Donovan provided a witness statement (117-119) in which he states (117-119) that he was only instructed during the course of the final hearing that the appellant's fall-back option was mainstream schooling. He did not have time to prepare written notes but would have argued that LW was entitled to opt for a mainstream school under section 38 of the Children and Families Act 2014. He submits that this would not have represented a change in the grounds of appeal.

  Assuming for the moment that it was indeed raised, I am unable to see (i) how this submission was not a significant change in the grounds of appeal. LW's case throughout was that a mainstream setting was unsuitable for K who, she insisted, required a specialist setting ([2] and [4] of the F-tT Decision); and (ii) how a change of this magnitude could have been accepted by the F-tT at the last minute.

- 7/5/18 The LA briefed Mr Peter Oldham, QC. He wrote the response to the appeal and subsequently his skeleton argument (see 5/7/18)).

- 16/5/18 An oral hearing was notified to the parties for 19/7/18.

- 16/5/18 Excerpts from the F-tT's Notes of Evidence were received which record that the appellant walked out of hearing and left the building on the afternoon of the final day. Thereafter, the issue discussed with the representatives was whether the LA's choice of institution, RF (a pupil referral unit ('PRU')) was a school under the Children and Families Act 2014. This had not been raised previously, and GG (the LA solicitor) objected to its last-minute introduction but nevertheless addressed the point. The F-tT stated that closing submissions were at the discretion of Tribunal. GG stated she was 'happy without them' and Mr O'Donovan reiterated his point that a PRU was not a school. GG distinguished the case that Mr O'Donovan was relying on for that proposition. Nothing was mentioned about an alternative mainstream school.

- 16/5/18 The Upper Tribunal receives the LA's response to appeal and GG's detailed witness statement (p125ff). It refers to a number of attempts by Mr O'Donovan to re-introduce, unsuccessfully, matters on which rulings had already been given. He was informed by the Tribunal that he must not leave it until his closing submissions to raise issues that needed to have been explored in evidence during the hearing (p132-3, § 24 and § 25). GG's witness statement (§ 29 – 30) bears out the LA's submission that the question of alternative provision at a mainstream school was not raised. GG's statement that both representatives independently agreed that it was not necessary to make closing submissions (written or oral) differs from Mr O'Donovan's recollection and that of the Tribunal (in § 10 of the Decision at the final bullet point) which states that Mr O'Donovan offered to make *a written* submission. The Tribunal states, however, that it had received the necessary evidence on all outstanding issues. These are then listed in § 11 of the Decision and do *not* include any fall-back submission that K attend a mainstream school if the parent's choice of school was rejected.

- 12/6/18 Appellant requests a copy of LA's response to the appeal to the UT.

- 26/6/18 LA's response sent to appellant.

- 5/7/18 Mr Oldham QC's skeleton arguments are completed but, it appears, not sent to the Upper Tribunal. It is unclear whether the grounds were sent to the appellant.

- 10/7/18 The appellant's solicitors applied to withdraw the appeal stating that 'due to significant change of circumstances the appellant the will now be pursuing a different route of redress and requesting an annual review. She now considers that pursuing the current appeal would waste Tribunal's time and resources.'

- 11/7/18 UT consented to withdrawal and the hearing for 19/7/18 was vacated.

- 12/7/18 LA indicates that it may seek costs from the appellant. They requested evidence of 'significant change of circumstances', noting that the evidence they had received did not appear to change K's presenting needs significantly nor relate to the issues in the appeal.

- 17/7/18 LA provided a letter from Simpson Millar (Annex B) stating that the significant change was that 'the appeal has fallen away' because 'K cannot attend a mainstream school given her current difficulties with chronic fatigue. Given this new diagnosis that Ms Wright will now be requesting an interim annual review in order to address the information missing from K's EHCP. This course of action will mean that an upper Tier appeal [sic] is no longer necessary.'

- 25/7/18 LA wrote to Simpson Millar asking for permission to disclose the report in which the diagnosis of chronic fatigue was made. Permission was refused.

- 6/8/18 LA's application for costs was received by the Upper Tribunal. The LA submitted that the 'parent acted unreasonably in conducting the appeal ('reg' [sic] rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008). They disputed the credibility of the appellant's reason for withdrawal 'that 'K's current difficulties of chronic fatigue meant she could not attend mainstream school'. The LA pointed out that her chronic fatigue was diagnosed on 27/4/18 but they were not able to provide the document disclosing this because of a promise not to do so without the appellant's permission, and the appellant would not give permission.

- 6/8/18 Simpson Millar refuses to ask appellant for her consent to disclose letter and considers the costs application to be inappropriate, with no further explanation.

  I pause to note that and her solicitors have a duty to cooperate with the Tribunal pursuant to the overriding objective in rule 2(4) of the Tribunal

Procedure Rules 2008. The report was plainly pertinent to the question of costs the Upper Tribunal had to decide.

- 11/1/19 LW ceased to be a client of Simpson Millar.

Legislation and Tribunal Procedure (Upper Tribunal) Rules 2008

3 Section 29 of the Tribunals, Courts and Enforcement Act 2007 and rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 give the Upper Tribunal the power to award costs in cases involving special educational needs. Section 29 of the Tribunals, Courts and Enforcement Act 2007 provides:

> **29** "(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.
>
> (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 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 is unreasonable to expect that party to pay.
>
> (6) In this section *"legal or other representative"*, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

4 As relevant, rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

> 10 (1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings [transferred or referred by, or on appeal from,] another tribunal except—
>
> (a) …
> (b) to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs (or, in Scotland, expenses).
>
> (2) …

(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except—
(a) in judicial review proceedings;
(b) …
(c) under section 29(4) of the 2007 Act (wasted costs) [and costs incurred in applying for such costs];
(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;
(4) The Upper Tribunal may make an order for costs (or, in Scotland, expenses) on an application or on its own initiative.

(5) A person making an application for an order for costs or expenses must—

(a) send or deliver a written application to the Upper Tribunal and to the person against whom it is proposed that the order be made; and
(b) send or deliver with the application a schedule of the costs or expenses claimed sufficient to allow summary assessment of such costs or expenses by the Upper Tribunal.

(6) An application for an order for costs or expenses may be made at any time during the proceedings but may not be made later than 1 month after the date on which the Upper Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b) [notice under rule 17(5) that a withdrawal which ends the proceedings has taken effect].

(7) The Upper Tribunal may not make an order for costs or expenses 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 and the order is to be made under paragraph (3)(a), (b) or (d), considering that person's financial means.

(8) The amount of costs or expenses to be paid under an order under this rule may be ascertained by—

(a) summary assessment by the Upper Tribunal;
…

The LA's submissions

5 The LA seeks costs on the basis that LW acted unreasonably in conducting the proceedings by delaying her withdrawal of the appeal until the 11/7/18, a week before the scheduled hearing. By this time, the LA's solicitor had prepared the case papers for the Upper Tribunal hearing and leading counsel had prepared his skeleton argument by 5/7/18. The skeleton does not, however, appear to have been sent to the Upper Tribunal nor LW. The result of LW's conduct was, the LA submit, unreasonable, substantial costs which were entirely avoidable and unreasonable in light of the reasons given for LW's withdrawal.

6 The LA submits that, although LW asserts a significant change in K's circumstances, there was nothing of the sort. The diagnosis that LW received regarding K's chronic fatigue was known since April 2018, but LW had refused to allow the LA to disclose this information without her permission (which she and her solicitors refused). The refusal is a mystery since K's unremitting fatigue figured prominently throughout the

papers. Moreover, the LA argues that the reason was illogical. LW wanted K to attend an independent special school but suddenly sought an annual review instead.

7 Having read the papers, including over 100 pages of initially unpaginated evidence about K, I cannot see any material, let alone significant change in K's circumstances. LW's pressure for mainstream provision to be made for K was a lead up to K's annual review in or around autumn of 2018. LW had managed to persuade the LA to make money available for some home tuition for K pending the annual review, but the LA did not, from what I can see in the papers LW sent, back down from its position that the F-tT's order remained in force and appropriate for K. I find that LW's request for a mainstream school for K was unrealistic and unreal. It was the complete opposite of the case she put to the F-tT; and was plainly a non-runner given K's known problems with fatigue and her previous inability to cope at a mainstream school.

Case law on unreasonable conduct

8 The principles and case law from which they are derived are discussed by Upper Tribunal Judge Jacobs in *Buckinghamshire County Council v ST* (SEN) [2013] UKUT 468 (AAC). The question is whether LW's *conduct* was unreasonable, and not whether the withdrawal was unreasonable: *McPherson v BNP Paribas (London Branch)* [2004] ICR 1398 at [30], per Mummery LJ.[1] The costs that could be awarded were not necessarily limited to the costs attributable to the unreasonable conduct. The nature, gravity and effect of the unreasonable conduct were factors relevant to the exercise of the discretion whether to award costs, but the party claiming costs did not have to prove that specific unreasonable conduct caused particular costs to be incurred [40]. The award of costs was not, a punitive exercise. It was not punitive and impermissible for a Tribunal to order costs without confining them to the costs attributable to the unreasonable conduct [41]. Unreasonable conduct was a precondition to the order of costs and also a relevant factor to be taken into account when deciding whether to make the order and the form of the order [41]. The party's ability to pay was not a relevant factor and the costs should cover as a minimum the costs attributable to the unreasonable behaviour (*Kovacs v Queen Mary and Westfield College* [2002] ICR 919, Court of Appeal). In *MG v Cambridgeshire County Council (SEN)* [2017] UKUT AAC (reported as [2017] AACR 35) Upper Tribunal Judge Rowley confirmed that Ch 205 at 232. Although that discussion arose in relation to wasted costs Upper Tribunal Judge Jacobs considered the discussion to be applicable to the question of unreasonable costs in the tribunal context: *HJ v London Borough of Brent (SEN)* [2011] UKUT 191 (AAC) at [7]. *Ridehalgh v Horsefield* states:

> '"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.'

[1] *McPherson* concerned a provision equivalent to rule 10(1)(b).

9 In *MG v Cambridgeshire County Council* [SEN] [2017] AACR 35, an appeal to the Upper Tribunal concerning a legally aided appellant seeking costs against the LA, Upper Tribunal Judge Rowley stated in passing that First-tier Tribunals that they should apply considerable restraint when considering an application for costs under rule 10. Orders should be the exception, not the rule and should be made only in the most obvious cases. Judge Rowley considered that it was 'crucially important … to begin by emphasising that 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 for costs. 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' [26]

10 Whilst there is much to agree with in that statement, there are caveats. Before the Tribunals, Courts and Enforcement Act 2007, special educational needs decisions from a local education authority were heard by way of judicial review in the High Court. It was not a cost-free regime. Parliament chose to continue the power to award costs when these cases moved to the tribunal system. There is no direct comparison with social security cases [now in the First-tier Tribunal (Social Entitlement Chamber)] where there has never been a power to award costs. The power to award costs in special educational needs cases should certainly be used sparingly lest ordinary people are frozen out of the specialist justice forum that tribunals uniquely provide. It generally will be inappropriate in a jurisdiction such this, where parents will often be acting on their own or with representatives who are not legally qualified, to encourage satellite applications for costs. But there will inevitably be cases in which the one side or the other abuses the generosity of the system. It is for these that a Tribunal's discretionary power to award costs should be reserved.

Three stage approach to deciding whether to make an award

11 The three basic steps in determining whether a costs order should be made are

(i) Determine whether the party against whom an order for costs is sought has acted unreasonably;
(ii) If it did, *should* the Tribunal make an order for costs?
(iii) If so, how much.

12 It is important to bear in mind that the issue is whether the conduct was unreasonable, and not the withdrawal *per se*. Withdrawing an appeal may well be reasonable, depending on the circumstances. The salient circumstances were these: The F-tT's decision was in January 2018. LW appealed. The main platform of the appeal was that she was denied a fair hearing because Mr O'Donovan was not allowed to put forward a submission that K should attend a mainstream school if LW's choice was not adopted. I find that LW has not come near to showing that she or Mr O'Donovan raised the issue of mainstream schooling for K at the First-tier Tribunal. Neither the Notes of Evidence nor the exhaustively detailed Written Reasons support the submission. I find the issue that Mr O'Donovan raised at the end of the final hearing to be whether RF could be classified as a

school at all. The F-tT heard argument on this from both sides at the tail end of the hearing. Under rule 5(1) of the First Tier Tribunal Rules (HESC) it was entitled to decide, as master of its own procedure, that closing submissions were not required. There is nothing that suggests to me that it acted unfairly in deciding that it did not need a further submission.

13 Even if I am wrong and the issue had been raised, the F-tT would have been more than entitled to refuse Mr O'Donovan's request to make submissions on a completely new issue, diametrically opposed to the case LW had run, at the last minute. That would be to abuse of the F-tT's inquisitorial function. The remainder of the grounds on which LW was granted permission to appeal were very weak indeed, and in my view had no prospect of success.

14 LW obtained leading counsel's opinion based but his opinion was based on an inaccurate account of the proceedings. LW was in any event pressing for K's annual review, which was in the offing for the autumn of 2018. LW used this opportunity to get the LA to agree to fund some home tutoring for K and to enable LW to press for mainstream placement. LW's attempt to obtain a mainstream alternative for K was, I find, not only unrealistic in K's circumstances but could not have been really believed by her to be suitable. The LA remained of the view that RF was the appropriate placement. Following a discussion with her solicitors some time before 4 July 2018, LW was advised by them to instruct them unequivocally confirming the type of school placement she wished for K, as she was 'now' unsure whether K could attend at a mainstream school. If she did not envisage a mainstream placement, her solicitors advised that there would be no benefit in continuing the appeal to the Upper Tribunal, and they could no longer justify the funding (legal aid) to act for her (p. 63, appendix bundle). Her solicitors applied to withdraw the appeal on 10/7/18, 9 days before the hearing. By this time the LA had behaved responsibly in preparing the bundle and obtaining leading counsel's skeleton arguments.

15 I pause here to stress that the Tribunal dealt with all the evidence placed before it and **all** of objections LW raised against RF school. It explained at length why LW's chosen school was not suitable. Not least of the difficulties with LW's choice was the journey to that school – some 90 miles round trip, by road. This must be seen in the context of LW's strong objection to RF school because she considered K unable to cope with the journey (around 40 minutes away in bad traffic). LW's own expert witnesses did not support her at the hearing and considered RF to be suitable. At the end of the day, there was no good reason why K could not attend RF school. I have come to the conclusion that LW wanted to thwart the F-tT's decision by whatever means necessary. I find that there had been no material change in K's circumstances at any material time. All that changed was name given to the signs and symptoms described. This did not make any difference to her special educational needs or suitability of RF school. I also find that at all material times LW knew that K would not be able to cope with a mainstream school. She was not making efforts to find a realistic solution.

16 In these circumstances, I find that her conduct, including withdrawing at a date by which time costs had been needlessly expended, was unreasonable conduct for the purposes of a costs order.

Quantification

17 Rule 10(8) of the Upper Tribunal Procedure Rules permits summary assessment of costs by the Upper Tribunal. I consider this the most appropriate and proportionate way of dealing with the matter.

18 In all cases in which a costs order is contemplated, the paying person must be given the opportunity to make representations about the order; and if the order is to be made against an individual, the Upper Tribunal must consider her financial means. I gave LW the opportunity to do both and in relation to the latter directed her to provide evidence of earnings, savings, assets and benefits of which she was in receipt as well as any documents relating to legal aid, if she was in receipt of it.

19 LW complied partially with those directions. Her solicitors supplied LW's legal aid certificate dated 1/5/19 and considered that the application was inappropriate. LW supplied a notification from the Department of Work and Pensions dated 18/1/18 regarding her award of Income Support. She also supplied evidence that she was paying for weekly tutoring for K, for which she was eventually reimbursed by the LA. LW was paying privately for the therapies that were set out in the EHC plan (appendix, p44) according to invoices she included in the post-hearing correspondence. In addition, K takes horseback riding lessons though LW has not explained how these are paid for (appendix p124). She has not supplied any other evidence that I directed.

20 The LA's solicitors, Gillan Legal Solutions Ltd., has produced a schedule of costs at Annex D of the papers. The firm's costs were £1845 at an agreed rate of £90 per hour plus VAT. Counsel's costs for reviewing the papers, drafting a response and telephone conference, amending a witness statement and telephone conference and drafting a skeleton argument were £3400. This totals £5245. I find that these were the costs arising from the unreasonable conduct of LW.

(Signed on original)

S M Lane
Judge of the Upper Tribunal

(Dated) **28 March 2019**