UA v London Borough of Haringey (SEN)
[2016] UKUT 0087 (AAC)
Upper Tribunal Case No: HS/3596/2015

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 5 October 2015 under reference SE309/14/00031) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the tribunal had jurisdiction to accept the application for costs and will now decide that application.

REASONS FOR DECISION

A. The issue

1. This case raises an issue about the interpretation of apparently conflicting provisions in rules 10 and 17 of the Tribunal Procedure (First-tier Tribunal) (Heath, Education and Social Care) Rules 2008 (SI No 2699).

B. What happened

2. Ms A brought proceedings before the First-tier Tribunal in its special educational needs jurisdiction against the local authority. The appeal was lodged on 29 December 2014 and was listed for hearing on 1 October 2015. The parties reached agreement and, on 29 September 2015, Ms A gave notice withdrawing her case. The tribunal gave its consent on 30 September 2015 and gave notice of its decision by email on the same day. On 2 October 2015, Ms A applied for an order of costs against the local authority. The tribunal refused the application, but gave Ms A permission to appeal to the Upper Tribunal against its decision.

C. Rules 10 and 17

3. It is convenient to set out the rules at this point.

4. Rule 10 deals with costs.

> **10 Orders for costs**
>
> (1) Subject to paragraph (2), 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.

…

(4) 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 claimed with the application.

(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.

5. Rule 17 deals with withdrawal.

17 Withdrawal

(1) Subject to paragraphs (2) and (3), a party may give notice of the withdrawal of its case, or any part of it—

(a) 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 …

…

(6) The Tribunal must notify each party in writing that a withdrawal has taken effect under this rule.

D. The First-tier Tribunal's decision

6. The judge first set out rule 10(1) and (5). She quoted rule 10(5) as:

(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 the decision notice recording the decision which finally disposes of all issues in the proceedings.

She then cited *HJ v London Borough of Brent* [2011] UKUT 191 (AAC), in which the local authority accepted on appeal to the Upper Tribunal that an application for costs had been made orally at the hearing. Next, the judge set out the history of the case, as I have done in Section B, before finally giving her decision, which was to refuse the application on the ground that 'the Tribunal has no jurisdiction in relation to the costs application as the parties reached settlement and the appeal was withdrawn.'

7. Spelling that out, the judge's reasoning seems to have been this. There was an appeal, but that appeal was withdrawn. Once the appeal was withdrawn, the proceedings were at an end and it was no longer possible to make a costs application.

E. The appeal to the Upper Tribunal

8. The appeal is in two parts. First, the tribunal applied the wrong legislation. The version of rule 10(5) quoted by the judge was the version in force until April 2013, not the version that applied in September and October 2015, which I have set out in Section C. The second part of the appeal is that, applying the correct version of rule 10(5), Ms A was entitled to apply for costs following the tribunal's notice that it had accepted her notice of withdrawal, despite the fact that the proceedings had come to an end under rule 17.

9. I allowed the local authority a month in which to respond to the appeal, but the Upper Tribunal has not received any response. In the circumstances, I have not troubled Ms A further.

F. Analysis

10. I am sure that the judge applied the wrong version of rule 10 and overlooked the 2013 amendments. She quoted the original version and, although she may have come to the same conclusion, her reasoning would have been different.

11. But that is not the end of the matter. Applying the correct version of rule 10 is not straightforward. On its face, there is a contradiction between rule 10 and rule 17. The effect of a withdrawal is to bring proceedings to an end. The notice that the tribunal has to give under rule 17(6) is, as the provision says, notice that a decision has taken effect. It is the tribunal's consent that has that effect. But rule 10 can be read as contradicting both itself and rule 17. It can be read as meaning (i) that an application for costs can only be made while the proceedings are ongoing, but (ii) that it can be made within 14 days after the section 17(6) is sent, by which time, the proceedings are no longer in existence.

12. It is essential to give effect to both rule 10 and rule 17 in a way that makes coherent sense of the rules as a whole. It is, though, difficult to do that by reference to the language alone. I prefer, if possible, to find an interpretation that avoids either a bald proposition of result or a resort at some point to implication. 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, while rule 17 is clearly designed to bring proceedings to an end as soon as the tribunal has consented to withdrawal. A possible interpretation would be to imply that that rule 17 is subject to rule 10(5)(b). An alternative approach is to interpret the rules together as meaning that a withdrawal does not take effect for 14 days *for the purposes of making an application for costs*.

13. In my provisional comments on the appeal, I suggested a further approach. This is a slightly developed version. It involves splitting rule 10(5) into two parts.

The first part contains the opening clause – 'An application for an order under paragraph (1) may be made at any time during the proceedings'. As this uses *may*, it can be read permissively as providing when an application *may* be made (during the proceedings) but not when it *may only* be made. The second part contains the rest of paragraph (5), including subparagraphs (a) and (b). This also uses *may*, but differently. Here it is both permissive (*may* be made) in allowing an application to be made within the 14 days and limiting (*may only* be made) by setting the absolute time limit once proceedings have been disposed of or withdrawn. This is a rather disjointed interpretation of the same word within a single sentence, but it produces the result that the rules as a whole obviously require.

14. This apparent contradiction arises starkly in the case of a withdrawal, because it is clear from rule 17 that a withdrawal takes effect once the tribunal had given its consent. But it also arises if the tribunal makes a decision on the merits and it arises on both the original and the amended versions of rule 10(5). The difficulty there lies in the absence of any provision in the rules for the time at which proceedings come to an end. The reasoning I have suggested in paragraph 13 is capable of applying in these cases also, although the need for this reasoning is less acute given the vagueness in the time when proceedings actually cease to exist.

15. Accordingly, the judge was wrong to decide that the tribunal had no jurisdiction to accept the application for costs. I have re-made her decision to provide that the tribunal did have jurisdiction. The tribunal will now deal with the application.

Signed on original
on 15 February 2016

Edward Jacobs
Upper Tribunal Judge