

IN THE CARE TRIBUNAL

RM

-v-

DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

Before:

**J.A. Kenneth Irvine (Chairman)
Roberta Brownlee
Paul Archer**

Decision on Costs

Background

1. The Applicant had appealed against her inclusion on the Disqualification from Working with Children (DWC) and Disqualification from Working with Vulnerable Adults (DWVA) Lists. That appeal was heard by the Tribunal on 31st March and 1st April 2008 and was determined in Applicant's favour.
2. By letter dated 24th April McCann & McCann, Solicitors on behalf of the Applicant, submitted an application for an Order awarding costs. The request was accompanied by a detailed statement of costs and by a Submission prepared by Mr. Nick Jones, Barrister-at-Law.
3. The Respondent was, in accordance with Regulation 25(2) (b) of the Care Tribunal Regulations (Northern Ireland) 2005, invited to make representations. On 12th June 2008 the Departmental Solicitor, on behalf of the Respondent, submitted a response accompanied by a Submission prepared by Miss. Denise McBride, Barrister-at-Law.

Submissions on Costs

4. In his Submission Mr. Jones set out in summary the history of the case and the circumstances which led to the Applicant being placed upon the DWVA and DWC Lists. He argued that as the Applicant had at the hearing acknowledged that she had committed an act of misconduct and had addressed the risk of future harm and because it was 'apparent that the complaints made against [her] were in relation to minor misconduct' she should not have been included on the Lists; that accordingly 'in all the circumstances ... the Department acted unreasonably in placing her on these lists and in opposing her appeal'.
5. In response, Miss. McBride, having reviewed the Authorities in the Care Standards Tribunal (CST) in Great Britain, submitted that in considering whether to make a Costs Order the Tribunal cannot look at the conduct of the Department prior to the

lodging of the appeal. Although it was not necessary for her to do so, she addressed the issues raised by the Applicant in respect of her listing, namely, that there had been an act of misconduct (the legislation requires only misconduct, not gross misconduct) which had placed a vulnerable adult at risk. She said that it was only at the hearing that Applicant had accepted that this was indeed the case and it was only on the second day of the hearing that evidence as to her suitability emerged. She argued that in the circumstances it was not unreasonable for the Department to have proceeded with the appeal. Finally, she submitted that the fact that the Applicant was successful in her appeal is not sufficient in itself to merit a Costs Order.

Decision on Costs

6. This is the first case in which this Tribunal has been invited to make an Order for costs and it is therefore appropriate to set out the position clearly. The CST has given guidance in several cases. Regulation 24 of the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, which was the basis of the Decisions in Great Britain, is in identical terms to Regulation 25 of the Care Tribunal Regulations (Northern Ireland) 2005 which is the provision relevant to this case. The legislation being identical, the CST Decisions are of great assistance in dealing with this matter.

7. Regulation 25 states:

‘(1) Subject to regulation 32 and to paragraph (2), if in the opinion of the Care Tribunal a party has acted unreasonably in bringing or conducting the proceedings, it may make an order (a "costs order") requiring that party ("the paying party") to make a payment to the other party ("the receiving party") to cover costs incurred by the receiving party.

(2) Before making a costs order against a party, the Care Tribunal must -
(a) invite the receiving party to provide to the Care Tribunal a schedule of costs incurred by him in respect of the proceedings; and
(b) invite representations from the paying party and consider any representations he makes, consider whether he is able to comply with such an order and consider any relevant written information which he has provided.’

8. The CST dealt with the issue in some detail in the case of AR v. OFSTED [2006] 769 EA:

‘In deciding whether to make a costs order, the Tribunal must:

- a. be satisfied that the paying party has acted unreasonably in bringing or conducting the proceedings;
- b. invite the receiving party to prepare a schedule of costs; and
- c. consider representations from the paying party and
- d. consider whether the paying party is able to comply with such an order and
- e. consider any relevant information that the paying party has provided.’

The CST went on to review the case law to that date and concluded:

'These cases as well as the Court of Appeal case of *McPherson v BNP Paribas* [2004] 3 All ER, provide several guidelines relevant to the facts in this case, namely that:

- a. Regulation 24 creates a presumption in favour of no order for costs
- b. The test in regulation 24 (1) is a high one and the burden is on the receiving party to satisfy the Tribunal to that standard that the paying party has acted unreasonably in bringing or conducting proceedings. ...
- c. It is not necessary to show that the conduct of a paying party in proceedings before this Tribunal was "wholly unreasonable", only that the paying party can be shown "not to have acted in accordance with reason or good sense" (the definition of 'unreasonable' from the Shorter Oxford Dictionary)
- d. The relevant time for any costs order runs from when the proceedings begin, namely when the appeal is initiated, that is when the Application Form A1 was filed. Therefore the conduct of a party before the institution of proceedings before the Tribunal cannot in itself be treated as an act of unreasonableness in the conduct of those proceedings.
- e. The Tribunal are nevertheless entitled to take account of conduct prior to proceedings in determining unreasonableness and is therefore able to look at the whole history of the matter in forming a view on whether the decision to pursue the appeal was unreasonable and whether that party's conduct of the proceedings was unreasonable.
- f. The question of whether conduct was reasonable must be a decision made individually in each case, considered on the facts and decided on the circumstances pertaining to that case. The Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion as to whether a costs order should be made
- g. In judging whether conduct is unreasonable, the Tribunal should "concentrate on what the position was at the time the party made a particular decision which it is alleged now was unreasonable, examine that decision and form a view on whether the paying party, at that time, was conducting the proceedings in an unreasonable manner or not."

9. On the question of reasonableness in placing a person on the Lists the Decision of the CST in *Ulliott v Secretary of State* [2004] 343 PC is helpful:

'20. The Secretary of State has a duty under Protection of Children Act 1999 s 2(7) to confirm an individual on the list if he is of the opinion (a) that the organisation reasonably considered the individual to be guilty of misconduct (whether or not in the course of his employment) which harmed a child or placed a child at risk of harm; and (b) that the individual is unsuitable to work with children.

21. The Tribunal, on an appeal, has a different statutory framework. Section 4(3) of the Act states that if on an appeal, the Tribunal is not satisfied of either of the following, namely (a) that the individual was guilty of misconduct...which harmed a child or placed a child at risk of harm; and (b) that the individual is unsuitable to work with children, the Tribunal shall allow the appeal...otherwise it shall dismiss the appeal.'

While this Decision refers to the POCA list (equivalent to the DWC List), the same principles apply to the POVA (or DWVA) List.

10. Having carefully considered the papers in the proceedings and the submissions made by both parties Tribunal is ultimately not satisfied that the Applicant has discharged the substantial burden of demonstrating that the Respondent acted unreasonably in its conduct of the proceedings so as to justify making a costs order. It does not therefore need to consider the other limbs imposed by Regulation 25.

Accordingly, the application for a Costs Order in this case fails.

J.A.Kenneth Irvine, Chairman

23rd June 2008