



Neutral Citation number: [2023] UKFTT 438 (GRC)

**First-tier Tribunal
(General Regulatory Chamber)
Nitrate Vulnerable Zones**

Appeal Number: NVZ/2021/0004

**Considered on the papers
On 19 May 2023**

Decision issued on 23 May 2023

Before

JUDGE OF THE FIRST-TIER TRIBUNAL J K SWANEY

Between

JEREMY COWLEY

Appellant

and

SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Respondent

DECISION

1. Time for making an application for costs is not extended and the application for costs is not admitted.

REASONS

Background

2. The appellant seeks an order for costs on the basis that the respondent acted unreasonably in contesting the appeal.

The law

3. The power to award costs comes from section 29 of the Tribunals, Courts and Enforcement Act 2007 (the TCEA 2007).
4. Rule 10 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the Procedure Rules) governs applications for costs. It provides where relevant:

- (1) Subject to paragraph (1A) 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) and costs incurred in applying for such 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 the Gambling Commission or the Information Commissioner is the respondent and a decision, direction or order of the Commission or the Commissioner is the subject of the proceedings, if the Tribunal considers that the decision, direction or order was unreasonable.
- (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 –
 - (a) a decision notice recording the decision which finally disposes of all issues in the proceedings;

Findings and reasons

5. The tribunal's decision was sent to the parties on 14 February 2023. According to rule 10((4)(a), the appellant's application for costs should have been received by no later than 28 February 2023. It was not in fact received until 20 March 2023 and was therefore 20 days out of time. No explanation for the lateness of the application was given and on 21 March 2023 I directed that an explanation should be provided within 7 days. I also directed the respondent to provide a response to the application within 14 days.
6. A response on behalf of the appellant was received on 27 March 2023 in which it was stated that:
 - The appellant is a litigant in person and was not aware that an application for costs must be made within 14 days of the date on which the decision notice was sent.

- On 17 February 2023 the appellant instructed his employee to make enquiries of the tribunal as to how an application for costs could be made. The staff member spoken to did not know and suggested that a written enquiry should be made.
 - An enquiry was made by email seeking advice on how to make an application for costs on 17 February 2023.
 - The response from the tribunal on 7 March 2023 was the first time the appellant was aware of the timescale within which the application for costs should be made, by which time that deadline had already passed.
7. The appellant contended that in having regard to the overriding objective to deal with matters justly, and to ensure that proceedings are conducted without undue formality, it was appropriate to extend time.
 8. I have considered the fact that the appellant contacted the tribunal to ask how he should make an application for costs and that he did so within the 14 day timescale provided for in rule 10(4)(a). It may have assisted had the appellant at that stage been referred to the Procedure Rules; however, staff who answer the general enquiries line are not legally qualified and do not give specific legal advice.
 9. The appellant was advised on 7 March 2023 as to the procedure for making a costs application. Following a further email on that date asking for an extension of time, the appellant was advised that he should make his application for costs as soon as possible, setting out the reasons as to why it was late. Despite this, the application for costs was not received for a further 13 days and did not include an application to extend time, nor did it set out the reasons why the application was late.
 10. The tribunal must seek to give effect to the overriding objective when exercising any power or interpreting any rule. Time limits are an important part of the Procedure Rules, as they provide clearly defined timescales which ensures clarity and fairness for all parties. While the tribunal has discretion to extend time limits, it must be satisfied that it is in the interests of justice to do so. While I take account of the fact that the appellant is a litigant in person, that does not of itself excuse him from complying with the Procedure Rules. It is the responsibility of the appellant to comply with any deadlines and the Procedure Rules are publicly available on the tribunal's website. The appellant could and should have had regard to this information.
 11. For these reasons I do not extend time and I do not admit the application for costs.
 12. Even had I decided to extend time and admit the application, I would have refused it on the merits.
 13. The definition of 'wasted costs' in section 29(5) of the 2007 Act replicates verbatim that contained in section 51(7) of the Supreme Court of Judicature Act 1981 (inserted by section 4 of the Courts and Legal Services Act 1990). The following commentary is contained in the Supreme Court Practice 1999, Volume 2:

The definition of 'wasted costs' given in section 51(7) shows a preference for a version of the harsher tests found in recent case law; it does not require a showing of misconduct or gross neglect but is, at its lowest, a negligence test.

14. Guidance on the statutory terminology can be found in paragraph 16 which sets out an extract from Ridehalgh v Horsefield [1994] Ch 205. In relation to unreasonable conduct the following is said:

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...

15. The appellant seeks his costs on the basis that the respondent acted unreasonably in defending the proceedings. He argues that in light of the evidence contained in the first technical submission, the respondent ought to have reviewed the decision under appeal, which he contends would have resulted in the re-designation of the waterway.
16. The respondent argues that although it is accepted that the tribunal ultimately concluded that the screening process to assess undue influence was not correctly undertaken, this was simply a factual dispute that was resolved in the appellant's favour. The respondent argues that this falls short of the threshold of unreasonableness.
17. I accept the respondent's submissions on this point. The respondent was entitled to contest the appeal and in doing so, the respondent's conduct falls a long way short of conduct which is vexatious, or designed to harass the other side rather than advance the resolution of the case.
18. The appellant also argues that the respondent's failure to properly apply the screening and exclusion procedures resulted in avoidable proceedings. This is essentially an argument that the respondent acted unreasonably in making the underlying decision. This is not an argument that is open to the appellant to make. In an appeal of this type, the tribunal only has power to award costs in respect of the conduct of the appeal proceedings, not where the underlying decision was unreasonable.
19. The appellant's final argument is that the respondent ought to have used local resources to 'ground truth' their assertions with officers from a specific area. The respondent contends that this is simply not realistic. Whether or not it is realistic, a failure to do so does not make the respondent's conduct of this appeal unreasonable.

20. For all of these reasons, had I admitted the appellant's application for costs (which I do not), I would have disallowed the application.

Signed *J K Swaney*

Date 19 May 2023

Judge J K Swaney
Judge of the First-tier Tribunal