

Case No: IPT/09/134/C

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 1 February 2011

Before:

LORD JUSTICE MUMMERY

MR JUSTICE BURTON

Between:

W

Complainant

- and -

Public Authority

Respondent

JUDGMENT

1. We deliver this judgment in anonymised form, since no determination was made in favour of the Complainant, upon his withdrawal of his complaint, but the judgment is otherwise a public judgment because it resolves a general issue as to costs in this Tribunal.
2. The Complainant made a complaint against the Respondent in October 2009. After initial investigations, a letter was sent to the parties in October 2010, making arrangements for an inter partes hearing fixed for 6 and 7 December 2010, setting out the issues to be addressed at that hearing and giving directions for the service of witness statements by the parties (such witnesses to attend for cross-examination) and written submissions to be served sequentially, in the case of the Complainant by 5 November 2010. The Respondent incurred costs in relation to preparation for that hearing (including Counsel's fees) in the sum of some £5,700.
3. No submissions were served by the Complainant by 5 November, and, upon complaint to the Tribunal by the Respondent and enquiry by the Tribunal of the Complainant by email dated 9 November, the Complainant's response by email dated 10 November 2010 was to inform the Tribunal that he was formally withdrawing his complaint. At the Tribunal's request this was confirmed in writing by letter dated 15 November 2010.
4. The Respondent now seeks recovery from the Complainant of its costs, and, given that this issue has not previously been addressed by the Tribunal, the Tribunal directed that the parties lodge written submissions on the issue as to whether the Tribunal has the power to award the costs sought by the Respondent and, if so, whether it should exercise that power. Both parties have served very helpful and full submissions, both original submissions and then in reply to each other, in the case of the Respondent two sets of submissions prepared by Mark Alder of Counsel, and, in the case of the Complainant, a first written submission of his own composition and then a second and very full submission on his behalf from Andrew Allen of Counsel. The Tribunal has been greatly assisted by those submissions.
5. The issue which we are deciding in this case is limited to the following, namely whether costs can (and if so should) be awarded to (i) a respondent against a complainant (ii) upon a withdrawal by the complainant.
6. There is no express power in the statute which created and governs this Tribunal, the Regulation of Investigatory Powers Act 2000 ("RIPA"), or under the Rules (Investigatory Powers Tribunal Rules 2000 ("the 2000 Rules")) made by the Secretary of State under s69 of RIPA, to award costs. As this Tribunal is a creature of statute, any power must be drawn from the statute: there is no inherent power. As Mr Allen has pointed out, there are other tribunals which have no express or implied power to order costs: he draws attention to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care of Chambers) Rules 2008 Rule 10(2) and to Rule 10 in respectively the Tribunal Procedure (First-tier) Social Entitlement Chamber Rules 2008 and the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation) Rules 2008.
7. The only available provisions from which such a power could be drawn are s67(7) and s68 of RIPA and Rule 12 of the 2000 Rules. However:
 - i) S67(7) provides (inter alia):

“Subject to any provision made by rules under section 69, the Tribunal on determining any proceedings, complaint or reference shall have power to made any such award of compensation or other order as they think fit.” [Examples of such orders are then given such as orders for quashing a warrant or authorisation and destruction of records.]

Even assuming that “*any ... other order as they think fit*” could include an order for costs, the context appears to be referring to, and certainly only exemplifies, orders in favour of a complainant. However, significantly for the determination of the issue before us, even if it could be read as including the possibility of an order for costs in favour of a respondent, such order could only be made “*on determining any proceedings, complaint or reference*”, and this Tribunal has not made any such determination, because the complaint was withdrawn prior to determination.

ii) Rule 12 provides as follows:

“(1) Before exercising their power under s67(7) of the Act, the Tribunal shall invite representations in accordance with this rule.

(2) Where they propose to make an award of compensation, the Tribunal shall give the complainant and the person who would be required to pay the compensation an opportunity to make representations as to the amount of the award.

(3) Where they propose to make any other order ... affecting the public authority against whom the ... proceedings are brought, or the person whose conduct is the subject of the complaint, the Tribunal shall give that authority or person an opportunity to make representations on the proposed order.”

Quite apart from the fact that the Rule appears to emphasise and support a conclusion that s67(7) is, as above, only intended to address orders in favour of the complainant, that is certainly the case so far as this Rule is concerned – subparagraph 3 addressing only a case in which the Tribunal is making *any other order against* a respondent, i.e. in favour of a complainant.

iii) In those circumstances, the power of the Tribunal to determine its own *procedure* under s68(1) of RIPA (particularised in Rule 9), to which Mr Alder for the Respondent drew attention, does not appear to us to include a power to award costs.

iv) The Tribunal has the power, which it does from time to time exercise, under s67(4) of RIPA and Rule 13(3) to determine that a complaint is frivolous or vexatious. As Mr Allen points out, even in relation to such a determination, no express power is given to the Tribunal to award costs: the reality is that the operation of that power, at a time before any requirement has been made of the respondent to carry out investigations or put in responses, in fact avoids the expenditure of costs, by rendering it unnecessary for a respondent to have to incur them.

8. We conclude that it would appear from the statute that the Tribunal was intended to be cost-free to the complainant. Mr Allen, on behalf of the Complainant, has pointed to the Tribunal's website, which reads as follows:

“Will making a complaint or claim to the Tribunal cost me anything?”

No. The Tribunal's investigation of complaints and claims is free of charge. The Government has an obligation to provide all the resources required by the Tribunal to enable it to carry out its functions. However, if you decide to submit your complaint and claim through a solicitor or other representative, the Tribunal cannot refund any costs you may incur as a result.”

9. We do not doubt that the author of the website would not have had in mind the questions that we are now deciding and, in any event, as Mr Allen fairly points out, the question of inter partes costs is not addressed. However, whether or not it could be said that that website leads to a legitimate expectation on the part of a complainant that he or she will not be under any liability for costs, we conclude that it is a significant factor that the Tribunal's primary task is to investigate the conduct of public bodies, and hence to be inquisitorial. Mr Allen has drawn our attention to a Supplemental Decision of the Social Security Commissioner dated 15 May 1990 R (FC) 2/90 (apparently given in the case which led to **Jones v Department of Employment** [1989] QB 1), referred to in **Tribunal Practice and Procedure** (2009) by Edward Jacobs at para 7.182 (p380), which we have found helpful. Concluding, in paragraph 17, that he had “*no implied or inherent power to make an award of costs from any circumstances*”, the Commissioner gives (in paragraph 19) as the reason for this that he “*exercises an inquisitorial function*”.
10. We conclude for all the above reasons our answer to the question set out in paragraph 5 above should be negative. We do not conclude that there is power to award costs in favour of a respondent against a complainant who has withdrawn his complaint. Notwithstanding the matters which, because they have been so helpfully canvassed, have been set out above, we reach no other decision than that in the instant case and on this occasion.
11. For the sake of completeness we should state that, had we had such a power to award costs in such circumstances, we would have been influenced - not simply because of the provision in s67(2) of RIPA, which may not be directly relevant, that the Tribunal “*shall apply the same principles for making their determination in ... proceedings as would be applied by a court on an application for judicial review*” - by the settled practice of the Administrative Court where there is a withdrawal by a claimant prior to determination of the issues by the Court (see e.g. **Boxall v Mayor & Burgess of LB Waltham Forest** 21 December 2000 per Scott Baker CO/3234/2000). We would have concluded that this was a case in which it cannot now be determined whether, after full consideration, a determination would or would not have been made in favour of the Complainant, so that no order for costs would have been the appropriate course. That is not to say that the Tribunal does not regret that in this case, where care had been taken by the Tribunal to set down a procedure for compliance by both sides, the Complainant should have left it so late before notifying the Tribunal (and that only after being chased) of his intention to withdraw.