Upper Tribunal for Scotland

2022UT19

Ref: UTS/AP/21/0020

DECISION NOTICE OF SHERIFF COLIN DUNIPACE,

JUDGE OF THE UPPER-TIER TRIBUNAL FOR SCOTLAND (GENERAL REGULATORY CHAMBER)

IN THE CASE OF

Mr Yanis Arnaudov, 31/2 Lochinver Crescent, Paisley, PA2 9EX

Appellant

- and –

Glasgow City Council, City Chambers, Glasgow, G2 1DU

Respondent

FtT case reference GP00124-2003

14 June 2022

Decision

The Upper Tribunal refuses the Appeal.

Introduction

1. By way of background, Mr Yanis Arnaudov (hereinafter referred to as 'the Appellant') was issued with a Penalty Charge Notice (hereinafter referred to as the 'PCN') at

14.25 on 8 July 2019 at Dowanside Road, Glasgow, in relation to an alleged parking contravention whereby he was said to have been parked in a residents' or shared use parking place or zone without either clearly displaying a valid permit or voucher or pay and display ticket issued for that place, or without payment of the parking charge.

2. Following his receipt of the PCN, the Appellant submitted what was referred to as an 'informal' appeal against its imposition upon him to Glasgow City Council (hereinafter referred to as "the Council"). This informal appeal was rejected by the Council on 26 August 2019, and a Notice to Owner was thereafter issued by the Council on 23 September 2019. Upon his receipt of this Notice to Owner, the Appellant submitted a formal appeal, with detailed representations thereupon, to the Council on 9 October 2019. The Council issued a Notice of Rejection in respect of these submissions on 29 October 2019. In this correspondence the Council indicated that they were prepared to re-instate the period available to pay the discounted penalty, and that if payment of the aforementioned discounted amount of £30 was received by them before 12 November 2019, then the Appellant would still qualify for that discounted rate. The Council also advised the Appellant that after that date that the full charge of £60.00 would then fall to be due for payment. Further, and by way of explanation, the Council advised the Appellant that if payment was not received before that date, then a subsequent Notice to Owner would be issued in due course which would enable the Appellant to make a formal representation that the Council would be obliged to consider, and if this in turn was rejected, then the Appellant would be able to lodge an appeal with the Parking and Bus Lane Tribunal for Scotland (now the First-tier Tribunal). The Appellant continues to maintain that this approach as adopted by the Council was incorrect in law, and I shall return again to the significance of this disputed procedure in due course.

3. A further Notice of Rejection was subsequently issued by the Council on 26 February 2020. Upon his receipt thereof the Appellant submitted an appeal to the First-tier Tribunal on 4 March 2020 in relation to the index PCN and on 5 March 2020 the Appellant was notified

by the Council that they had decided not to contest the appeal. The Appellant thereafter submitted this application for expenses on 10 March 2020, and this application was thereafter listed for a postal decision, being subsequently considered and determined by a Legal Member of the First-tier Tribunal on 26 October 2020. At that time the application for expenses was refused. The terms of the Legal Member's written determination as issued is available, and is referred to for their terms.

4. On 7 November 2020 the Appellant applied to the First-tier Tribunal seeking a review of the aforementioned decision of the Legal Member of 26 October 2020, and this request was admitted to the review process in terms of Rule 17 of the First-tier Tribunal for Scotland General Regulatory Chamber Parking and Bus Rules of Procedure 2020 (contained in the Schedule of the Chamber Procedure Regulations 2020 (SSI No 98) (hereinafter referred to as "the Procedure Rules"). The Review application was considered by a different Legal Member of the First-tier Tribunal, and a telephone hearing on this application took place, with the Appellant being represented at that stage by his representative Mr Murray Smith. At this hearing the Council were neither present nor represented. Whilst I have not seen a formal record of the decision of the First-tier Tribunal in respect of this hearing, I have noted that the reasoning of the Legal Member in relation to the decision of the First-tier Tribunal to take no action is contained in the subsequent decision in relation to the application for permission to appeal dated 17 June 2021. In this regard I have noted that the decision of the First-tier Tribunal was stated to be that:

> *a. The application for review was made under rule 17 (2)(e) of Procedure Rules. This provides that a decision may be reviewed if the interests of justice require such a review.*
> *b. In* ***Ross v London Borough of Enfield (LPAS)*** *the adjudicator held that whether the interests of justice require a review depends upon the circumstances of any specific case. If a party had misled an adjudicator, the interests of justice may require a review of the decision. This is not such a case.*
> *c. An analogous provision exists in the Employment Tribunal rules of procedure. Under those rules, it is recognised that an employment tribunal has a wide discretion but one which should be carefully exercised. It should not be taken to mean that in every case where a litigant is unsuccessful, they are automatically entitled to a*

reconsideration [i.e. review] because virtually every unsuccessful litigant thinks that the interests of justice require the detailed outcome to be reconsidered. In that jurisdiction, the ground only applies where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order.
d. In this case, the application for review provides, in the section headed "introduction", that the legal member who issued the Decision made an error in law. At the hearing, Mr Murray Smith confirmed that was the basis for the review and repeated the salient arguments set out in the application for review. Having read the application for review and having heard Mr Murray Smith, the Tribunal was not satisfied that the application engaged rule 17 (2) (e) of the Procedure Rules it did not accept that it has been suggested that there was anything which went radically wrong with the procedure that involved a denial of natural justice or something of that order leading to the Decision.
e. Since 1 April 2020, a party has had the right to seek permission to appeal to the Upper Tribunal and may do so ***only on a point of law****. If a party wishes to appeal to the Upper Tribunal, they must first obtain the permission of either the First Tier Tribunal or the Upper Tribunal. An application must be made pursuant to Rule 18 of the Procedure Rules.*
f. In substance, the application for review was, to all intents and purposes, an application for permission to appeal to the Upper Tribunal because the legal member made an error in law in the Decision by refusing the applicant's application for expenses.

5. The Appellant subsequently submitted an application for permission to appeal to the First-tier Tribunal in terms of Rule 18(2) of the 2020 Procedure Rules on 10 June 2021. This application was accepted as timeous by the First-tier Tribunal on the basis of written submissions made on behalf of the Appellant, and permission to appeal was granted on 17 June 2021 on the basis that the grounds of appeal as stated raised arguable points of law.

6. Given that permission to appeal has been granted by the First-tier Tribunal, the Appellant has now submitted a full appeal in terms of section 46(1) of the Tribunals (Scotland) Act 2014 on Form UTS-1. In support of this appeal the Appellant has lodged the following documentation:

a. Form UTS-1

b. Legal Member's decision

c. Decision of First-tier Tribunal allowing Permission to Appeal

Grounds of Appeal

7. The full grounds of appeal as now set out by the Appellant state as follows:

"The facts of the case are outlined in the decision which is under appeal.
The Road Traffic Act 1991 (the "1991 Act") as amended by The Road Traffic (Permitted Parking Area and Special Parking Area) (City of Glasgow) Designation Order 1999 (the "Designation Order") provides at paragraph 2(7) of Schedule 6 that:
It shall be the duty of the parking authority when representations are duly made to it under this paragraph—
(a) to consider them and any supporting evidence which the person making them provides; and
(b) to serve on that person notice of their decision as to whether they accept that the ground in question has been established.
The legal duty imposed by paragraph 2(7)(b) speaks for itself and does not give any scope for the parking authority to issue an "informal" rejection.
Hence the First-tier tribunal fell into error when it held that:

> *I considered that the Council's response dated 29 October 2019 to the Appellant's formal representation did not constitute a 'NOR' for the purposes of paragraph 4 of the 'RTA' because the Council decided to reinstate the discounted penalty charge amount for a period of 14 days.*

The response dated 29 October 2019 is on its face "notice of their decision as to whether they accept that the ground in question has been established".
This being the case, the requirements of paragraphs 4 and 5 of Schedule 6 to the 1991 Act apply.
Paragraph 4 mandates the contents of a "notice of their decision" where the parking authority does not accept that any statutory ground for cancellation of the penalty charge has been established by the representations:

Rejection of representations against notice to owner

4 Where any representations are made under paragraph 2 above but the parking authority do not accept that a ground has been established, the notice served under

(a) state that a charge certificate may be served under paragraph 6 below unless before the end of the period of 28 days beginning with the date of service of the notice of rejection—

(i) the penalty charge is paid; or
(ii) the person on whom the notice is served appeals to a parking adjudicator against the penalty charge;
(b) indicate the nature of a parking adjudicator's power to award costs against any person appealing to him; and
(c) describe in general terms the form and manner in which an appeal to a parking adjudicator must be made, and may contain such other information as the parking authority consider appropriate.

Paragraph 5 provides the statutory right of appeal:

Adjudication by parking adjudicator

5 (1) Where the parking authority serve notice under sub-paragraph (7) of paragraph 2 above, that they do not accept that a ground on which representations were made under that paragraph has been established, the person making those representations may, before
(a) the end of the period of 28 days beginning with the date of service of that notice; or
(b) such longer period as a parking adjudicator may allow, appeal to a parking adjudicator against the parking authority's decision.
(2) On an appeal under this paragraph, the parking adjudicator shall consider the representations in question and any additional representations which are made by the Appellant on any of the grounds mentioned in paragraph 2(4) above and may give the parking authority concerned such directions as he considers appropriate.
(3) It shall be the duty of the parking authority to comply with any direction given to it under sub-paragraph (2) above.

The First-tier tribunal went on to say:

While the Council are more likely to reinstate the discounted penalty amount at the stage of rejection of the informal representations rather than in response to the formal representations made after the 'NTO' has been issued, Schedule 6, paragraph 2 (7) confers a wide discretion on a local authority in carrying out its duty to consider Representations made, which includes a discretion to reinstate the discount period at any time.

However, there is no legal principle that prevents the parking authority from issuing a Notice of Rejection which allows the recipient to either pay the discounted penalty within (for example) 14 or 21 days, or pay the full penalty within the 28 day statutory period, or appeal against the full penalty, indeed this is standard practice for many local authorities.

As the First-tier tribunal rightly stated, the discretion conferred by paragraph 2(7) of Schedule 6 to the 1991 Act is very wide indeed. This discretion must reasonably include a discretion to re-offer payment of the discounted penalty on the proviso that the recipient of the Notice of Rejection accepts liability for the lower amount and does not appeal the rejection. This approach would not reasonably be open to a public law challenge, as it would be a rational public policy to offer a discount on the penalty to those who save the parking authority and the First-tier tribunal the trouble and expense of a contested appeal hearing.

This approach would also, within the civil enforcement regime, mirror the provisions that apply in a criminal context under section 196 of the Criminal Procedure (Scotland) Act 1995, which gives scope for an acceptance of guilty to result in a lesser punishment.

Therefore there was in principle no impediment to the parking authority issuing a Notice of Rejection on 29 October 2019 that also re-offered the discount. It follows that the First-tier tribunal fell into error when he said that (emphasis added): Furthermore, the Council's decision to reinstate the discounted penalty amount at that stage was clearly of benefit to the Appellant and did not prejudice him in any way. In these circumstances I am therefore satisfied that as the Appellant had not paid the 'PCN' at the discounted rate after the expiration of this period, ***the Council was obliged to reissue*** *what in effect was the same 'NTO' with a revised date on it in the requisite 28 day period under paragraph 2 (3) of the 'RTA' in which to make formal representations.*
As the council was not obliged to reissue anything and could have issued a lawful Notice of Rejection while also re-offering the discount, the tribunal's finding that the council was ***obliged*** *to re-issue the Notice of Rejection has no basis in fact or in law, this finding is fundamentally flawed and cannot stand.*

Furthermore the tribunal's finding that the parking authority's chosen course of action "did not prejudice [the Appellant] in any way" is unsustainable on grounds of rationality: the Appellant was required to engage in a further cycle of representations before he was able to exercise his right to appeal to the tribunal, so a degree of prejudice undeniably occurred.

Finally the tribunal held that:
In these circumstances I am therefore satisfied that as the Appellant had not paid the 'PCN' at the discounted rate after the expiration of this period, the Council was obliged to reissue what in effect was the same 'NTO' with a revised date on it in order to provide the Appellant with the requisite 28 day period under paragraph 2 (3) of the 'RTA' in which to make formal representations.

Not only was the parking authority not under any obligation to re-issue anything, but it had no statutory authority to issue a second NTO, with a revised date or otherwise. The only circumstances where a parking authority has authority to issue a new Notice to Owner is provided for at paragraph 3(2) of Schedule 6:
The cancellation of a notice to owner under this paragraph shall not be taken to prevent the parking authority serving a fresh notice to owner on another person.
In the absence of any statutory authority, the parking authority's purported reissue of a Notice to Owner on the same person is a nullity and of no legal effect. The tribunal did not identify any statutory or common law authority that would validate the parking authority's actions and if the legal member's interpretation of the law were correct, this would give a blanket mandate to the council to extend the process more or less indefinitely (because the council could potentially reissue the NTO over and over again, more or less indefinitely).

The tribunal's view must be wrong in any event because, had Parliament intended to allow the council to re-issue a Notice to Owner, it would have been simple to include words in the legislation to confer such a power, and such statutory provisions would have inevitably defined limits on that power to re-issue (because matters such as time-limits, the number of occasions on which such statutory notices may be issued and so on are matters for detailed regulation by Parliament).

On the contrary, the clear intent of Parliament is that upon receipt of a representation, the parking authority must either accept or reject those representations and if those representations are not accepted, the recipient of the PCN has a statutory right to take the matter (at that stage and with no further delays) to a fair and impartial tribunal.

It is not open to the parking authority or, with respect, to the First-tier tribunal, to add any burdens, obstacles or impediments to a citizen's right to access the tribunal once the criteria put in place by Parliament have been met.

To hold otherwise would not only be an interpretation of the law at odds with Article 6 of the ECHR, but it would be an impermissible nullification of the will of Parliament. On 17 June 2021 the chamber president of the First-tier tribunal held that this appeal raises arguable points of law, and he granted leave to app

8. The procedural history of this appeal, is as above narrated. Neither the Appellant nor the Council have indicated that they wished a full oral hearing in relation to this matter either by telephone or in-person.

9. In determining this matter I have noted that the relevant issue before the First-tier Tribunal related not to the substantive appeal issue, given that the Council had decided not to contest the appeal in relation to the issuing of the original Penalty Charge Notice on 5 March 2022, but rather related to a determination of whether the Appellant's application for expenses submitted on 10 March 2020 should have been granted. Whilst I have noted the detailed and careful submissions of the Appellant's representative in relation to the procedure adopted by the Council, given that the matter was ultimately not contested by the Council, these submissions are limited in their application, albeit they do have a bearing on the reasonableness or otherwise of the actings of the Council.

10. The factual position in relation to the issuing of the Penalty Charge Notice is as set out in the decision of the Legal Member of the First-tier Tribunal and was fully narrated in the decision of the aforementioned Legal Member dated 26 October 2020. By way of summary the position as noted by the Legal Member was stated to be as follows:

> (i) On 8 July 2019 the Appellant's vehicle was issued with a 'PCN' at 14:25 hours at Dowanside Road, Glasgow given that the vehicle was said to be parked in a residents' or shared use parking place or zone without either clearly displaying a valid permit or voucher or pay and display ticket issued for that place, or without payment of the parking charge.
>
> (ii) The Appellant has submitted an application for expenses on procedural and substantive grounds. In terms of the procedural grounds, the Appellant's submission is to the effect that at the outset of the appeal process that an informal rejection letter was issued by the Council on 26 August 2019 in response to an informal challenge dated 24 July 2019. This in turn led to the issuing of a Notice to Owner being issued by the Council on 23 September 2019. The Appellant thereafter submitted a formal representation in response thereto on 9 October 2019, prompting a response from the Council on 29 October 2019 which stated that they were satisfied that the PCN had been issued correctly, and accordingly there were no grounds to cancel the Notice to

Owner. In this response the Council further stated that they were prepared to re-instate the discount period and that payment of the discounted amount of £30 must be received before 12 November 2019 to qualify for this discounted rate, failing which the full charge of £60.00 would be due for payment. It was not accepted by the Appellant that this was a lawful position for the Council to have adopted.

(iii) The Council had further stated that in the event that payment was not received before 12 November 2019, that a further Notice To Owner would be issued in due course, thereby enabling a formal representation to be made to the Council, that they were obliged to consider and if rejected, the owner could then lodge an appeal with the Parking and Bus Lane Tribunal for Scotland (now the First-tier Tribunal).

(iv) The position of the Appellant was to the effect that the Council's initial response of 29 October 2019 should have entitled him to appeal to the First-tier Tribunal immediately in accordance with paragraph 5 of Schedule 6 of the Road Traffic Act 1991 as amended. He had in fact attempted to lodge an appeal with that Tribunal at that time, but had been advised by the Tribunal in their letter dated 15 November 2019 that they could not accept his appeal until a further Notice To Owner had been issued to him, thereby allowing him to make further representations, which if rejected by the Council, would result in a further a Notice of Rejection being issued. At that point he was advised that he would be entitled to appeal to the First-tier Tribunal.

(v) The position of the Appellant was to the effect that this latter procedure was fundamentally flawed and that he was in fact entitled to appeal immediately once the original Notice of Rejection had been received, and that, in effect, the issuing of the second Notice to Owner on 26 February 2020 was unlawful and could be of no legal effect. The position of the Appellant was expanded further to the effect that the Council cannot in law reset a penalty to a Notice to Owner thereby prolonging proceedings more or less indefinitely by continuously issuing a succession of such Notice to Owners.

(vi) Further it was submitted by the Appellant that by thus prolonging the proceedings through an unlawful manipulation of the process that the Council was

acting in a manner which was ultra-vires, and thereby constituted an abuse of process which was also wholly unreasonable. It followed therefore in the Appellant's submission that even if the contravention had occurred (which was denied), that the only penalty that could be demanded was nil.

(vii) In respect of the substantive grounds, the Appellant submitted that the alleged parking contravention had not occurred because the signage at the locus had not satisfied the requirements of Regulation 17(1)(f) of The Local Authorities' Traffic Orders (Procedure) (Scotland) Regulations 1999 and that the Council had never satisfactorily addressed the submission on behalf of the Appellant to the effect that the nearest pay and display signage at the locus was over 100 yards away and was hidden behind a bend in the road. Furthermore, it was stated that the wrong contravention code had been used for the Penalty Charge Notice given that the one issued applied to residents or shared use parking places, whereas the bay in question was a pay and display bay.

(viii) The Appellant further submitted that the Council's conduct had been wholly unreasonable and requested that an order for expenses be made against the Council in the sum of £95, representing five hours of work at £19 per hour, this being the time he had spent researching the law and preparing his appeal, inclusive of telephone, stationary and postage costs.

11. The response of the Council to the substantive aspect of the appeal had been to demonstrate the positions of the informative plates and the pay and display machines at the location and to enclose a map of the Restricted Parking Zone in support thereof. They submitted that they retained a discretion to cancel a PCN at any stage in the appeal process and that following their review of the case upon receipt of the appeal that they had ultimately decided not to contest that PCN. In the foregoing circumstances the Council did not consider that it had acted in a frivolous or vexatious way, nor had the disputed decision in any way been wholly

unreasonable. Accordingly the Council submitted that no expenses were due in terms of the Road Traffic (Parking Adjudicators) (City of Glasgow) Regulations 1999.

12. The Appellant in turn responded to the Council stating that they had still not addressed the fact that no signage was visible from where the Appellant's vehicle had been situated, and that any signage on the opposite side of the road would not normally be relevant, and further that they had mis-stated the location of the pay and display machine. The Appellant further submitted that the actions of the Council in issuing the second Notice to Owner had been unreasonable, as was the fact that they had persisted in pursuing the matter. It was further stated that the Council had not argued that the service of the second Notice to Owner on the same person, and for the same contravention was lawful.

13. On 14 August 2020 the Council responded to the Appellant's submissions stating that it had issued a rejection letter to him on 29 October 2019 and reinstated the discount amount which automatically reset the 'Notice to Owner' to its original status, and that as a result that it had therefore been incumbent upon them to resend a further 'Notice to Owner' to the Appellant.

14. On 18 August 2020 the Appellant replied that even if the re-offered discount automatically reset the penalty status as a result of the Council's IT and case management systems, that this had no legal status or bearing on the law and that if the Council had wished to reject the representation, it could and indeed should have issued a proper Notice of Rejection given there was no other permitted course of action. In relation to the application for expenses, the Appellant also made reference to the fact that reliance was being placed upon Rule 12 of the Road Traffic (Parking Adjudicators) (City of Glasgow) Regulations 1999, which provides that:

12 (1) The adjudicator shall not normally make an order as to expenses but may, subject to paragraph (2) make such an order–

(a)against a party (including an Appellant who has withdrawn his appeal or the parking authority if that authority has consented to an appeal being allowed) if he is of the opinion that that party has acted frivolously or vexatiously or that that party's conduct in making, pursuing or resisting an appeal was wholly unreasonable; or

(b) against the parking authority where he considers that the disputed decision was wholly unreasonable.

(2) An order shall not be made under paragraph (1) against a party unless that party has been given an opportunity of making representations against the making of the order.

(3) An order under paragraph (1) shall require the party against whom it is made to pay to the other party a specified sum in respect of the expenses incurred by that other party in connection with the proceedings.

15. In relation to the question of expenses it was noted that the position of the Legal Member when considering this appeal had been to the effect that they were satisfied that the Council had not acted in such a wholly unreasonable manner as envisaged in Rule 12 of the Road Traffic (Parking Adjudicators) (City of Glasgow) Regulations 1999. In coming to this conclusion the Legal Member had concluded that the Council's response dated 29 October 2019 to the Appellant's formal representation had not constituted a Notice Of Rejection for the purposes of paragraph 4 of the Road Traffic Act because the Council had decided to reinstate the discounted penalty charge amount for a period of 14 days. The Legal Member concluded that whilst the Council were more likely to reinstate the discounted penalty amount at the stage of rejection of the informal representations rather than in response to the formal representations made after the 'Notice to Owner' has been issued, Schedule 6, paragraph 2 (7) conferred a wide discretion on a local authority in carrying out its duty to consider representations made, which included a discretion to reinstate the discount period at

any time. Furthermore, the Council's decision to reinstate the discounted penalty amount at that stage was clearly of a realisable benefit to the Appellant and did not prejudice him in any way. In these circumstances the Legal Member was satisfied that as the Appellant had not paid the PCN at the discounted rate after the expiration of this period, the Council was obliged to reissue, what was in effect the same Notice to Owner, with a revised date thereupon to provide the Appellant with the requisite 28 day period under paragraph 2 (3) of the Road Traffic Act within which to make formal representations. The Legal Member also did not accept that the Council had used the wrong contravention code for the PCN given that this contravention specifically included circumstances where a vehicle was parked in a 'zone' without a pay and display ticket which applied to the Appellant's vehicle in the present circumstances, a matter which has no bearing upon the subject matter of the present appeal. The Legal Member also concluded that the Parking Attendant had been entitled to issue the PCN at the material time given that the Appellant's vehicle was apparently parked in a Restricted Parking Zone without demonstrating an appropriate permit or proof of payment of the parking charge. The Council had also subsequently decided to no longer contest the Appellant's appeal against liability for the PCN meaning that no further procedure had been necessary.

16. The Legal Member further concluded that whilst the Council's actions did not reach the high threshold required to amount to 'wholly unreasonable conduct' under Rule 12 of the aforementioned Regulations, that they should have been clearer in their correspondence to the Appellant of 29 October 2019 by advising him that as they were reinstating the discount period for 14 days that this did not constitute a formal Notice to Owner and that if the PCN was not paid during this period, then the Notice to Owner would be re-issued with the appropriate amended date to enable the Appellant to make formal representations thereafter. The Legal Member further observed that given the Appellant's representations from the outset regarding the inadequate signage at the location, that it might have been reasonable for the Council to have considered their position regarding this appeal sooner than they did, thereby avoiding a protraction of the appeals process and the need for the Appellant to engage in a series of time-consuming correspondence which ultimately led to the present

application. The Legal Member concluded that whilst this was an unfortunate set of circumstances (and indeed some sympathy was expressed with the Appellant), nonetheless, and for the reasons previously provided, when considering all of this evidence in the round, the Legal Member had found no basis upon which to award expenses to the Appellant in respect of this application.

Discussion

17. The Parking and Bus Lane jurisdiction was brought within the integrated structure of Scottish Tribunals within the General Regulatory Chamber of the First-tier Tribunal for Scotland as part of its rolling programme of reform on 1 April 2020. Prior to that date there was no statutory right to seek permission to appeal decisions of adjudicators to the Upper Tribunal for Scotland. On that date the Adjudicators of the Parking and Bus-Lane Tribunal for Scotland became Legal Members of the General Regulatory Chamber of the First-tier Tribunal for Scotland. In the present application, the index contravention was alleged to have occurred on 4 December 2020 which follows the integration of the Parking and Bus Lane Tribunal into the General Regulatory Chamber. Accordingly, and given that the Appellant's appeal was considered by the Legal Member of the First-tier Tribunal and the determination was issued on 22 July 2021, there does exist a statutory right to seek permission to appeal to the Upper Tribunal for Scotland in relation to this matter.

18. The terms of section 46(1) the Tribunals (Scotland) Act 2014 ("the 2014 Act") provide that the Upper Tribunal for Scotland may only hear appeals in cases where Permission to Appeal has been granted either by the First-tier Tribunal or by the Upper Tribunal itself. Permission will only be granted in accordance with section 46(2) (b) of the 2014 Act if the Appellant has identified an arguable error on a point of law in the decision of the First-tier Tribunal which he wishes to appeal. It is noted that in the present appeal that Permission to Appeal has been granted by the First-tier Tribunal.

Conclusion

19. The Appellant has been granted Permission to Appeal to the Upper Tribunal in terms of section 46 (3) (a) of the 2014 Act. The question at this stage is the Appellant is entitled to an award of expenses against the Council in respect of his original appeal against the decision to impose a PCN upon him.

20. As a starting point it is helpful to note that the Council did not ultimately oppose the original appeal submitted by the Appellant, and that by the time that the matter was dealt with by the First-tier Tribunal that the substantive element of the appeal was no longer live. Whilst I have noted that the Appellant's representative has set out at some length in the full Note of Appeal, his defence in relation to the original alleged contravention, given the concession of the Council not to contest the appeal, those submissions have relevance only insofar as they impact upon the reasonableness or otherwise of the Council in their original rejection of the Appellant's appeal. The sole issue before the Legal Member at the time of the original hearing was in relation to the Appellant's application of expenses and this decision will accordingly focus upon the decision of the Legal Member in that regard. Accordingly I have noted that I should have regard to determining whether the original Tribunal has made:

(i) an error of general law, such as the content of the law applied;

(ii) an error in the application of the law to the facts;

(iii) making findings for which there is no evidence or which is inconsistent with the evidence and contradictory of it; and

(iv) a fundamental error in approach to the case: for example, by asking the wrong question, or by taking account of manifestly irrelevant considerations, or by arriving at a decision that no

reasonable tribunal could properly reach (see Advocate General for Scotland v Murray Group Holdings 2016 SC 201 at paras 42 to 43).

21. In the present appeal the position of the Appellant is as stated at paragraph 7 above. The broad thrust of the Appellant's submissions was to the effect that Rule 12 of the Road Traffic (Parking Adjudicators) (City of Glasgow) Regulations 1999 specifically made provision for an award of expenses in terms of Rule 12(2) as set out above. In considering such an award of expenses, whilst the general position as stated in Rule 12(1) of the foregoing Regulations is that an adjudicator (now Legal Member) shall not normally make an award of expenses, such an award is possible in terms of paragraph 12(2), where an authority has consented to an appeal being allowed if that adjudicator is of the view that the party has: "acted frivolously or vexatiously or that that party's conduct in making, pursuing or resisting an appeal was wholly unreasonable"; or where "he considers that the disputed decision was wholly unreasonable".

22. Accordingly at this juncture, the issue for determination is whether the Legal Member has erred in their determination of this issue at the previous hearing before the First-tier Tribunal. In this regard I have noted that the relevant section of the aforementioned determination is contained with the written reasons of the Legal Member and states as follows:

> *"The starting point for a Legal Member in determining such an application is that in accordance with Rule 12 of the 'Regs 1999,' an order as to expenses is not normally made. These provisions set a high threshold to be met.*
> *Having carefully examined the Appellant's representations and parties' evidence incorporated herein, I found that 'GCC' has not acted in a wholly unreasonable manner. In reaching this view I have taken account of the following.*
> *I considered that the Council's response dated 29 October 2019 to the Appellant's formal representation did not constitute a 'NOR' for the purposes of paragraph 4 of the 'RTA' because the Council decided to reinstate the discounted penalty charge amount for a period of 14 days.*

While the Council are more likely to reinstate the discounted penalty amount at the stage of rejection of the informal representations rather than in response to the formal representations made after the 'NTO' has been issued, Schedule 6, paragraph 2 (7) confers a wide discretion on a local authority in carrying out its duty to consider representations made, which includes a discretion to reinstate the discount period at any time. Furthermore, the Council's decision to reinstate the discounted penalty amount at that stage was clearly of benefit to the Appellant and did not prejudice him in any way. In these circumstances I am therefore satisfied that as the Appellant had not paid the 'PCN' at the discounted rate after the expiration of this period, the Council was obliged to reissue what in effect was the same 'NTO' with a revised date on it in order to provide the Appellant with the requisite 28 day period under paragraph 2 (3) of the 'RTA' in which to make formal representations.

In terms of the alleged contravention itself, I do not accept that the Council used the wrong contravention code for the 'PCN' as this contravention specifically includes circumstances where a vehicle is parked in a 'zone' without a pay and display ticket which applied to the Appellant's vehicle on these facts. I am further of the view that it was legitimate for the Parking Attendant to issue the 'PCN' at the material time on the basis that the Appellant's vehicle was parked in an 'RPZ' without an appropriate permit or payment of the parking charge. Moreover, in this instance 'GCC' subsequently decided to no longer contest the Appellant's appeal against liability for the 'PCN.'

Although I do not consider that 'GCC's actions reach the high threshold required to amount to wholly unreasonable conduct under Rule 12 of the 'Regs 1999,' I am of the view that the Council should have been clearer in their correspondence to the Appellant of 29 October 2019 by advising the Appellant that as it was reinstating the discount period for 14 days, it was not a formal 'NOR' and that if the 'PCN' was not paid during this period, the 'NTO' would be reissued with the appropriate date in order for the Appellant to make formal representations thereafter. Equally, in light of the Appellant's representations from the outset regarding the inadequate signage at the location, I am of the view it would have been reasonable for 'GCC' to consider

their position regarding this appeal sooner than it did. To do so would have avoided a protraction of the appeals process and the need for the Appellant to engage in a series of time consuming correspondence with 'GCC' which ultimately led to this application. This is most unfortunate and I sympathise with the Appellant for that.

23. As mentioned earlier, at this stage I am simply concerned with the question of whether it can be demonstrated that the Legal Member erred in not making an award of expenses against the Council in favour of the Appellant. The original index alleged contravention is no longer before this Tribunal, nor indeed was it before the First-tier Tribunal, except insofar as the Council's ultimate non-contest of the PCN following the aforementioned procedure might be demonstrative of unreasonable actions of their part. Accordingly the only question is whether the Legal Member erred in not determining that the Council had acted in a frivolous or vexatious manner, or had acted in an unreasonable fashion. In determining this matter I have noted the position of the Appellant's representative as set out in his careful written submissions and also as set out in the decision of the Legal Member.

24. In this regard I have noted that the Appellant's representative has taken issue with the procedure adopted by the Council in dealing with the original PCN. In particular I have noted that the Appellant's representative argues that the terms of section 2 and 4 of Schedule 6 of the Road Traffic Act 1991 make clear that the Council have no discretion available to them in the process following the issuing of a Notice to Owner in terms of section 1 of the foregoing Schedule. In this case the Appellant chose to make representations in terms of section 2(1) of the Schedule, presumably to the effect that section 2(4)(b) applied, namely that the alleged contravention did not occur. Having so received these representations the Council was thereafter bound by the terms of the statute to respond in terms of section 2(7) of the Act which states:

(7) It shall be the duty of an authority to whom representations are duly made under this paragraph—

(a) to consider them and any supporting evidence which the person making them provides; and

(b) to serve on that person notice of their decision as to whether they accept that the ground in question has been established.

25. Having served such a notice indicating that the Council did not accept that the ground in question had been so established, the position of the Appellant was to the effect that the terms of section 5 of the 1991 Act should have been immediately triggered. For the purposes of clarification the terms of section 5 state as follows:

5(1)Where an authority serve notice under sub-paragraph (7) of paragraph 2 above, that they do not accept that a ground on which representations were made under that paragraph has been established, the person making those representations may, before—

(a)the end of the period of 28 days beginning with the date of service of that notice; or

(b)such longer period as a parking adjudicator may allow,

appeal to a parking adjudicator against the authority's decision.

26. The position of the Appellant, in summary, appears to be that by in effect by introducing a further stage in the process, namely the issuing of another Notice to Owner, that the Appellant was prevented from, or at least delayed in exercising his rights in terms of the foregoing section. In so doing the Council were therefore acting in a manner which could be considered *ultra vires* and therefore was unreasonable and capable therefore of being considered to being frivolous or vexatious or at least wholly unreasonable, thereby justifying an award of expenses against the Council.

27. In determining this matter the issue before this Tribunal at this stage is now a relatively straightforward one, namely whether the Appellant is entitled to an award of expenses given that having issued the original PCN, that this was treated as non-contested at the First-tier Tribunal hearing. The reasons provided by Appellant's representative as to why there should

be such an award are set out fully at paragraph 7 above, but broadly to summarise these the position appears to be as follows:

- that the Council acted wholly unreasonably in issuing the PCN in the first place;
- That the Council acted unreasonably in rejecting the Appellant's original representations against the NTO;
- That the Council thereafter acted unlawfully and unreasonably by failing to comply with the obligation imposed upon them in terms of Paragraph 2(7) of Schedule 6 to the 1991 Act, which provides: "It shall be the duty of an authority to whom representations are duly made under this paragraph: (a) to consider them and any supporting evidence which the person making them provides; (b) to serve on that person notice of their decision as to whether they accept that the grounds in question has been established." By resetting the PCN and allowing the Appellant the opportunity to pay the discounted amount the Council had sought to circumvent the terms of the foregoing statutory provision;
- As a result of the foregoing failure to apply the provisions of the aforementioned section the Appellant was denied at that stage his opportunity to immediately make representations to the First-tier Tribunal, as he in fact attempted to do. This denial was *ultra vires* and resulted in an unmerited period of delay for the Appellant.
- If the Council had acted reasonably, it would not have sent the Appellant a Notice to Owner at all, and, in any event, upon receipt of the Appellant's representations, it would have promptly withdrawn the Notice to Owner and would not have pursued the penalty further, as it eventually did when they decided not to contest the Penalty.
- The Council had acted unreasonably following receipt of the Notice of Appeal, by failing to immediately non contest the appeal, which was said in itself to have been wholly unreasonable conduct.

28. Whilst it may be that, as accepted by the First-tier Tribunal, that in this case, the Council might have performed better in this case in a number of aspects, the question remains whether their conduct could be described as being 'frivolous or vexatious' or whether its conduct in this appeal could be said to have been wholly unreasonable.

29. Looking at the representations of the Appellant I have noted that the initial response of the Council required to be in accordance with the terms of Paragraph 2(7) of Schedule 6 to

the 1991 Act), a provision which imposes an important and serious duty. At that stage the Council was placed under an obligation to fully consider the representations and any supporting evidence provided by an Appellant. It would appear to be the case that any failure to fully comply with that obligation might constitute a fundamental failure on the Council's part which might well render any further pursuit of the penalty unlawful. However, in this case, although the letter of rejection was perhaps not perfectly expressed, it would appear to be apparent that the Council did fully consider the terms of the Appellant's representations. The position of the Council at this stage was that they had concluded that the PCN was properly issued by their parking attendant. At this stage it is not perhaps necessary to express a view on the correctness of the Council's view, but nevertheless having examined the representations made I am unable to conclude that even if they were wrong in their interpretation of the situation, that their assessment of the evidence could be said to have been wholly unreasonable. Nor would I be able to conclude that it was frivolous or vexatious of them at that stage to continue to seek to have pursued the outstanding penalty. On the face of it the PCN had been properly issued by their parking attendant.

30. Whilst I have noted the suggestion that had the Council properly investigated the situation further at that earlier stage that they would have inevitably preferred the position advanced by the Appellant and therefore not proceeded to pursue the penalty, having examined this evidence I am unable to agree with this assessment. I accept that there remained a discretion available to the Council as to whether or not to pursue a penalty that may be due, and that they could not be said to have been unreasonable in their assessment of this available evidence. Even it an assessment was made to the effect that they had been wrong in so determining this position, their adopting of this stance was not thereafter necessarily and automatically 'unreasonable'.

31. Having assessed the evidence, and having concluded that the penalty remained payable, the Council appear to have concluded that it might be fair and equitable to afford the Appellant a further opportunity to pay the outstanding penalty at the discounted amount. I note that the position of the Appellant to the effect that he was prejudiced by this decision on the part of the Council. Leaving aside the question of whether the Council were entitled to effectively re-set the amount due in respect of the penalty due, it is difficult to ascertain any great degree of prejudice occasioned by this concession. Whilst I appreciate that this might have extended the

process by a short period, the offering of a reduce penalty does not appear to be a step which has prejudiced the Appellant to any significant degree. Indeed it might also on one view appear to be somewhat unfair and perverse to penalise the Council for acting in a manner which on the whole appears to have been adopted to benefit the Appellant.

32. Thereafter the Council appear to have decided not to pursue this penalty further, and in effect to 'non-contest' the penalty. Again this step appears not to have occasioned any prejudice to the Appellant, and indeed was a step which was clearly to his advantage. In considering whether it might be appropriate for a Council to exercise its discretion in not pursuing a contentious PCN, it appears to be entirely counter-productive for a local authority to be placed under a threat of costs if, through the exercise of its discretion, it decided not to pursue an appeal, preferring instead to give an Appellant the benefit of the doubt rather than requiring him to go through with a full appeal.

33. In considering this appeal I have examined the reasoning of the Legal Member of the First-tier Tribunal in refusing to award expenses to the Appellant. In this regard I have noted the aforementioned reasoning set out at paragraph 22 *supra*. I have noted that the Legal Member appears to have considered the submissions of the Appellant in some detail, and to have concluded that the Council had not acted in a wholly unreasonable manner. In coming to this conclusion the Legal Member stated that account had been taken of the following factors:

- The Legal Member considered that the Council's response of 29 October 2019 had not constituted a rejection of representations against notice to owner in terms of section 4 of Schedule 6 of the Road Traffic Act 199, given that the Council had simply decided to reinstate the discounted penalty charge amount for a period of 14 days, and that this step was permissible in terms of Schedule 6, paragraph 2 (7) which confers a wide discretion on a local authority in carrying out its duty to consider representations made. The view of the Legal Member was that this included a discretion to reinstate the discount period at any time.
- The decision of the Council to reinstate the discounted penalty amount at that stage benefitted the Appellant and did not occasion any prejudice to him. Given that the Appellant did not pay the PCN at the discounted rate after the expiration of this period, the Council was not only entitled to, but was in fact obliged to reissue the

same Notice to Owner to provide the Appellant with the requisite 28 day period under paragraph 2 (3) of Schedule 6 of the Road Traffic Act 1991 in which to make formal representations.

- The Legal Member also did not accept that the Council used the wrong contravention code for the PCN given that this particular contravention specifically included circumstances where a vehicle is parked in a 'zone' without a pay and display ticket which applied to the Appellant's vehicle on these facts. The Legal Member ultimately concluded that the Parking Attendant was entitled to issue the PCN given that the Appellant's vehicle was parked in a Restricted Parking Zone without an appropriate permit or payment of the parking charge.
- It was noted that the Council ultimately chose not to contest the Appellant's appeal against liability for the PCN.
- The Legal Member confirmed that consideration was given to the application of Rule 12 of the 199 Regulations, but concluded that the actions of the Council did not reach the high threshold required to amount to 'wholly unreasonable conduct' as envisaged in the aforementioned Regulations.
- Whilst the Legal Member concluded that the Council should have been clearer in their correspondence to the Appellant of 29 October 2019 by advising the Appellant that as it was reinstating the discount period for 14 days, that this did not constitute a formal rejection of representations against the Notice to Owner, and that if the discounted payment was not received within that time period, then such a formal Rejection would be 'reissued' with the appropriate date in order for the Appellant to make formal representations thereafter.
- The Legal Member also concluded that given the Appellant's representations from the outset regarding the inadequate signage at the location, that it might have been reasonable for the Council to consider their ultimate position regarding the appeal sooner than it did, thereby avoiding the protraction of the appeals process, thereby preventing the requirement for the Appellant to engage in a series of time consuming correspondence with the Council. The Legal Member concluded that this was 'most unfortunate' and expressed some sympathy for the Appellant in that regard.

34. Having considered the foregoing I am satisfied that the Legal Member correctly applied the statutory test as set out in The Traffic (Parking Adjudicators) (City of Glasgow)

Regulations 1999. As set out in section 12(1) of the aforementioned Regulations the Legal Member could have made an award of expenses against the Council in two situations, namely:

> 12.- (1) (a) against a party (including an appellant who has withdrawn his appeal or the parking authority if that authority has consented to an appeal being allowed) if he is of the opinion that that party has acted frivolously or vexatiously or that that party's conduct in making, pursuing or resisting an appeal was wholly unreasonable; or
>
> (b) against the parking authority where he considers that the disputed decision was wholly unreasonable.

35. It appears to be envisaged therefore that an award of expenses can be made against the Council as the relevant 'parking authority' in two circumstances, that is where they have, as in this case consented to an appeal being granted and they have acted frivolously and vexatiously or where their conduct in resisting the appeal was 'wholly unreasonable' or where the disputed decision itself was 'wholly unreasonable'. There appear therefore to be two situations whereby an award can be made, namely where the Council's conduct of the appeal process was frivolous, vexatious or wholly unreasonable, or where the original decision itself was wholly unreasonable. I shall consider the terms of Rule 12(1)(a) and 12(1)(b) separately.

36. Having examined the appeal process as stated above I am not satisfied that the conduct of the Council in resisting the appeal satisfied the legislative requirements for an award to be made in terms of Rule 12 (1)(a). As indicated above the Council considered the representations of the Appellant, and having done so they concluded that the PCN had been properly issued. Having examined the evidence, this appears to have been a positon which they genuinely believed to be the correct approach, and the approach taken by them does not appear to meet the high bar of being 'frivolous, vexatious or wholly unreasonable'. Having considered the aforementioned submissions the Council afforded the Appellant a further opportunity to pay the PCN at the discounted rate. In these circumstances it is difficult to perceive any real prejudice to the Appellant, nor does there appear to be any suggestion that the Council were deliberately employing this as a strategy to spin out the appeal process. Presumably it is in the Council's interests to conclude the Appeal process expeditiously and not to spin matters out unnecessarily thereby causing further expenditure and a further

allocation of resources which might well seem entirely disproportionate in the context of a PCN. In these circumstances I have seen no evidence that the Council have acted in a frivolous or vexatious manner, nor have their actings been wholly unreasonable. Whilst I might disagree with the assessment of the Council and the Legal Member to the effect that the terms of section Paragraph 2(7) of Schedule 6 to the 1991 Act, provided a discretion to the Council to issue a further Notice to Owner, the fact that the Council's assessment of the situation may have been incorrect, does not in itself render their conduct frivolous, vexatious manner, nor wholly unreasonable. Simply making an error does not render a decision in such a manner. There has also been no suggestion, so far as I have been made aware, of any bad faith on the part of the Council. It would further appear to be inequitable to penalise the Council for their actings in accepting that they did not wish to pursue the matter by the making of an award of expenses against them. In itself this might provide a perverse incentive on the Council to pursue every appeal, given that they might potentially face an award of expenses if they sought to prevent unnecessary procedure. Indeed such a course of action on their part might in itself be indicative of reasonableness on their part at that stage. The test for actings to be determined as being frivolous and vexatious is an extremely high test, and would involve the Council acting in such a way that they were pursuing the proceedings when there was absolutely no prospect of success, or when their case as stated was readily recognisable as being devoid of merit. As indicated above these terms should be used sparingly, and simply because an action has been ultimately dismissed or non-contested does not necessarily mean that it satisfies the foregoing tests. Having considered the evidence I am not satisfied that that actings of the Council in relation were petty, insignificant or completely without a legal or factual basis. Whilst I believe that they might have been misguided or erroneous, I am not satisfied that the Council pursued them without believing in their merit. Similarly I am not satisfied that the Council have acted in a manner which could be characterised as being 'wholly unreasonable', which is also a high test to be met. The Council acted in accordance with the information made available to them by their parking attendant. Factual disputes are not uncommon in these matters, and even if the Council did err in their decision, this did not make their decision-making process unreasonable, far less wholly unreasonable. Accordingly I am not satisfied that the Appellant has satisfied the terms of Rule 12(1)(a).

37. In relation to the terms of Rule 12(1)(b), which relate to the reasonableness, wholly or otherwise of the Council's actings in relation to the appeal itself, I am again not satisfied that these actings could be said to have been wholly unreasonable The Council have a duty to enforce parking regulations within their areas. In the present case the Council's parking attendant has issued a PCN in circumstances where the Appellant's vehicle was parked without clearly displaying a valid permit or voucher or pay and display ticket issued for that place, or without payment of the parking charge. Whilst I have noted that the Appellant raised a number of concerns regarding the signage at the locus, in my view those concerns do not meant that there was at the very least a prima facie case which would have justified the initial issuing of that PCN. That it was subsequently non-contested by the Council does not in my view affect the initial reasonableness of the issuing of the actings of the PCN, and in these circumstances it could not be said that it was wholly unreasonable for the Council to pursue a PCN which they had no reason to believe had been wrongly issued. Accordingly I cannot be satisfied that the Appellant has established that the terms of Rule 12(1)(b) of the aforementioned Regulations has been engaged.

38. For the foregoing reasons therefore I am not satisfied that the Appellant has satisfactorily satisfied the criterion for an award of expenses in terms of Rule 12 of the aforementioned Regulations. Whilst I have some sympathy for the position of the Appellant, I have concluded that this Appeal should be refused. Whilst as indicated above I might not necessarily agree with the reasoning of the Legal Member to the effect that the Council was entitled to re-set the PCN, and indeed had this been the issue in this present appeal then I might well have concluded that the Appellant's representative was correct in his interpretation of Paragraph 2(7) of Schedule 6 to the 1991 Act, that is not the relevant issue for the purposed of this Appeal. This process concerns whether the Council acted in a vexatious or frivolous or a wholly unreasonable manner. That is a high bar and for the forgoing reasons I am not so satisfied. Accordingly this Appeal is refused.

39. Having reached this decision, I have considered the appropriate disposal in terms of Section 47(2) of the 2014 Act. Accordingly the appeal is refused and the original decision of the First-tier Tribunal is affirmed.

Notice to Parties

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.

Sheriff Colin Dunipace

Sheriff Colin Dunipace

Sheriff of South Strathclyde Dumfries and Galloway at Hamilton