



First-tier Tribunal
(General Regulatory Chamber)
Information Rights

NCN: [2022] UKFTT 322 (GRC)
Appeal Reference: EJ/2021/0015

Before
Recorder Stephen Cragg Q.C. (sitting as a judge of the FTT)
Tribunal Member Marion Saunders
Tribunal Member Aimée Gasston

The case was heard through the CVP platform on 31 August 2022.

Between:-

Derek Moss

Applicant

-and-

Royal Borough of Kingston-upon-Thames

The Information Commissioner

Respondents

Attendances:

For the Appellant: In person

For the Respondent: Mr John Fitzsimons

**DECISION AND REASONS IN RELATION TO APPLICATION UNDER
RULE 7A FIRST-TIER TRIBUNAL (GENERAL REGULATORY CHAMBER)
RULES 2009 (AS AMENDED)**

DECISION

1. The application is dismissed.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Applicant and the two witnesses for Kingston-upon-Thames Council (the Council) were only able to attend the hearing with audio connection. This was not ideal, but in the circumstances of the case, the Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

INTRODUCTION

3. The Applicant appealed against a decision notice from the Commissioner to the effect that the Council did not hold information in relation to a request for information made to the Council.
4. The hearing of that appeal took place on 14 October 2020 before the first-tier tribunal (FTT) and the FTT upheld the findings of the Commissioner (decision promulgated 19 October 2020).
5. However, the Applicant says that the Council knew that it did hold information relating to the request, but failed to inform the Commissioner and then the FTT that that was the case. The Applicant has made an application under rule 7A of the Tribunal Rules for the Tribunal to certify to the Upper Tribunal these acts and omissions of the Council as amounting to contempt.

BACKGROUND

6. On 6 December 2018 the Applicant made a request to the Council which referred to a Finance and Contracts Committee Revenue and Budget Monitoring report issued by the Council:-

I note that para.11 of this report says that the Community Benefit Society (CBS) project, which was approved by the Housing Sub Committee on 23 January and reaffirmed by Council on 27 February 2018, has been postponed to 2020/21. <https://moderngov.kingston.gov.uk/docume...>

I am unaware that this decision was debated by any Committee or full Council. Please provide documents showing who was involved in making

this decision, what information they considered before making this decision and their reasons for deciding to postpone the project.

7. The Council's response was that the decisions to establish the CBS remained in force and had not been superseded:-

The position outlined in the Finance and Contracts Committee Revenue and Budget Monitoring report refers to a budget adjustment due to the exclusion of previously projected income from the proposed Community Benefit Society project which has not yet been realised. The budget forecasting reflects that this projected income has been modelled from the 2020/2021 financial year. However, this does not represent a decision not to implement the Community Benefit Society and no documents exist that supersede the Housing Sub Committee decision of 23 January 2018 as confirmed by Council on 27 February.

8. The Applicant requested an internal review on 9 January 2019, and on 17 May 2019 the Council explained that there had been no 'postponement' by the Council and that the Council's decision to implement the CBS remained and that the operational decisions regarding practical elements towards the creation of the CBS remained with the delegated officers.

9. The Applicant complained to the Commissioner and the Council maintained its position.

10. During the investigation of the complaint the Commissioner asked the Council what searches had been carried out to seek to find the requested information. The Council replied, in a letter dated 23 September 2019, from its Data Protection Officer, Rhian Allen:-

The use of the word 'postponed' in the budget monitoring report relates to a financial decision as to which areas are prioritised for the coming financial year and which areas are to be considered again in the following financial year. The CBS has not yet been established and will be considered again in the next financial year.

As there has been no committee or delegated decision made to postpone establishment and implementation of the CBS it was not felt necessary to carry out such a search at the time of internal review. However to comply with this ICO request, a full search of all communications and documents relating to community benefit society has now been carried out. **This has not revealed any further information relevant to the complaint or to the original FOI request.**

The council has now carried out a full electronic search of all communications and related documents between council officers and councillors relating to the Community Benefit Society.

The search terms 'CBS' and 'Community Benefit Society' were used to search all electronic communication using the council G Suite. This included emails, attached documents and links to shared drive documents. There are no additional paper records held. **(emphasis added)**

11. By decision notice dated 17 December 2019, the Commissioner found that the Council did not hold any information within the scope of the request.
12. The Applicant appealed to the Tribunal and a hearing was held on 14 October 2020. The Council was not added as a party to the proceedings, and was not asked by the Tribunal or the Commissioner to expand on its position or provide further evidence or submissions.
13. However, the Council was aware of the appeal proceedings as the Commissioner wrote to Ms Allen on 17 July 2020 to say that the bundle for the appeal was being prepared and informing the Council that it was proposed to include correspondence in the bundle between the Commissioner and the Council. On 3 August 2020, Ms Allen confirmed that the Council was content for this to happen.
14. In a short decision promulgated on 19 October 2020 the FTT set out the relevant part of the Council report of 29 November 2018, which led to the Applicant's request, which said:-

Community Housing are currently predicting an underspend of £573k, a reduction of £222k since month 4 [presumably August 2018] ... Movement from month 4 mainly due to exclusion of previously projected income from the proposed Community Benefit Society (CBS) project which is now postponed until 2020/21 and a small net increase in B&B numbers.

15. The FTT agreed with the Commissioner that the Council was 'right to maintain that the word "postponement" in the report relates to "projected income" and not to the project itself:-

7. We understand why Mr Moss draws the conclusion he does from the November 2018 report, but, applying our collective experience, particularly in relation to the workings of local government, we are satisfied that his interpretation of the report is wrong and that the Council are right to maintain that the word "postponement" in the report relates to "projected income" and not to the project itself. On the balance of probabilities we find that the Council did not make a decision to postpone the project but that it had not come into operation by November 2018 and that, having appreciated that this was the case, the finance team took a view as to the timing of "projected income" from the project for the purposes of their report.

8. It is fair to say the Council could have been more forthcoming in their response to Mr Moss but we consider that they were therefore entitled to say that there was no “decision” to postpone the project and accordingly that the requested information simply did not exist.

16. There matters lay until on 14 September 2021 Wale Adetoro (Housing Assistant Director) responded to a further FOIA request by the Applicant as to why the CBS had not been established or made operational. Mr Adetoro disclosed an email relating to what is referred to as the ‘Community benefit trust’ (both in the body of the email and in its subject line). The email, dated 23 January 2018, was sent by Councillor Emily Davey to various officers at RBKT. It states:-

Dear all,

Thank you for the meeting about the Community benefit trust. thank you agreeing [sic] to provide more financial information, and if it is financially sustainable to introduce it after the ballot and after the rent arrears policy and procedure has been updated. I have been thinking further. I would be very uncomfortable about implementing it with existing temporary tenants not even the worst rogue landlords treble the rent on their tenants over night. I would rather it only apply to new temporary accommodation tenants. They know what they are committing to when they sign the tenancy agreement they make an informed decision.

Thank you.

17. Mr Adetoro also stated in his letter to the Applicant:-

Our records confirm the view of the Portfolio Holder for Housing, Councillor Emily Davey, not to introduce the CBS as proposed by the Housing sub Committee resolution on 23 January 2018.

As the CBS was not implemented in response to the Portfolio Holder’s direction, rents were not increased through the introduction of a CBS.

18. On 5 October 2021, the Applicant requested an internal review of the Council’s response. By its response dated 22 October 2021, the Council explained that no other recorded information was held in respect of the decision not to proceed with the Community Benefit Society.

THE APPLICATION

19. On 11 October 2021 the Applicant made the following application to the Tribunal, that the Council failed:-

to inform the Tribunal that it had lied to the Information Commissioner during the course of her investigation of the Applicant’s complaint, thus

causing the Tribunal to be misled by that lie and to rely on it when dismissing the Applicant's appeal on 15 October 2020 (EA/2020/0029/P).

LEGAL FRAMEWORK

20. Section 61(3) FOIA states that:-

(3) Subsection (4) applies where –

(a) a person does something, or fails to do something, in relation to proceedings before the First-tier Tribunal on an appeal under those provisions, and

(b) if those proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court.

21. Section 61(4) FOIA explains that ‘the First-tier Tribunal may certify the offence to the Upper Tribunal’. Where such an offence is certified, section 61(5) explains that the Upper Tribunal may ‘(a) inquire into the matter, and (b) deal with the person charged with the offence in any manner in which it could deal with the person if the offence had been committed in relation to the Upper Tribunal’.

22. Rule 7A of the Tribunal Rules states, materially:-

7A.—(1) This rule applies to certification cases.

(2) An application for the Tribunal to certify an offence to the Upper Tribunal must be made in writing and must be sent or delivered to the Tribunal so that it is received no later than 28 days after the relevant act or omission (as the case may be) first occurs.

(3) The application must include—

(a) details of the proceedings giving rise to the application;

(b) details of the act or omission (as the case may be) relied on;

(c) if the act or omission (as the case may be) arises following, and in relation to, a decision of the Tribunal, a copy of any written record of that decision;

(d) ...

(e) the grounds relied on in contending that if the proceedings in question were proceedings before a court having power to commit for contempt, the act or omission (as the case may be) would constitute contempt of court;

(f) a statement as to whether the applicant would be content for the case to be dealt with without a hearing if the Tribunal considers it appropriate, and

(g) any further information or documents required by a practice direction.

(4) If an application is provided to the Tribunal later than the time required by paragraph (2) or by any extension of time under rule 5(3)(a) (power to extend time)—

(a) the application must include a request for an extension of time and the reason why the application was not provided in time, and

(b) unless the Tribunal extends time for the application, the Tribunal must not admit the application.

(5) When the Tribunal admits the application, it must send a copy of the application and any accompanying documents to the respondent and must give directions as to the procedure to be followed in the consideration and disposal of the application.

(6) A decision disposing of the application will be treated by the Tribunal as a decision which finally disposes of all issues in the proceedings comprising the certification case and rule 38 (decisions) will apply.

23. There is no mention in either section 61 of FOIA, or indeed elsewhere, as to the required standard of proof by which the allegation of contempt must be judged. In the ordinary course, given the seriousness of contempt proceedings, the standard of proof by which the contempt must be demonstrated is the criminal standard of beyond reasonable doubt: see for example, Arlidge, Eady & Smith on Contempt, 5th Edition, 12-50 onwards and [*JSC Mezhdunarodniy Promysbellniy v Pugachev* [2016] EWHC 92, at [41]. This is the standard that we apply to our considerations, and we note that the FTT in the recent case of *Moss v Royal Borough of Kingston-upon-Thames* (NJ/2018/0007)(1 April 2022), applied this standard.

24. Mr Fitzsimons for the Council drew our attention to the case of *JSC Mezhdunarodniy Promysbellniy Bank v Pugachev* [2016] EWHC 192 (Ch), where Rose J summarised the principles at [41] as follows:-

1) The burden of proving the contempt that it alleges lies on the Bank...

2) The criminal standard of proof applies, so that the Bank's case must be proved beyond reasonable doubt – or so that the court is sure. In case the meaning of this formulation were unclear, Phipson on Evidence (17th edition, 2009 at paragraph 6.51) cites the Privy Council in *Walters v R* [1969] 2 AC 26 as indicating that “[a] reasonable doubt is that quality or kind of doubt which when you are dealing with matters of importance in your own affairs you allow to influence you one way or another.”

3) The court needs to exercise care when it is asked to draw inferences in order to prove contempt. The law in this respect is summarised in a passage in the judgment of Teare J in *JSC BTA Bank v Ablyazov* [2012] EWHC 237

(Comm). Circumstantial evidence can be relied on to establish guilt. It is however important to examine the evidence with care to see whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the Bank's case. If, after considering the evidence, the court concludes that there is more than one reasonable inference to be drawn and at least one of them is inconsistent with a finding of contempt, the claimants fail.

25. Section 101(1) of the Local Government Act 1972 makes it clear that subject to any express provisions, a local authority may arrange for the discharge of any of their functions (a) by a committee, a sub-committee or an officer of the authority; or (b) by any other local authority.
26. A corporation or a limited liability company or a trade union can be fined for contempt, as opposed to the persons, such as councillors or directors or members of the executive committee, who actually make the decisions which give rise to the contempt: *In re Cook and Others' Application (No 2)* [1986] NI 283 per Hutton J.

THE HEARING

27. In the hearing of this applicant the Applicant set out his case that the Council had misled the Tribunal.
28. In essence his case was that it was clear from Cllr Davey's email and Mr Adetoro's letter that the Council knew that the CBS had, indeed, been postponed. The Council had failed to inform the Commissioner of this during the investigation of the Applicant's complaint, and instead Ms Allen had told the Commissioner that a full search of documents relating to the CBS 'has not revealed any further information relevant to the complaint or to the original FOI request', when this was not true. Further, the Council knew that the case had gone to a Tribunal hearing, but had failed to inform the Tribunal that there was, in fact, information held by the Council. Even though the Council was not a party to the appeal, in the words of s61(3) and (4) FOIA it was a person who 'does something, or fails to do something, in relation to proceedings before the First-tier Tribunal' which if the proceedings had been proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court, and therefore the Tribunal should certify the offence to the Upper Tribunal.

29. In his skeleton argument for this hearing the Applicant has identified the relevant acts or omission of the Council to which his application attaches, as follows:-

(a) the alleged failure by Kingston to inform the Tribunal that the answers it had given to Mr Moss and the Commissioner in 2019 were untrue and misleading;

(b) the alleged failure by Kingston to provide the Tribunal with the additional evidence that it held, which showed that the answers it had previously given, as contained in the documents that were lodged with the Tribunal by the Commissioner, were untrue.

30. The Applicant's case as set out in his application is that the reply of 14 September 2021 as set out above, and the email disclosed in that letter:-

.... shows that the Council made a decision not to implement the CBS over a month before the publication of the Finance Committee's report dated 29 November 2018, which prompted the Applicant to make his FOI request on 6 December 2018, and then it repeatedly lied to him and the Commissioner throughout 2018-2019 by stating that no such decision had been made and that a full search for records, including emails, relating to the CBS had been conducted and nothing relevant to the request was held.

31. The Tribunal heard evidence from Mr Adetoro and Ms Allen. Mr Adetoro explained that his letter of 14 September 2021 had not been intended to give the impression that Cllr Davey had 'postponed' the CBS. The position was that the CBS had not been 'followed up' but there was no decision to postpone it. This application had shown that there was still an extant decision that the CBS had been approved by the Council and this would be reviewed in a Council meeting in September 2022. Individual councillors did not have authority to 'postpone' Council decisions.

32. Ms Allen was asked about her 23 September 2019 response to the Commissioner during the investigation of the Applicant's complaint. She confirmed that, initially, no searches had been carried out because it had been ascertained that no 'postponement' decision had been taken. Ms Allen was asked about the results of the 'full search of all communications and documents relating to community benefit society' that she said had been carried out. Her response to the Commissioner had been that the search 'has not revealed any further information relevant to the complaint or to the original FOI request'. Ms Allen was asked whether this meant that no information relating to the CBS had been found at all, or whether it meant that documents had been found, but that it had been decided that they were not 'relevant' to the FOI request. Ms Allen was unable to answer this question. She said

she had tried to access the relevant folder on the morning of the Tribunal hearing but had been unable to do so.

33. The Tribunal was of the view that it would be useful to have an answer to this question, and Mr Fitzsimons agreed that further enquiries would be made and an answer provided to the Tribunal. However, the response we now have from the Council is still that it has not been possible to access the relevant folder and so this takes matters no further forward.

34. The Council's position can be summarised as follows (taken from the Council's skeleton argument):-

- (a) The Council did not lie to the Commissioner, and accordingly the Tribunal was not misled. As a matter of fact, there has been no decision to postpone the CBS. As such, the alleged "act or omission" did not occur;
- (b) Even if (a) is wrong and the alleged "act or omission" did occur, it did not occur "in relation to proceedings before the First-tier Tribunal on an appeal" under s57(1) Freedom of Information Act 2000 ("FOIA");
- (c) Even if (a) and (b) are wrong, the Council was not a party to *Moss v Information Commissioner* EA/2020/0029/P, gave no undertaking to the Tribunal and has not breached any Tribunal order arising in those proceedings. Its act or omission therefore cannot be said to "constitute a contempt of court" if these proceedings were proceedings before a court; and
- (d) Even if (a)-(c) are wrong, if an offence of contempt can be made out beyond reasonable doubt, the Tribunal should decline to exercise its discretion in certifying an offence of contempt to the Upper Tribunal.

DECISION

35. The Council's position, as set out above, is that there was no omission by the Council and neither the Commissioner nor the Tribunal were misled. Councillor Davey in her email referred to above did not give a direction to postpone the CBS and that in fact no decision has been taken to postpone the CBS.

36. In our view the starting point in this case is the finding made by the FTT that the use of the word 'postponement' in the report referred to by the Applicant in his request was a reference to 'projected income' and not to the CBS project itself. That finding has not been challenged and we agree with it.

37. We also accept the evidence of the Council witnesses that a single councillor or portfolio officer did not have the power to postpone the CBS project, and that the project has not been postponed by a full Council meeting or committee. Mr Adetoro's evidence was that this application has highlighted that this is still the case and the CBS project will be further considered by a Council meeting in September 2022.

38. As the Applicant's request was specifically directed at a decision to postpone the CBS project, it is understandable that the Council took the approach that, as a decision to postpone the project had not been taken, then it would not hold any information relevant to the request.

39. That approach can be seen in the response of Ms Allen on 23 September 2019 to the Commissioner during the investigation where she says:-

As there has been no committee or delegated decision made to postpone establishment and implementation of the CBS it was not felt necessary to carry out such a search at the time of internal review.

40. It seems to us that that is a logical response: there had been no postponement decision and therefore there would be no point searching for documents relating to such a decision.

41. The question is whether Cllr Davey's disclosed email and the linked correspondence changes this position. It is clear from her email that Cllr Davey (who we were told was not the housing portfolio holder when the CBS project was initially passed by the Council) was not a supporter of implementing the project in full. She says that she would be 'very uncomfortable about implementing it with existing temporary tenants'. However, she says 'I would rather it only apply to new temporary accommodation tenants' indicating that she supported the implementation of the CBS project at least in part. She thanks officers for agreeing 'to provide more financial information, and if it is financially sustainable to introduce it after the ballot and after the rent arrears policy and procedure has been updated'.

42. It seems to us that this email cannot be seen as a decision by the Council to postpone the project as claimed by the Applicant. We know that Cllr Davey did not have the power to postpone the project once it had been agreed to by the Council. At most

this is an email that expresses some concern about the effect of the introduction of the policy in full, and seeks further financial information.

43. We know from another email to Cllr Davey from Sarah Lawton at the Council dated 7 August 2018 (several months after Cllr Davey's email) to Cllr Davey and others, to which we were taken by the Applicant, that:-

In accordance with the 2nd resolution of the Housing Sub Committee decision on 23/1/18 "the Director of Adult Social Services and the Monitoring Officer, in consultation with the Portfolio Holder for Adults Social Care and Health, is authorised to agree and sign off any final documentation in relation to the creation of the CBS".

44. Ms Lawton went on to say:-

... as such the final T&C's for the CBS including rent setting still require final agreement & sign off by Stephen Taylor, Jeanette McGarry, and yourself or Margaret Thompson.

45. Ms Lawton responds to queries from Cllr Davey on the scheme and says:-

I would welcome the opportunity to meet at your soonest convenience and/or to discuss any queries you may have regarding the creation of the CBS by phone.

46. It seems to us that this email is evidence that the intention, at least in August 2018, was that the CBS was proceeding. Ms Lawton was clearly anxious to finalise its implementation. The conclusion we draw is that it had not been postponed by Cllr Davey or by the council.

47. What happened to the CBS project thereafter is not clear. The evidence of Mr Adetoro was that it was not followed up. However, we do know from his evidence that the project has never been formally postponed by the Council.

48. We do need to refer, though, to Mr Adetoro's letter of 14 September 2021 which accompanied the disclosure to the Applicant of Cllr Davey's email (see above). This said that Cllr Davey's 'view' was 'not to introduce the CBS as proposed by the Housing Sub Committee resolution on 23 January 2018', and that 'the CBS was not implemented in response to the Portfolio Holder's direction'.

49. It would seem to us that these comments are not reflected in a fair reading of Cllr Davey's email. Indeed, in written evidence (confirmed in oral evidence), Mr Adetoro now says:-

I regret that the information...in the response to Mr Moss's FOI request dated 14th September 2021 does not reflect the correct position. Councillor Davey's email expresses misgivings about the viability of the scheme but did not amount to a direction to postpone the scheme, which is clear from the terms of the email from Councillor Davey.

50. In relation to Ms Allen's letter to the Commissioner on 23 September 2019 it is regrettable that we have no information either about whether any information relating to the CBS was located, or the decision-making process which led Ms Allen to inform the Commissioner that no relevant information was held. However, it seems to us that there are two likely scenarios. The first is that, for whatever reason, no documents relating to the CBS were found. In relation to Cllr Davey's email it is noted that that refers to the Community Benefit Trust (not Society), and so may not have been brought up by any search. The second possibility is that CBS information was found during the search but, given that Ms Allen was proceeding on the basis that there had not been a 'postponement' of the CBS, then no information revealed by the search would or could be 'relevant' to the particular request.

51. Taking all this into account it is our view that the Applicant cannot establish that the Council misled the Commissioner or the Council. The true position in our view, and as found by the FTT, was that the CBS project had not been postponed by the Council (as that would have required a decision compliant with Section 101(1) of the Local Government Act 1972). The views expressed by Cllr Davey in emails did not amount to a decision to postpone (and indeed the emails indicate she was actively involved in discussions to implement the project, at least in part). The comments made by Mr Adetoro about the emails were made long after the relevant communications between the Council and the Commissioner in this case, and do not, in our view, reflect the contents of the emails in any event.

52. Therefore, when Ms Allen informed the Commissioner that the project had not been postponed and that there were no documents held which were relevant to the Applicant's request, that response was likely correct and neither the Commissioner nor the Tribunal were misled, and nor was there any intention to mislead.

53. We make positive findings to that effect but note of course that for this application to be successful the Applicant must show, beyond reasonable doubt, that the Commissioner and the Tribunal were misled. That standard and burden of proof has certainly not been discharged in this case.

54. That finding is sufficient to deal with this application. Interesting questions were raised as to whether the Council, as a non-party in the appeal, and not subject to any orders or directions of the FTT, could fall within the ambit of s61(3) FOIA in any event. We note that s61(3) FOIA refers to ‘a person’ who ‘does something, or fails to do something, in relation to proceedings before the First-tier Tribunal on an appeal’, which suggests a very wide possible ambit for this provision. But we also note that the act or omission must also constitute contempt of court if those proceedings were proceedings before a court having power to commit for contempt, and it seems to us at least arguable that, even if the Council had further information it could or should have informed the Tribunal about, then its failure to do so would not have been a contempt of court. However, we do not need to resolve this issue and our comments in this paragraph do not form part of our decision.

55. This application is therefore dismissed.

56. By virtue of rule 7A(6) the Appellant has a right to make a written appeal against this decision within 28 days of the date this decision is sent to the Appellant (see rule 42 of the Rules for details).

Recorder Stephen Cragg QC

Sitting as Judge of the First-tier Tribunal

Date: 06 September 2022.