Neutral citation number: [2024] UKFTT 1056 (GRC)

Case Reference: FT/EJ/2024/0009

First-tier Tribunal
(General Regulatory Chamber)
Enforcement

Decision given on: 26 November 2024

Before

JUDGE MOAN
TRIBUNAL MEMBER GRIMLEY-EVANS
TRIBUNAL MEMBER TATAM

Between

ANDREW PRESTON

Applicant

and

CHIEF CONSTABLE OF WEST YORSHIRE POLICE

Respondent

Decision: The application to certify an offence contempt was dismissed.

The application was considered on the papers – all parties consented to a determination without a hearing.

REASONS

1. The Applicant made an application dated 14th August 2024 to certify an offence of contempt of court. The Applicant's case was that the Respondent had not fully complied with the Tribunal's substituted decision because information from 1st June 2014 to 7th October 2014 had not been supplied, that two FOI records had (suddenly) disappeared and that the information supplied was not correct.

Background to the original appeal

2. This application arises from the First Tier Tribunal's decision made on 9th April 2024 in case number EA/2021/0062, in relation to the decision of the Information

Commissioner (the "Commissioner") dated 2nd February 2021 (IC-48664-Y6S4). The Tribunal were dealing with an appeal concerning the Applicant's request for information about previous Freedom of Information requests received by the Respondent. He requested -

> *"It now appears appropriate and convenient to please raise here, a fresh FOI request for the timing related to all FOI requests processed by WYP [West Yorkshire Police] in the period from 1st June 2014 to today, 20th April 2020.*
> *For each FOI request and associated linked IR request, I would simply like to know the date the request was made, the date the response was supplied, whether any IR was carried out and if so, when that final IR response was communicated. Finally, I would like to know the status of the outcome of each FOI request, linking together which case was escalated to the ICO, further to the IRT, or to any other legal arena, all with relevant dates please, reference numbers and outcomes. "*

3. The Applicant was provided with information about more than 7000 FOIA requests; this was essentially numerical data. Following the supply of information, the Applicant asked for an internal review as he considered that there were a large number of errors in the information provided. Following a complaint to the Information Commissioner's Office (ICO), the ICO decided that the Respondent had complied with its obligations to provide information, whether the information was accurate or not.

4. The Applicant appealed that decision on the basis that the information was incomplete and inconsistent. The Applicant's case was that the Respondent had failed to provide accurate information which it held at the time of the requests. He submitted that he had made requests to other forces in the England which he stated showed that a manual extraction of the information could be carried out (and that the error rate of the Respondent was more than 50 times worse than comparable police forces).

5. The issue that the Tribunal determined centred on whether the parameters of his request were defined by the date of receipt of the FOIA request or the date that the clock started for the purposes of calculating the time taken for a response.

6. Ultimately the Tribunal found that the Respondent had provided information from the clock start date rather than the date that the information request was received and so data may have been missed from the disclosure. This could be corrected by an amended spreadsheet using the date received as the trigger for the period in question. Whilst the Tribunal had been told that some information was missing, the Tribunal found that there was nothing to indicate that the records had been falsified or edited. On balance, the Tribunal found the information provided was an accurate record of the information on the Respondent's case management system, as extracted for the purpose of the response. The Respondent was not required to cross-check the information provided and the Respondent was not required to correct any inaccuracies on the case management system; the duty on the public authority is to supply the information as held at the date of the request. Therefore, the basis of the

appeal being successful was that the Respondent has used the wrong start date as the parameters for responding to the Applicant's request, and that the information should be re-provided using the correct parameters.

7. On 9th April 2024, the Tribunal made the following substituted decision –

> *2. The Second Respondent is to provide a new version of the spreadsheets that were originally provided to the Applicant in response to his request. The column "date received" in these spreadsheets is to be amended so that it contains the date each request was received as it was recorded in the searchable field in their case management system for FOIA requests, instead of the clock start date. The Second Respondent is to provide this information by 42 days from when this decision is sent to the parties.*
>
> *3. The Second Respondent is entitled to rely on section 12 FOIA (cost of compliance) to withhold any other information within the scope of the request which was held at the time of the request but was either (a) not a searchable field in their case management system for FOIA requests, or (b) was held in other documents.*

Background to the contempt application

8. The Respondent responded to the substituted decision on 8th May 2024 and provided the information requested. The covering letter highlighted some caveats regarding the information provided.

9. The application to certify a contempt was made by the Applicant on 14th August 2024 under Rule 7A of the Tribunal Procedure (First Tier Tribunal) General Regulatory Chamber) Rules 2009 (2009 Rules). In his complaint, the Applicant stated that he was not satisfied that the Respondent had provided the information that he requested.

10. The Applicant calculated the date for compliance with the substituted decision notice to be 21st May 2024. He acknowledged that he received a reply from the Respondent on 8th May 2024. He said that the Respondent had provided information for the period between 8th October 2014 and 20th April 2020. He said that the original request was for information between 1st June 2014 and 20th April 2020; the data between 1st June 2014 and 7th October 2014 had not been supplied. He said that this data existed at the time of the initial discourse as those records were received (albeit with incorrect dates received) by email on 18th June 2020. He said that 427 records existed but had not been supplied. He considered that the Respondent was in breach of the substituted Tribunal decision by failing to supply the missing information which was held in a searchable field of its case management system. He referred to the decision notice which repeated the confirmation of the Respondent that the records were still held. Two records had disappeared but they were evidenced by the information supplied on 18th June 2020.

11. The Respondent responded on 13th September 2024 to the contempt application in the following way:
    (i) It had complied with the substituted decision notice;
    (ii) Any non-compliance was a misunderstanding as the decision notice was not clear.

12. The Respondent said that it operated two different systems for logging FOIA requests; the first system was known as Corvus. A new system went live in October 2014. Data from Corvus had not been provided as that information had been provided to the Applicant previously and that information had not changed. Any misunderstanding with the dates did not apply to the Corvus system which had only one start date. The original appeal revolved around the misunderstanding of the clock start/date received distinction regarding the system that operated from October 2014. The Respondent did not consider that the substituted decision applied to the Corvus data. The substituted decision left the question of whether previously provided information needed to be re-disclosed at large and any non-compliance is inadvertent. The Respondent submitted that there was no basis for a contempt to be certified.

13. The Respondent provided the witness statement of Emily Dawson, the Data and Information Sharing Support Officer for the Respondent, dated 5th July 2023 which was made for the purpose of the first substantive appeal. She accepted that information on the Respondent's website as to the number of FOIA requests and publishing the same may be misleading. She stated that the Applicant's own FOIA request dated 20th April 2020 was logged on 22nd April 2020 and so had a clock start date on the system of 23rd April 2020 which is why it did not appear on the spreadsheet of requests as 20th April 2020. She explained how requests were logged and variances in the spreadsheets as regards date received and clock start dates, and the impact of delays whilst the request was being clarified. Those fields auto-populated. She clarified why in some cases closure dates were the same date as receipt but before the clock started.
    The Respondent had amended the way it reported requests and then back-dated figures recorded from the start of 2020 which is why there may be some variance with the figures provided.
    The Respondent had not claimed that the information was not held and the information had indeed been supplied.

14. A further statement from Emily Dawson dated 16th September 2024 had been provided in connection with the contempt proceedings. She accepted that the Tribunal considered that the Respondent should provide the data from the date of receipt of the FOIA request and not the clock start date. She said that as a result of the substituted decision, the Applicant had been provided with a fresh spreadsheet from the new system. The issues about why the additional 183 records supplied in May 2024 were not disclosed in June 2020 was because of the distinction between date of receipt and clock start as the timeline for the information requested. In response to the Applicant's submissions that two data sets were missing, Ms Dawson

explained that the first should have been extracted but was not and this could not be explained. The other missing data set related to two records and there was a technical error within the system when two records were kept in one file; it was included in the 2020 disclosure but not the 2024 disclosure as it was confirmed it was not a FOIA request. She confirmed that all of the information requested had been supplied to the Applicant.

15. We note that Ms Dawson gave evidence at the substantive appeal hearing. She was found to be a clear and credible witness by the Tribunal who heard her oral evidence. She was knowledgeable in both Corvus and the later system of logging FOIA requests. Some information could be returned from the case management system but other information such as referring back to the original request for information, or linking the FOIA datasets to their internal reviews or appeals to the ICO, was a manual task which would exceed the s12 appropriate cost limit. Some manual checks of the information were completed nonetheless and the information provided on 18th June 2020 to the Applicant. She was able to explain the discrepancies in the clock start dates and closure dates. There were some unexplained discrepancies with requests marked as closed before it was opened. She was unable to report on all of discrepancies identified by the Applicant at that hearing albeit this Tribunal had the benefit of her further statement dated 16th September 2024.

The Legal Framework for a contempt application

16. The powers of the Tribunal are to be found in sections 61(3) and (4) of FOIA 2000 –

> *(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.*
>
> *(4) The First-tier Tribunal may certify the offence to the Upper Tribunal.*

17. The 2009 Rules provide details of the procedure to be followed. The procedures were not contentious in this application.

18. The power of contempt is to be considered amongst the other provisions of FOIA 2000 namely –
    (i) The power of the Information Commissioner under s50 to make a decision upon application;
    (ii) The power of the Information Commissioner under s52 and 54 to enforce its own decision; and
    (iii) The creation of a criminal offence under s77 of altering etc information with the intent to prevent disclosure.

    The delineation of powers and responsibilities are a clear reflection of the will of Parliament.

19. The power to certify an act or omission as a contempt has two distinct phases. Firstly, the Tribunal will consider whether the Respondent has committed an act or omission that would amount to a contempt and secondly, whether the First Tier Tribunal should exercise its discretion to certify the contempt to the Upper Tribunal.

20. In **Rotherham Metropolitan Borough Council v Harron & The Information Commissioner's Office and Harron v Rotherham Metropolitan Borough Council & The Information Commissioner's Office: [2023] UKUT 22 (AAC)** Farbey J said -

> At para 53 "*…There is no power to compel a public authority to comply with a substituted decision notice. In the context of para 8 of Schedule 6 to the 1998 Act, the UT has held that there is a power to punish for not doing so, although that power may operate as an incentive to comply (Information Commissioner v Moss and Royal Borough of Kingston Upon Thames [2020] UKUT 174 (AAC), para 1). I see no reason to take a different view.*"

21. And at para 54 -

> "54. *The principle that proceedings for contempt of court are intended to uphold the authority of the court and to make certain that its orders are obeyed is longstanding (for a recent restatement, see JS (by her litigation friend KS) v Cardiff City Council [2022] EWHC 707 (Admin), para 55). A person who breaches a court order, whether interim or final, in civil proceedings may be found to have committed a civil contempt. Given the nature and importance of the rights which Parliament has entrusted twenty-first century Tribunals to determine, the public interest which the law of contempt seeks to uphold – adherence to orders made by judges – is as important to the administration of justice in Tribunals as it is in the courts. There is no sound reason of principle or policy to consider that any different approach to the law of contempt should apply in Tribunals whose decisions fall equally to be respected and complied with.*"

22. In that case, Mrs Justice Farbey also restated the principles elucidated by the Court of Appeal in **Navigator Equities Limited v Deripaska [2021] EWCA Civ 1799**, para 82 as they apply to contempt –

> "*The following relevant general propositions of law in relation to civil contempt are well-established:*
> *i) The bringing of a committal application is an appropriate and legitimate means, not only of seeking enforcement of an order or undertaking, but also (or alternatively) of drawing to the court's attention a serious (rather than purely technical) contempt. Thus a committal application can properly be brought in respect of past (and irremediable) breaches;*
> *ii) A committal application must be proportionate (by reference to the gravity of the conduct alleged) and brought for legitimate ends. It must not be pursued for improper collateral purpose;*
> *iii) Breach of an undertaking given to the court will be a contempt: an undertaking to the court represents a solemn commitment to the court and may be enforced by an order for*

committal. Breach of a court undertaking is always serious, because it undermines the administration of justice;
iv) The meaning and effect of an undertaking are to be construed strictly, as with an injunction. It is appropriate to have regard to the background available to both parties at the time of the undertaking when construing its terms. There is a need to pay regard to the mischief sought to be prevented by the order or undertaking;
v) It is generally no defence that the order disobeyed (or the undertaking breached) should not have been made or accepted;
vi) Orders and undertakings must be complied with even if compliance is burdensome, inconvenient and expensive. If there is any obstacle to compliance, the proper course is to apply to have the order or undertaking set aside or varied;
vii) In order to establish contempt, it need not be demonstrated that the contemnor intended to breach an order or undertaking and/or believed that the conduct in question constituted a breach. Rather it must be shown that the contemnor deliberately intended to commit the act or omission in question. Motive is irrelevant;
viii) Contempt proceedings are not intended as a means of securing civil compensation;
ix) For a breach of order or undertaking to be established, it must be shown that the terms of the order or undertaking are clear and unambiguous; that the Respondent had proper notice; and that the breach is clear (by reference to the terms of the order or undertaking)."

23. In the case of **Information Commissioner v Moss [2020] UKUT 174 (AAC)**, the Upper Tribunal concluded that, noting the enforcement powers that already existed under Rules 7 and 8 of the 2009 Rules, that not much else is left for section 61 of FOIA to deal with, apart from non-compliance with a substantive decision of the First Tier Tribunal.

Conclusions

24. The basis of the application was that information was not re-supplied and that the spreadsheet was inaccurate/had missing information.

25. The Applicant has the onus of proving that the Respondent has not complied with the substituted decision. As these are contempt proceedings, the Applicant will need to make the Tribunal sure that there had been non-compliance. The Applicant's case was difficult to follow, his submissions were unnecessarily protracted and lacked clarity. The helpful and inquisitorial approach of the Tribunal in Freedom of Information appeals will not apply to the very serious matter of contempt of court. The onus is squarely on the Applicant to provide evidence of contempt; he cannot be assisted by the Tribunal to establish his allegations of contempt.

26. The Respondent has confirmed that they did not supply the first four months of data as they had previously supplied the same information in 2020. The issues regarding the date of receipt and clock starting times did not apply to this data as recorded on the Corvus system. The Applicant did not submit that he had not received this data as part of the original disclosures; at pages A31-A32 he seeks to analyse that data, he

accepts that he received it in 2020. He questions the accuracy of that information and expected a further (correct) copy. He said that the Corvus data should have been reviewed and the absence of the date clock started data did not imply that the data was valid or correct. There were 20 records that he said could not be correct.

27. The Tribunal accepted that the decision notice did not distinguish between the information maintained on Corvus and the post-October 2014 data collection system. It was clear that the clock start date only applied to the data from October 2014. The issues about the parameters of the request and whether the clock start date or date received date were the correct parameters were clearly adjudicated upon and articulated by the Tribunal in their decision. They did not however differentiate in their substituted decision between the Corvus data and the later data. This Tribunal, having the benefit of reading the previous decision has considered the mischief behind the substituted decision. It is a waste of public resources for an authority to be directed to provide information that has already been supplied. That is not the purpose of the Tribunal or its decision. The Tribunal were satisfied that the first four months of information had been provided and did not need to be re-supplied.

28. The Applicant also claims that the information is inaccurate or there may be records that are missing. The evidence of the Respondent was that there had been a technical issue with extracting one record and another file was confirmed not to be a FOIA request. The witness providing that explanation is an expert user and has been found by the Tribunal, having heard her oral evidence, to be a clear and credible witness. We accept those findings as to her credibility apply to her later written statement.

29. The Applicant submitted that there was a duty to provide correct information; the Tribunal disagrees. The obligation is to provide the information held. It is not the Tribunal's function to dictate the manner in which information is held by the Respondent. He questions the data provided in terms of its accuracy; that does not form the basis of a contempt application.

30. The Applicant requests compensation and an apology. The Tribunal has no power to award compensation or to direct any apology, even where a breach is found.

31. We have considered the evidential basis for the application noting the high threshold for Applicant to show contempt. The Respondent had complied with the objectives of the substituted decision notice; they had provided a lot of information. There was no intent to avoid compliance with the decision notice. There was no basis for a finding that the Respondent had deliberately provided incorrect information; the information always had caveats applied to its accuracy. A manual review had taken place to correct some issues, a process that the Respondent did not have to undertake. There was absolutely no basis for criticising the Respondent.

32. In summary, the substituted decision required the Respondent to provide information and they had done so. They provided the information within the time period allowed. They are not required to re-provide information already supplied

or to review the information already supplied for inaccuracies. The decision notice has been complied with. Any deficiencies in the information supplied are de minimus and inadvertent; over 7000 records have been supplied. The requirement is to supply the information held. There is no proportionate and legitimate purpose in pursuing the contempt proceedings, this was not an authority that had refused or neglected to provide the information. In the Tribunal's view, the contempt proceedings were misdirected.

33. There is no definition of "Contempt of Court" within either section 61 or the 2009 Rules. However, there is very little information in this application for a properly directed Tribunal to conclude that the Respondent has committed an act or omission that would amount to a contempt upon which the Tribunal could certify the proceedings to the Upper Tribunal. The application was misconceived and cannot be a vehicle to dispute the reliability of the information provided. Contempt is a matter of the upmost severity and not an opportunity to re-litigate.

34. Even if a minor breach had been established by the lack of re-provision of the Corvus data, or the dates on a handful of records differing by a few days, on a literal reading of the substituted decision, it was neither necessary nor proportionate for the breach to be certified to the Upper Tribunal having regard to the extensive information provided, very substantial compliance with the substituted decision and that the data from June to October 2014 had already been provided.

35. The application is dismissed.

District Judge Moan sitting as a Judge of the First Tier Tribunal

25th November 2024