



NCN: [2024] UKFTT 709 (GRC)

Case Reference: EJ/2023/0007  
Decision given on: 6 August 2024

**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Before**

**JUDGE MOAN**

**Between**

**ANTHONY MOTT**

Applicant

**and**

**THE CABINET OFFICE**

Respondent

The application was determined without a hearing.

**Decision:** The application to certify a contempt is **struck out** under Rules 8(2)(a) (no jurisdiction) and 8(3)(c) (no realistic prospect of success) of the Tribunal Procedure (First Tier Tribunal) General Regulatory Chamber) Rules 2009.

### **REASONS**

1. The application to certify a contempt was made by the Applicant on 30<sup>th</sup> November 2023 under Rule 7A of the Tribunal Procedure (First Tier Tribunal) General Regulatory Chamber) Rules 2009 (2009 Rules). This application arises from the First Tier Tribunal's decision made on 13<sup>th</sup> October 2023 in case number EA/2023/0131. The Tribunal were dealing with an appeal concerning the Applicant's request for information for the number of cases from a sift of 36 cases that had Widows Pension's contributions repaid by salary reimbursement.
2. In that case, the Tribunal made the following substituted decision:

*"The Cabinet Office must, by no later than 4pm on 31st October 2023, state if it held the information requested by the Applicant in his request of 21 July 2021 and, if it did hold it, either supply the information to the Applicant by 4pm on 31st October 2023 or, by this same*

*date, serve a refusal notice under section 17 of FOIA, including what grounds the Cabinet Office relies on (save for section 12 (1) of FOIA which the Cabinet Office is precluded from relying upon)."*

3. On 31<sup>st</sup> October 2023 the Cabinet Office responded to the Applicant and confirmed that –  
*"... we are writing to advise you that following a search of our paper and electronic records, we have established that the information you requested is not held by the Cabinet Office."*

And later added:

*"MyCSP, the pensions administrator, do have the original sift criteria spreadsheet where details of the reviews were recorded. However, the way the WPS contribution were refunded was not specifically noted by the member of staff who was running the sift (and they are no longer with the business).*

*As a result, CO are unable to provide from the original data 'the number of cases within the batch of the fully reviewed 36 cases that had their additional contribution repaid by salary'. This information is not held by the CO."*

4. On 30<sup>th</sup> November 2023 the Applicant issued an application for the Tribunal to certify a contempt. In this application, the Applicant submitted that the Cabinet Office were thwarting legitimate requests for information and the explanations about information not being recorded was not credible. He submitted that either the pensions review was not properly undertaken in July 2021 or that the Cabinet Office are deliberately concealing the information. He submitted that the Cabinet Office were guilty of an offence under section 77 of the Freedom of Information Act 2000 (FOIA). The Application was just out of time; any application for contempt should be lodged within 28 days of the Act or omission (i.e. 28<sup>th</sup> November 2023). It was two days' late.
5. Directions given on 30<sup>th</sup> November 2023 highlighted that the Tribunal had no ability to investigate or determine whether the Cabinet Office was guilty of a criminal offence under section 77 of FOIA. The Cabinet Office were directed to provide submissions on the Applicant's application for an extension of time to make the application under Rule 7A and submissions about whether the Applicant could make a further appeal under section 50 of FOIA to the Information Commissioner as regards the response dated 31<sup>st</sup> October 2023. The Applicant was given a right to reply to that Response.
6. The response of the Cabinet Office is dated 14<sup>th</sup> December 2023. That response can be succinctly summarised as containing no objection to the late submission of the contempt application but that the Tribunal had no jurisdiction to determine an alleged offence under section 77 of FOIA. The Cabinet Office confirmed that the Applicant had the right to apply to the Information Commissioner as regards its response dated 31<sup>st</sup> October 2023. The Cabinet Office issued a further response to the Applicant (outside the original FOIA request) on 13<sup>th</sup> December 2023 to clarify issues that he had raised.

7. The Applicant responded on 29<sup>th</sup> December 2023 and stated that the Cabinet Office have changed their facts and submissions, and deliberately withheld information or destroyed records to prevent disclosure. There was no further explanation of that submission. He continued to submit that the Respondent was guilty of an offence under section 77.
8. The Tribunal issued further directions on 30<sup>th</sup> January 2024 which includes a notice to the Applicant that the Tribunal were proposing to strike out his contempt application on the basis that the Tribunal had no jurisdiction to deal with his application and that there were no reasonable prospects of his application succeeding. Further representations were sought from the Applicant and the Cabinet Office were afforded an opportunity to reply.
9. The Applicant responded on 12<sup>th</sup> February 2024 and reiterated his contention that the Cabinet Office had provided false information. The Cabinet Office responded in similar terms as previously.
10. The Tribunal notified the Applicant twice of its concern that the Tribunal did not have the power to deal with the issues raised by him. He has been put on notice by the Tribunal that the Tribunal was considering using its power of striking out his application and afforded the Applicant a full opportunity to respond.
11. The power to certify for contempt is wholly contained within the 2000 Act and the 2009 Rules. The Tribunal does not have the power to take actions that are not given to it by statute.
12. This case management decision has been made without a hearing. Convening an oral hearing results in delay and extra cost to the parties, public and to the Tribunal; it results in delay to other cases that also have to wait for a hearing. The Tribunal must deal with cases justly and proportionately. I am satisfied that the issues that arise from this application can be justly determined without a hearing and that the Tribunal has a clear grasp of the Applicant's complaint.

### **The Legal Framework for a contempt application**

13. 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.*
14. The 2009 Rules provide details of the procedure to be followed. The procedures were not contentious in this application.

15. 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.

16. 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. It is the first phase that is in issue in this application.

17. By contrast section 77 of the 2000 Act provides –

***77 Offence of altering etc. records with intent to prevent disclosure.***

*(1) Where –*

*(a) a request for information has been made to a public authority, and*

*(b) under section 1 of this Act [F1](#)... the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section, any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.*

*(2) Subsection (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.*

*(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.*

*(4) No proceedings for an offence under this section shall be instituted –*

*(a) in England or Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions;*

*(b) in Northern Ireland, except by the Commissioner or by or with the consent of the Director of Public Prosecutions for Northern Ireland.*

18. Section 77 creates a criminal offence. Whilst a criminal offence may be prosecuted by an authorised body or an individual (private prosecution), the provisions expressly require consent from the Director of Public Prosecution (DPP) as an additional safeguard.

19. 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.”*

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.”*

20. 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.
21. 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**

22. The original determination was of some assistance to understand the information request. The Applicant had sought to identify how many cases from a review had additional contributions refunded via their salary. The sift had identified a number of cases within the scope of that audit and 36 cases were rigorously reviewed. The Cabinet Office had misunderstood the information request as requiring a re-review and claimed an exemption based on the cost of that re-review but the Tribunal found that this was not the case, as the Applicant was simply asking for the number of cases within the 36 identified where refunds were made through salary. The Cabinet Office did not engage in the appeal process and so the Tribunal were left with some unknowns about the review and in particular the parameter of the final sift criteria in the review which was whether any of those 36 cases had their additional

contributions refunded via salary. The result of that final sift was that no errors were identified. What the Applicant wanted the number of cases that had repayments via salary, the Cabinet Office had maintained that they do not have that information in the appeal hearing and thereafter in their response to the substituted decision notice.

23. The original judgment recorded that the Cabinet Office had said that “As stated above, MyCSP does not currently hold the information required, or record it in the specific manner that the member has requested.” The response from the Cabinet Office was within this sample pool of members to which the fourth sift parameter was applied, “*no errors were identified*”.
24. Indeed, at para 36 the Tribunal found that “the application of the fourth sift parameter could lead to one of only two outcomes (i) that the PCSPS member had “*not had their additional contributions correctly refunded via salary*” or (ii) that the PCSPS member had their additional contributions correctly refunded via salary. The evidence before us does not disclose the possibility any other outcome.” And also at para 43 “On the evidence before us, we are unable to ascertain the extent of any records or calculations held by, or on behalf of, the Cabinet Office from the original review”. It was unfortunate and unhelpful that the Cabinet Office did not participate in the appeal process as the presence or otherwise of the information may have been clear.
25. The substituted decision required the Respondent to do one of three things. To confirm that they did not have the information, to disclose it or to claim an exemption from disclosing it explaining the exemption relied upon. The Respondent said they did not have the information in compliance with that decision.
26. The issue the Applicant raises is that he simply does not believe the Respondent. He considered that during the robust review in July 2021 there must have been some further information annotated on the spreadsheet. He finds it incredulous and inconceivable that it was not. He simply does not accept the response.
27. The Respondent has always indicated that it did not have further information. The recording of the method of repayment was simply not something that they were looking to record. It was whether repayments had been correctly made which were usually by salary. But there was no definitive record to that effect.
28. The Applicant speculates that they do have this information and that the review was incomplete if they did not. He asserts in his application that the Cabinet have changed their facts and submissions but does not say in what way. He surmises that the case review may not have been done correctly. Having read the original judgment, the Cabinet Office have been entirely consistent in their submissions. There is little additional cogent evidence that I have seen from the information provided to confirm that the Respondent did have that information and there is high threshold for contempt namely beyond a reasonable doubt.

29. There is no definition of “Contempt of Court” within either section 61 or the 2009 Rules. Deliberately destroying information that is subject to a court decision *could* amount to a contempt of Court. However, the burden of proving that rests on the Appellant to a very high standard. Otherwise, the case of **Moss** gives some helpful guidance as to the purpose of section 61. There is very little within the evidence that I have seen to suggest that the Cabinet Office had the specific information recorded or that they have destroyed, altered or disposed of it. The Tribunal is well aware of the ambit of the fourth parameter and that it did not require the review to record the method of repayment.
30. Parliament has decided that alteration or destruction of information is a criminal offence and such will be considered in the criminal courts if the Director of Public Prosecutions agrees to such a prosecution. Parliament could have decided that the Tribunal deal with such issues but it chose not to empower the Tribunal to do so.
31. The Tribunal is limited to the powers given to it by statute. It does not have a criminal jurisdiction and Parliament has already given the task of determining whether there has been alteration or destruction to the criminal courts. It is noted that the approval of the Director of Public Prosecution’s consent is required for a prosecution. To allow a substantive prosecution in the First Tier Tribunal not only extends its jurisdiction beyond that intended by Parliament but it would negate the explicit requirement for the DPP’s consent. It is doubtful that the evidence on file would meet the threshold test for prosecution namely a realistic chance of conviction.
32. There is no dispute that the Cabinet Office provided information within the remit of the decision notice within the time periods allowed. The Applicant claims that information has been altered or destroyed to prevent actual disclosure. He has no substantive evidence to prove his assertions, it is inference or speculation. His allegations are firmly within the ambit of section 77 and have no evidential basis. The First Tier Tribunal has no statutory jurisdiction to consider those allegations and as such there is also no realistic prospect that his application for contempt could succeed on those grounds.
33. The Tribunal is required to strike out his application for contempt on that basis.

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

29<sup>th</sup> July 2024

Promulgated on: 6 August 2024