



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2009/0078**  
**Information Commissioner's Ref: FS50190964**

**Heard at Procession House, London, EC4**  
**On: 8 January 2010**

**Decision Promulgated**  
**On: 13 January 2010**

**BEFORE**

**CHAIRMAN**  
**MELANIE CARTER**

**and**

**LAY MEMBERS**  
**GARETH JONES**  
**STEVE SHAW**

**Between**

**ROGER GALL**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**Subject matter:**

**Information Tribunal (Enforcement Appeals) Rules 2005 as amended**

Time limit for appealing, Rule 5

Application for striking out, Rule 9

Amendment and supplementary grounds, Rule 11

**Cases:**

Bennett v Information Commissioner EA/2008/0033

## **Decision on the papers**

The Tribunal grants the application of the Information Commissioner and this Appeal is struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005.

## **Reasons for Decision**

### **Introduction**

1. This appeal concerns the Appellant's long running correspondence with Weymouth and Portland Borough Council (the "Council") on the Council's discretionary exercise of its licensing policy. In the course of this correspondence he made a series of requests for information under the Freedom of Information Act 2000 (FOIA).
2. The Appellant made two complaints to the Information Commissioner (IC) under section 50 of FOIA the first dated 15 January 2008 (reference number FS50189399) and the second dated 28 January 2008, (reference number FS50190964). This appeal concerns the Decision Notice issued in relation to the latter complaint.
3. The first complaint (FS50189399) concerned the Council's application of section 40(2) of FOIA (exemption for personal data) to information the Appellant had requested. That complaint was closed by the Commissioner without issuing a Decision Notice, and the Appellant was advised of this in writing on 8 February 2008.
4. On 8 December 2007 the Appellant wrote to the Council, making a number of requests regarding the Council's Draft Statement of Licensing Policy. Between then and 18 January 2008 the Appellant wrote to the Council on number of occasions raising further questions.
5. On 23 January 2008 the Council wrote to the Appellant stating that it would not be responding to any further correspondence from the Appellant in relation to licensing

issues, on the basis that they deemed his repeated requests to be vexatious. The Council relied upon section 14 of FOIA. The Appellant complained to the IC on 28 January 2008 (FS50190964).

### **The Commissioner's Decision**

6. Following an investigation, the IC served a Decision Notice dated 13 August 2009.
7. The Commissioner found that certain of the information requested was environmental in nature and therefore fell to be considered under the Environmental Information Regulations (EIR). He upheld the decision of the Council that section 14(1) of FOIA and Regulation 12(4)(b) of the EIR applied.

### **The appeal to the Tribunal**

8. The Appellant appealed the Decision Notice on an undated form, received by the Tribunal Office on 7 September 2009. This was, therefore, received within the 28 day time limit (that is 28 days of the date of the Decision Notice 13 August 2009). The Appellant ticked the box on the form requesting the Tribunal to consider an out of time appeal but did not set out any reasons for this request (the form specifically asks for the "special circumstances"). It was accompanied by a letter dated 4 September 2009 in which the Appellant stated that he realised that he had 28 days to serve a notice of appeal but was not aware that he would be expected to supply his full case at the same time that the Notice was served. He stated that *"he had spent much of this time trying to obtain some legal representation for this appeal. The position as regards whether this will be possible is still unclear. As a result, I am not able to supply details of this or supply the full grounds of my appeal and supporting documents before expiry of this date and to do so at this stage may prejudice my appeal."* He requested an extended period within which to present his appeal.
9. The Appellant left blank the part of the form given for setting out the grounds of appeal. The Appellant sent with the form, a series of documents consisting of one letter from the Appellant to the ICO dated 17 August 2009 which related to the closed case

FS50189399, and a series of email exchanges between the Appellant and the Council in 2007.

10. In the IC's reply the Tribunal was asked to consider striking out the appeal under rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005 ("the 2005 Rules") on the basis that the Notice of Appeal did not disclose a reasonable ground of appeal.
11. On 16<sup>th</sup> October 2009, the Chairwoman issued directions stating that unless either party objected there would not be a preliminary hearing and that the Tribunal would meet in private to consider the strike out application. The Appellant was given 7 days to request a directions hearing and two weeks to provide written submissions why his appeal ought not to be struck out.
12. By a letter dated 19 October 2009, the Appellant wrote to the Tribunal Office to request a preliminary hearing and that "*my obviously incomplete application form be held or returned but that my Appeal is not to be struck out as a result of this misunderstanding? My intention would be to submit a correctly completed application form as soon as a proper case can be made and trust that you would be willing to hear this case at that point*". He enclosed with this, a letter from a solicitor's firm showing that as at that date, the Appellant had been trying to obtain pro bono legal assistance.
13. Following a telephone directions hearing on 10 November 2009, the Chairwoman issued directions providing a deadline for the Appellant to make an application to amend his notice appeal "including reasons why the Tribunal should accept the late amendments" and the particular grounds of appeal he wished to add.
14. The Appellant made his application to amend the Notice of Appeal by a letter dated 22 November 2009.

**The relevant law**

15. Rule 4 of the Rules provide, in so far as is relevant to this appeal:

*“Method of appealing - notice of appeal*

*4. - (1) An appeal must be brought by a written notice of appeal served on the Tribunal.*

*(2) The notice of appeal shall -*

*(a) identify the disputed decision and the date on which the notice relating to the disputed decision was served on or given to the appellant; and*

*(b) state -*

*(i) the name and address of the appellant;*

*(ii) the grounds of the appeal;*

*(iii)...*

*(iv)...*

*(v) where applicable, the special circumstances which the appellant considers justify the Tribunal's accepting jurisdiction under rule 5(2) below<sup>1</sup>; and*

*(c) be signed by or on behalf of the appellant.*

*(3)...*

*(4) A notice of appeal may include a request for an early determination of the appeal and the reasons for that request.”*

16. Rule 5(2) permits the Tribunal to accept an appeal out of time where it is of the opinion that *“by reason of special circumstances it is be just and right to do so”*.

17. Rule 9 of the 2005 Rules provides:

*“9. (1) ..... where the Commissioner is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal*

*discloses no reasonable grounds of appeal, he may include in his reply under Rule 8(2) above a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out. “*

18. There is little guidance provided for the Tribunal on the circumstances in which it will be appropriate to strike out an appeal under Rule 9. We have adopted the approach taken by a differently constituted panel of this Tribunal in the case of *Bennett v Information Commissioner EA/2008/0033* which stated that:

*“We consider that the language used in Rule 9 is unambiguous. A reasonable ground of appeal is one that is readily identifiable from the Notice of Appeal, relates to an issue the Tribunal has jurisdiction to decide and is realistic not fanciful.”*

19. Rule 11(1) provides that “with the leave of the Tribunal, the appellant may amend his notice of appeal or deliver supplementary grounds of appeal.”
20. The Tribunal’s jurisdiction on appeal is governed by section 58 of FOIA. As it applies to this matter it entitles the Tribunal to allow the Appeal if it considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the IC ought to have exercised his discretion differently.
21. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts.

### **The questions for the Tribunal**

22. The first question for the Tribunal was whether to allow the Appellant’s application to amend the Notice of Appeal.

23. If allowed, the Tribunal would have needed to adjourn to allow the ICO time to submit replies to the new grounds of appeal.
24. If the Tribunal declined the application to amend the Notice of Appeal its task then was to consider whether to strike out the appeal under rule 9 on the basis that it disclosed no reasonable ground of appeal.

### **Consideration**

25. The first question as indicated above, is whether to allow the Appellant, under rule 11(1), to amend his Notice of Appeal, or as the rule goes on to provide, “to deliver supplementary grounds of appeal”. The IC argues that as there are no grounds of appeal contained within the original Notice of Appeal, the Rules do not give the Tribunal jurisdiction to permit delivery of new grounds of appeal. It is argued that given the particular phrasing of rule 11(1), that is, split into either the amending of the Notice of Appeal **or** the “delivery of supplementary grounds of appeal”, the Tribunal does not have the power to allow the amendment of the Notice of Appeal by way of adding grounds of appeal where previously there were none. Only “supplementary grounds of appeal” may be added, not what would in effect be the late delivery of any grounds of appeal. The IC points out that the Rules do not provide for the protective serving of a Notice of Appeal simply to preserve an Appellant’s position with regard to the time limit.
26. The Tribunal is instead invited by the IC to consider this application as an application for an appeal out of time under rule 5(2). The Tribunal would then have to consider whether there were “special circumstances, pursuant to rule 5(2) which would mean that it was “just and right” to allow the appeal to be lodged out of time. The Tribunal was concerned however that the Rules would not permit this alternative route as the Appellant had lodged an appeal within the 28 day time limit. Short of that appeal being formally withdrawn under rule 12, the Tribunal could not see how it could treat the proposed new grounds as, in effect, a new appeal albeit out of time.
27. The Tribunal considered that the Appellant had set out to commence the appeal process within the prescribed time limit. He had not had the benefit of legal advice and was a litigant in person. As such, the Tribunal was anxious to ensure that his appeal was not excluded on a procedural technicality without his having the

opportunity to rectify matters. In the event, the Chairwoman had acceded to the Appellant's request for a preliminary hearing and had then provided time for him to make an application for amendment of the Notice of Appeal and in particular to provide the reasons why the Tribunal should grant the application.

28. The Tribunal considered that its broad discretion whether or not to allow an amendment to the Notice of Appeal under rule 11(2), whilst not cast in the same way as rule 5(2), would allow consideration of the same factors. Essentially, it all came down to the time taken by the Appellant to seek and then fail to find legal representation.
29. It was not necessary for the Tribunal to determine the legal arguments put forward by the IC in paragraph 25 above, as it did not consider the reasons given for the late steps taken by the Appellant warranted the exercise of the discretion under rule 11(1). Nor was it of the view that, had it been considering a late Notice of Appeal and an application for this to proceed out of time, this would amount to "special circumstances" under rule 5(2). As such, whichever way this was looked at and whatever the correct interpretation of the Rules, the Tribunal would not have allowed the new grounds of appeal to be considered. Its reasons for not accepting the Appellant's explanation for the delays were informed by the fact that time taken to obtain legal representation is not normally considered a sufficient excuse by the courts for missing a deadline. This Tribunal entertains appeals from many litigants in person who have conducted their cases, without the benefit of legal advice, from Notice of Appeal through to hearing.
30. The Appellant had the chance further to the second set of directions to provide his reasons for seeking amendment of the Notice of Appeal. His response was again that he had been seeking legal representation, that he had now accepted that this was not possible and would be acting as a litigant in person. This had been his opportunity to set out the steps he had taken, how long the steps had taken and whether any of this delay had been attributable to third parties. By the time the new grounds had been provided to the Tribunal, it was just over 3 months from the date of the Decision Notice. The Tribunal might have looked sympathetically had there been information and evidence before it that the Appellant had made significant efforts and/or had been caught up in dealing with others whom had contributed to the



delays. The Tribunal did not have sufficient information before it to warrant exercise of the discretion to allow a late amendment of the Notice of Appeal.

31. There was an important public interest enshrined in the imposition of appeal deadlines. Without these public authorities would not be able to draw a line under their decisions and move resources on to other public functions. There needed to be a reliable degree of finality in legal affairs so as to facilitate the proper functioning of a public authority. This was a fundamental aspect of the rule of law and fairness to all parties.
32. Thus, the next question for the Tribunal was to consider the IC's application for the appeal to be struck out on the basis that the Notice of Appeal did not disclose any reasonable grounds of appeal. Given the decision above not to allow a late amendment of the Notice of Appeal, the Tribunal was only considering the Notice of Appeal and documents supplied with it. The Tribunal noted that the form did not include any grounds at all. The accompanying documents evidenced the original letters of request and certain of the Council's responses. The only letter accompanying the form which might be said to have included sufficient to amount to a ground of appeal was the one referring to case number FS50189399. That case was closed without a Decision Notice and was a matter therefore which lay outside of the Tribunal's jurisdiction (see paragraph.... above). Thus, there were no grounds of appeal at all included within the Notice of Appeal and accordingly, the Tribunal decided to strike the appeal out under rule 9.

### **Conclusion and remedy**

33. The Tribunal decided not to allow a late amendment of the Notice of Appeal and to strike out the appeal under rule 9.
34. Our decision is unanimous.

Signed

Melanie Carter

Deputy Chairwoman

Date: 13 January 2010