



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Case No. EA/2011/0001

**ON APPEAL FROM:
Information Commissioner
Decision Notice ref FS50308409
Dated 16 December 2010**

Appellant: Gareth Davies

Respondents: (1) Information Commissioner
(2) Her Majesty's Revenue and Customs

Date of Tribunal meeting: 17 May 2011

Date of decision: 24 May 2011

Before

HH Judge Shanks

Marion Saunders

Michael Hake

Decision on the papers

Subject areas covered:

Freedom of Information Act 2000:

Whether information held s.1

Decision

For the reasons set out below the appeal is dismissed.

Reasons for Decision

Background facts

1. The Adjudicator's Office provides an independent review of complaints by HMRC customers, which HMRC itself has been unable to resolve. The Adjudicator's Office recognises that it can also make mistakes in the way it handles such reviews and its policy is to measure its performance by the same criteria as it applies to HMRC and other government departments. In appropriate cases the Adjudicator's Office will therefore offer redress for its own mistakes, whether a straightforward apology or, exceptionally, under a scheme which started in November 2007, something more by way of financial redress.
2. In deciding on the appropriate redress for such mistakes the Adjudicator's Office follows the same policy as HMRC. So far as financial redress is concerned that policy is recorded in HMRC's document "Complaints and putting things right" which states:

If you [ie the customer] think our actions have affected you particularly badly, causing you worry and distress, tell us straight away. We may be able, in some cases, to make a payment to apologise.

HMRC's internal policy as to the amount of any payment is recorded as follows:¹

Our payments for worry and distress are meant to be token – a way of acknowledging that our mistakes and delays have affected someone badly. They are not akin to damages and payment does not, in any way, amount to an admission of any legal liability.

The payments will usually range between £25 and £500. It is relatively difficult to give guidance on these payments now because we are looking more at the impact of our mistakes rather than the seriousness of the mistakes themselves. But in practice a decision is likely to be reached on the basis of both these factors and any other circumstances surrounding the case.

You [ie the person considering the complaint] should be prepared to make payments outside these limits. A payment of £10 may be appropriate in some cases, whereas a payment of £1,000 may be right where there has been a very serious impact as a result of a very bad mistake. In between these there are endless possibilities and you should use your judgment and experience to come to a decision that is fair to the customer and broadly in line with other similar cases that your team and others in HMRC deal with.

3. We accept the evidence of Tommy Robinson, who is an Adjudication Officer, that there are no hard and fast rules about the amount awarded in each case and that the decision involves a certain amount of intuition and settling on what “feels right”. He also states (and we accept) that in some cases the amount arrived at will be the result of discussion within the Office and that in some cases an officer's recommendation on file will not be accepted by the Adjudicator herself who makes the final decision.

The request for information

4. The Appellant, Mr Davies, complained to HMRC about the way they had dealt with his tax affairs. He was not happy with the way his complaints were dealt with by HMRC and so he complained to the Adjudicator's Office. There was substantial delay by the Adjudicator's Office in carrying out their review and Mr Davies complained about this which resulted in a payment to him by the Adjudicator's

¹ These words are taken from Tommy Robinson's letter dated 11 August 2010 at p 146 of the Tribunal bundle.

Office of £50. Mr Davies was not happy with that amount and on 27 January 2010 he requested certain information from the Adjudicator's Office under the Freedom of Information Act 2000 about "the process of ex gratia payments and the methodology that underpins it." In item 4 of his six requests for information he asked to know:

The nature and content of complaints [by others to whom payments were made] supported by a resume of how the amounts paid out in those cases was arrived at.

5. The Adjudicator's Office answered his request for information by letter dated 27 January 2010. In response to item 4 Mr Davies was supplied with a table listing the 26 payments that had been made since the scheme had started, showing the amounts and a short account of the reason for the payment. The letter also stated that each case was judged on its own merits which would include an assessment of the Adjudicator's Office's shortcomings and their affect on the individuals concerned and their personal circumstances including their state of health and enclosed a number of relevant documents including the Service Level Agreement between the Adjudicator's Office and HMRC.
6. Mr Davies was not happy with this response and wrote to Adjudicator's Office on 10 February 2010 stating:

... this is an unsatisfactory response lacking in depth precision and transparency ...

... NO EXPLANATION OF THE RATIONALE APPLIED has been given to substantiate the quantum of payments.

The Adjudicator's Office responded to that by letter dated 8 March 2010 stating:

At the date we received your request we did not hold an existing summary of case details or rationale you appear to want; the table we provided was taken from our electronic case data base rather than by manually retrieving original files form storage and analysing them.

... creating case summaries and rationale where none previously existed is creating "new information" and is not required....

... in order to produce a rationale for each case, we would have to review all the relevant manual files, and exercise a high degree of “skill and judgement” to try to determine all the criteria used in each case in setting the level of payment...

The letter went on to say that even if the information was “held” for the purposes of the Freedom of Information Act 2000 to obtain it would take more than 24 hours’ work and the cost would therefore exceed the appropriate limit for the purposes of section 12 of the Act.

The Information Commissioner’s decision and Mr Davies’s appeal

7. Mr Davies remained unhappy with the position and applied to the Information Commissioner under section 50 of the Act. In a decision notice dated 16 December 2010 the Commissioner found that the Adjudicator’s Office was correct in saying that they did not hold the requested information.
8. Mr Davies then appealed against the Commissioner’s decision notice to this Tribunal. HMRC (who are the relevant public authority for the purposes of the Freedom of Information Act 2000) were joined to the appeal as Second Respondents. At a directions hearing on 2 March 2011 it was agreed that the appeal would be determined “on paper” and that the issues to be resolved by the Tribunal were (a) whether HMRC “holds” the requested information and, if so, (b) whether they can nevertheless rely on section 12 of the 2000 Act.

Does HMRC hold the requested information?

9. In addition to the material in the bundle prepared for the Tribunal (which contains Mr Robinson’s statement dated 14 April 2011 and extensive written submissions from Mr Davies served subsequently) the Tribunal has been provided with a copy of the Adjudicator’s Office’s paper file in relation to five of the 26 complaints which resulted in payments as shown in the table supplied to Mr Davies. For obvious reasons Mr Davies was not provided with a copy of these files but he was shown a redacted version of a note prepared by Mr Robinson describing the contents.²
10. Clearly, it was not sufficient for the Adjudicator’s Office to say (as they did in their letter of 8 March 2010) that the information supplied in response to Mr Davies’s

² See pp 151-153 of the Tribunal bundle.

request was that contained in their “electronic case data base” and that they had not looked at the original paper files relating to individual complaints. If those files contained additional “information of the description specified in the request” (to adopt the words of section 1(1)(a) of the 2000 Act) then, subject to section 12, that information should have been supplied to him. That is the issue that we have focussed on.

11. As we read Mr Davies request it contained two elements; he wanted to know: (i) “the nature and contents of the complaints” and (ii) “a resume of how the amounts paid out in those cases was arrived at.” So far as the first element in the request is concerned, it is clear that the files contained much information about the individual complaints which went beyond the short summary contained in the table supplied to Mr Davies. However, giving a fair reading to his request, we consider that the table contained sufficient information about the complaints to tell him the “nature and contents” of them. We note in this context that the focus of his case has been on the second element in the request and that in his letter to the Commissioner dated 9 July 2010 he gives an example of the information he appears to require which really goes no further than that in fact supplied.³

12. The Tribunal had some difficulty in interpreting the second part of the request. However, having regard in particular to Mr Davies’s complaint that no explanation of the “rationale” for the quantum of the payments had been supplied,⁴ we formed the view that what he wanted was a record of the reasons for the quantum (or amount) of the payments decided upon in each case by the Adjudicator or her officer as the case may be. Having looked at the five files we have mentioned (which we have no reason to believe are materially different to other files) and bearing in mind the facts we have outlined at paragraphs 2 and 3 above, we are satisfied on the balance of probabilities that no such record is held: it is clear that the decisions are ultimately based, as Mr Robinson says, on the “feel” or intuition of the individual decision maker and that the decision maker has not indicated how specific amounts have been arrived at.

³ He gave as an example: “Mr “T” 2007/08 18 months delay, errors, poor communication & element for effects on personal circumstances £150.” (p 165 of the Tribunal bundle).

⁴ See his letter of 10 February 2010 at p 87 of the Tribunal bundle.

13. We anticipate that this finding may be just what Mr Davies is seeking to establish. In any event, if there is no recorded information of the description requested there is no obligation to supply anything under the 2000 Act and accordingly the Commissioner's decision must be upheld in this respect. We note that in reaching this conclusion we have not considered any question of whether "intellectual input" or specialist knowledge is required in looking at the files and understanding their contents although these matters were considered by HMRC and the Commissioner in reaching their decisions.

Conclusion

14. Our finding on the first issue means that Mr Davies's appeal must be dismissed and there is no need for us to consider the issues arising under section 12 of the 2000 Act.

15. Our decision is unanimous.

Signed

HH Judge Shanks

Dated 24 May 2011

(Revised 31 May 2011.)