



First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0155

Heard at Leeds Employment Tribunal
On 9 November 2016

Date of Decision: 19 November 2016
Date Promulgated: 21 November 2016

Before

CHRIS HUGHES

ANNE CHAFER

JEAN NELSON

Between

MICHAEL WHARTON

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

LEEDS CITY COUNCIL

Second Respondent

DECISION AND REASONS

1. The Appellant in these proceedings was employed by the Second Respondent (Leeds City Council "the Council") from 15 April 2013. There were concerns about his performance and conduct and on 29 October 2013 his performance during his probationary period was considered by a hearing and he was dismissed. He appealed to the relevant Chief Officer of the Council "Officer A" who after a hearing on 10 December 2013 upheld the dismissal.
2. While still an employee the Appellant started to make subject access requests under the Data Protection Act and requests for information under the Freedom of Information Act. The FOIA and DPA requests were:-
 - FOIA request 8 October 2013 (reply 1 November 2013) for % of staff failing probationary period, and a subject access request for all emails pertaining to himself or referencing himself to and from various Council Officers.'
 - DPA request for a copy of his HR file and copies of all instant messaging conversations relating to himself (request 18 December 2013, reply 7 January 2014)
 - FOIA request 8 April and reply 10 April 2014 relating to the recruitment competition which resulted in his appointment,
 - FOIA request 14 April and reply 15 May 2014 a six part request for information relating to Arts Council funding of the Council, including the provision of monitoring forms and for details of Equality Impact Assessment
 - DPA requests of 14, 16 and 17 April 2014 (reply 23 May) requesting recordings of his grievance and disciplinary hearings and appeal (which so far as they existed were provided) email correspondence between the appellant and the HR function (already largely provided and provided again)
 - DPA request 22 April 2014 (reply 23 May) providing emails between the Appellant and a Councillor.
 - FOIA request 25 May reply dated 4 June 2014 concerning "Officer A", any declarations of conflicts of interest he had made and details of the appointment process including the number of applicants and the application pack for the post when he was appointed.
 - FOIA request 5 June reply dated 11 June 2014 concerning "Officer A"'s recruitment panel.
 - DPA request 27 May 2014 (reply 11 June) providing email traffic between the Appellant and a Council Officer who heard his grievance and between the appellant and internal audit.
 - DPA request 28 July 2015 (reply 27 August 2015) in six parts covering matters relating to his employment and dismissal
 - FOIA request of 9 September 2015 (reply 7 October) concerning the selection of members of a steering group for a "Capital of Culture" bid in 2013.
3. The six FOIA and 5 DPA requests were all handled in a routine way by the Council. However on 24 December 2015 the Appellant asked the Council for:-

"All equality impact screening tools and/or equality impact assessments completed in respect of grants received by the Museum Service since 2011."

4. The Council refused the request by a letter of 26 January 2016 claiming that the request was vexatious under S14(1) FOIA explaining:-

"You have already made a significant number of information requests to the authority and these are, clearly, based upon a number of unfounded accusations with regard to funding the Culture and Sport service has received from the Arts Council, and with regard to the Chief Officer of the service,... and others...Whilst the council has endeavoured to be as helpful as possible in answering these requests, they have now reached a level of unreasonable persistence, and we do not consider that your continuing personal dispute with the authority on this matter serves any wider public interest.

In addition to your information requests, however, I am also aware that you have sent a number of pieces of correspondence on this matter into council officers and members under various pseudonyms, which have included you impersonating both officers and third parties who work alongside the council. In addition to these emails containing unfounded allegations, they have also contained abusive and aggressive language. I do not intend to refer to the specific wording you have used in these emails, but suffice to say that it is simply unacceptable, and is clear evidence of your vexatious nature."

5. The Appellant complained to the First Respondent, (the Information Commissioner "ICO") who investigated and issued a decision notice on 23 May 2016. This summarised the actions of the Appellant which the Council considered showed his request was vexatious (DN paragraphs 19-24). It concluded that although some of the material had not been written in the Appellant's name they had come from him and contained language "*far beyond the level of criticism that a public authority or its employees should reasonably expect to receive.*" (DN paragraph 26). They amounted to a vendetta against a council officer which extended to contacting his daughter in a way which would cause significant distress (DN paragraph 27). The Council had already expended significant time and resources on dealing with the requests (over 30 hours), supplied substantial quantities of information and further requests would cause a further burden (DN paragraph 28). The ICO noted that the Appellant's concerns with respect to the subject matter of this request had already been considered both by the Council and by Arts Council England; the ICO put the Appellant's claims to the Council and the ICO had concluded that the information requested was not necessary to prove the Appellant's allegations (DN paragraph 29-31). He concluded that the Appellant was pursuing a personal matter relating to his dismissal (DN paragraph 32) supplying the information would not produce a resolution (DN paragraph 33). The request would cause distress and harassment to staff and was a means of pursuing a personal grievance. In the light of the guidance in *Dransfield* the ICO concluded that the Council was correct to treat the request as vexatious; it was an inappropriate use of FOIA.

6. In the notice of appeal the Appellant criticised the Council stating that "*Leeds CC have found me guilty without any process of sending allegedly malicious emails which reference information provided under previous FOI requests*". He argued that there had been misconduct by the Council, that the public interest justified the request, that the test of vexatious in FOIA should be the same as for vexatious litigation in the courts, he referred to his ET claim against the Council where the Judge had refused to strike out his claim.
7. The ICO resisted the appeal relying on his DN, distinguishing the criteria for vexatious in FOIA from those for a vexatious litigation and, again relying on *Dransfield* concluded that S14 allowed a public authority to conclude:-

"*Enough is enough-the nature of this request is vexatious so that section1 [FOIA] does not apply.*"
8. The Council supported the ICO's reasoning and in its response stressed the nature of the obscene and defamatory correspondence sent by the Appellant to various recipients including the daughter of "Officer A". It confirmed the request amounted to a burden on the Council, the motive of the request was malicious and the language used was entirely inappropriate.
9. In his response to these arguments the Appellant repeated his claim of misconduct, he alleged that Council witnesses had perjured themselves in the ET hearing, that the solicitor for the Council had been in breach of duty as an officer of the court with respect to the ET.
10. In oral argument the Appellant contended the issue was the request itself, his requests had always been courteous, any other interactions between himself and the Council, whether ill-tempered or not, were irrelevant. He did not challenge the Council's witness.
11. Ms Gannon, for the Council, submitted the surrounding circumstances to the request were, in the light of *Dransfield* relevant, the test was whether the request was manifestly unjustified and a disproportionate use of FOIA. She submitted that the grounds of the Council's refusal were correct, in particular the abusive language, the burden, the clear personal grudge, the unreasonable persistence, the issues had been exhaustively dealt with by the Council and others, there were unfounded accusations and the request was futile since it would not actually assist the Appellant's arguments. She focussed her arguments on the Appellant's intransigence, demonstrating the inappropriate and nasty nature of the anonymous emails (and the tracking down of Officer A's daughter's university so that he could send a letter to her via the university), demonstrating that they were sent by the Appellant. She drew to the Tribunal's attention the grossly obscene nature of some of the emails which had been widely disseminated through the Council and the use of a false account for sending them, so that they apparently came from Officer A. She also reviewed the exhaustive investigations of the issues raised by the Appellant conducted by the Council and Arts Council England and the auditors of Arts Council England.

12. In response to these arguments the Appellant submitted that attempts to demonstrate that he was a vexatious person were irrelevant. He repeated his claims against the Council and Officer A. He claimed that investigations carried out on behalf of Arts Council England had been flawed, the accountants had not looked at the relevant issues. He had attempted a judicial review of the NAO but had been unsuccessful as the Court had held that NAO had an absolute discretion not to investigate. He accused a councillor of falsehood.
13. In response to a direct question from the Tribunal the Appellant confirmed:-

"I did send the letter to the daughter; [Officer A] often tweeted about her. I have been driven to become angry, I have been a vexatious person at times but that's irrelevant, the request itself was not vexatious.

One final thing, the "craven colleagues" email was sent after the NAO refused to investigate.

The Councillor had refused to take up my allegations... I didn't think her fit to protect children, following this she was removed, an unfit person was removed... I am going to re-launch a judicial review against Arts Council England."

Consideration

14. This request for information arose out of the dismissal of the Appellant. For a period of time he used statutory rights of access to information to discover material about his employment and dismissal. He then broadened out his requests in order to try and gather evidence to support a "whistle-blower" claim in the ET. This arose out of his tendentious interpretation of certain documents. The handling of his FOIA requests has created a substantial burden, the alleged public interest issues he has raised have been considered by the Council and Arts Council England. He has raised them with the NAO. No merit has been found in his allegations. He has continued to pursue them in an increasingly aggressive and defamatory way, with an increasing number of council officers and councillors the object of his malice. The obscenity of his emails is particularly concerning. It is also clear from the anonymous letter sent to Officer A's daughter that the motivation is personal. In addition to the vituperative abuse he launches at her father and his claim that her lifestyle is based on her father's misconduct in the concluding paragraph he drew attention to "the harm it would do to me and my family when he dismissed for trying to do my job..." It is noteworthy that throughout the months of conduct of the appeal he implicitly denied sending the anonymous material and only acknowledged his authorship following a forensic examination of the material by counsel for the Council and in response to a direct question from the tribunal. Even then he minimised the significance of his behaviour. He has used the process of the tribunal to make wild and unsubstantiated allegations against a number of council officers.
15. The ICO's analysis of the issues in his decision notice is correct. It is proper to take into account the surrounding circumstances. The legal basis for considering something vexatious is FOIA itself and its interpretation by the

Upper Tribunal in *Dransfield*, not the criteria for considering an individual is a vexatious litigant.

16. The Tribunal is satisfied that the decision of the ICO was correct in law and this appeal is dismissed.
17. Our decision is unanimous.
18. The Tribunal has the power to award costs under Rule 10 of the General Regulatory Chamber's Rules if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings. The tribunal directs the ICO and the Council to provide details of the costs they have incurred and any arguments they may wish to advance with respect to this issue by 4 December, the Tribunal will then make directions for the timetable for the Appellant to respond on the issue of costs.

Signed Chris Hughes

Judge of the First-tier Tribunal

Date: 19 November 2016