



Neutral citation number: [2022]

Case Reference: EJ-2021-0004

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

Heard at: Field House, London

**Heard on 6 October 2021
Decision given on: 3rd May 2022**

Before

**TRIBUNAL JUDGE LYNN GRIFFIN
TRIBUNAL MEMBER JEAN NELSON
TRIBUNAL MEMBER SUSAN WOLF**

Between

DOREEN KING

Applicant

and

BARKING, HAVERING & REDBRIDGE UNIVERSITY HOSPITAL NHS TRUST

Respondent

Representation:

For the Appellant: in person

For the Respondent: Julian Blake, counsel

Decision: The application is refused.

REASONS

1. The Applicant, Dr King, applied on 14 October 2020 for Barking, Havering & Redbridge University Hospital NHS Trust (the "Trust") to be certified for an offence of contempt to the Upper Tribunal arising from alleged non-compliance with the decision made in Appeal Reference: EA/2018/0209 dated 12 August 2019 (the "Decision").
2. The essence of the grounds for the application was that the Trust is in contempt of court because of its delay in responding to the Decision and the Trust's conclusion that it does not hold any further information within scope of the relevant parts of her request under the Freedom of Information Act 2000 ("FOIA").
3. The application was heard at a hearing held on 6 October 2021 at Field House in London.
4. The Tribunal had an open bundle comprising 281 pages plus the index, skeleton arguments from the Applicant and the Trust and a bundle of authorities.
5. At the hearing Dr King gave the tribunal a copy of the CQC report of an inspection on 2 March 2015 (on which the page numbers 139 – 143 had been written) and a document from the Trust called "Delivering our potential" about the improvement plan for King George and Queen's hospitals.
6. We heard evidence from Ms Rasool, Information Officer, on behalf of the Respondent, she was cross examined, and the Tribunal asked her questions. We have taken account of all of the documentation and evidence before us, including that which is not specifically alluded to in this decision.

The Decision in EA/2018/0209

7. Dr King made three separate requests for information from the Trust on 9, 19 and 20 April 2017. Those requests sought information relating to drug security measures at Queen's Hospital, Romford. The Trust aggregated these requests and responded on 27 June 2017. It disclosed some of the requested information; stated that it did not hold some of the requested information; and relied on s.12 (cost of compliance), s.14 (vexatious requests), s.21(1) (information available by other means) and s.43 (commercial interests) of FOIA.
8. By the time the appeal was considered by the tribunal in EA/2018/0209 some of the issues between the parties had been resolved but the following parts of the first request were still in issue.

“List of specific details required but entire reports and enquiries are requested relating to Queen’s Hospital, Romford of security and availability of drugs and non-compliance with the safe locking away of drugs

All details about Queen’s Hospital, Romford of security and availability of drugs, including

(j) Details relating to death on [redacted] Ward related to open PODs prior to August 2013. Details of any other deaths specifically related to drug access by patients/free access to drugs either before or after August 2013.

(k) Reports and details of whether or not the CQC found any clinical concern/health and safety risk in relation to trolleys being left unlocked, key access/uncontrolled drug key availability/POD access/administration of drugs by nurses (August 2013 to date), including all the papers on which the reports were based.

...

(n) Details of findings/improvements needed/made at Queen’s Hospital while in special measures in relation to nursing trolleys being left unlocked, key access/uncontrolled drug key availability/POD

(o) Details of all reasons found for unlocked trolleys/PODs (2013 to date).

(p) Details of [redacted], Deputy Chief Nurse/[redacted]/and or (sic) CQC concerns/reports/discussions/other in relation to key availability/drug access on [redacted] [same ward as (j)] and throughout the hospital (August 2013-August 2014).

(q) All background papers/consultations and report (sic) on the formulation of a Trust policy for drug key access for nurses (August 2013 to date).”

9. The following parts of the third request were also still in issue

“(5) Details of clinical concern/health and safety risk in relation to nursing trolleys being left unlocked/key access/POD access, 2013 to date, and enquiries made by management.

(6) Details of findings/improvements needed/made at Queen’s Hospital in relation to nursing trolleys being left unlocked, key access/POD access, 2013 to date if not included in (5).

(7) Details of all reasons found for unlocked trolleys/PODs (2013 to date) if not included in (5) -(6) above.

(8) Details of death on [redacted] Ward [same ward as in (j) above] related to open POD’s prior to August 2013; and data of avoidable deaths related to nursing trolleys being left unlocked, key access/POD access before or after August 2013.”

10. In EA/2018/0209 the Tribunal found that

- a. the Commissioner was right to uphold the Trust's case on request (q) that the information was not held. The tribunal agreed that "no Trust-wide policy was at any material time in contemplation, let alone formulated"; that the relevant extracts of a broader umbrella policy had already been disclosed; and that there were only informal guidelines in place at the relevant time.
 - b. requests (j) and (8), which concerned details of deaths related to drug access issues, would exceed the cost limit and that s.12 was therefore correctly applied. It held that the Appellant's request was clear and correctly interpreted.
 - c. requests (7) and (8) were vexatious and added nothing of substance to requests (o) and (j). Further, (7) and (o) were both vexatious because they "focus on a question of very limited relevance and would put the Trust to trouble and expense out of all proportion to any benefit"
 - d. the remaining five requests, (k), (n), (p), (5) and (6) were not vexatious and therefore found in the Appellant's favour in that regard.
11. The Tribunal allowed that part of the appeal on which it had found that the requests were not vexatious and substituted a decision notice that directed the Trust to communicate to the Appellant the information requested by the first request, paras (k), (n) and (p) and the third request, paras (5) and (6) within 35 days of the date of the Decision. The Decision was dated 12 August 2019.

Compliance with the Decision, the facts

12. The Trust's solicitors received the Decision on 12 August 2019 and forwarded the email to the Trust. The solicitors received an automated out of office reply that stated, "I am currently not in the office please direct all emails to [redacted]".
13. This automated message did not convey the fact that the recipient was on long term sick leave and that their email messages were not being monitored or forwarded in their absence.
14. The deadline expired on the next working day after Sunday, 15 September 2019, by application of rule 12(2) The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.
15. On 16 September 2019 the message was brought to the Trust's attention and on 17 September 2019 the solicitors wrote to the Tribunal and other parties to explain what had happened and to confirm the Trust was "putting together its response" by which we conclude the solicitors were communicating that the process of making enquiries and searches was underway.

16. The Trust provided its response to Dr King on 22 October 2019. In summary

- a. Request (k) sought “reports and details” of whether or not the CQC found any clinical concern/health and safety risk in respect of certain drug access matters from August 2013, “including all the papers on which the reports were based”. The Trust’s response explained that the CQC reports had been provided and that “none of those reports raised any of the concerns referred to in paragraph (k)”. The Trust also confirmed that it did not hold “all the papers on which the reports were based” (having been a report produced by the CQC itself). The Trust concluded that it did not hold any further information to be disclosed.
- b. Request (n) sought “details of findings/improvements needed/made” at the hospital in relation to certain drug access matters from August 2013. The Trust stated that the CQC reports had been disclosed and that no such findings or improvements were identified and nor did the Trust hold any further information containing details of “findings/improvements needed or made”. The Trust concluded that it did not hold any further information to be disclosed.
- c. Request (p) sought details of certain “concerns/ reports/ discussions/ other” in relation to “key availability/ drug access” during the period August 2013 to August 2014. The Trust noted that the CQC reports had been disclosed and that “no such findings/improvements needed” were identified. The Trust explained that it had already taken all reasonable steps to identify such information and that it did not hold any further information to be disclosed.
- d. Request (5) sought “details of clinical concern/health and safety risk” in relation to certain drug access matters from 2013, and “enquires made by management”. The Trust confirmed that it had “taken all reasonable steps to search for the information”, including searching for any reported incidents from 2013 onwards and none were found. It confirmed that it did not hold any further information to be disclosed.
- e. Request (6) sought “details of any findings/improvements needed/made” in relation to certain drug access matters from 2013 “if not included in (5)”. The Trust responded by confirming that it did not hold the information and that any such information would be contained in the CQC reports which had already been disclosed “and in incident reports (which have been searched and none were found)”. The Trust concluded that it did not hold any further information to be disclosed.

17. The relevant acts or omissions relied upon by Dr King in her application to certify for contempt are as follows

- a. The alleged failure by the Trust to respond to Dr King within the confines of the time limits specified in the Tribunal's Substituted Decision Notice in appeal EA/2018/0209;
- b. The alleged failure by the Trust, other than in the manner identified in (a) above, to comply with the Tribunal's Substituted Decision Notice in appeal EA/2018/0209.

The Legal Framework

18. Subsections 61(3) and (4) FOIA provide as follows:

*"(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."*

19. There are two questions to be answered

- A. Is the Trust guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute a contempt of court?
- B. If the Trust is "guilty of an act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute a contempt of court", should the Tribunal exercise its discretion to certify a contempt to the Upper Tribunal?

20. Contempt proceedings should not be used in cases where there is no real prejudice to the party affected, where it is a technical breach only or where such proceedings would be disproportionate: see PJSC Vseukrainskyi Bank v Maksimov [2014] EWHC 4370 (Comm) at paragraphs 21 to 24 and Direct International Plc v Rangers International Football Club [2016] EWHC 85 (Ch) at paragraph 89.

Analysis and conclusions

Question A

21. We considered whether the terms of the Substituted Decision Notice were sufficiently clear and unambiguous so as to be capable of founding a finding of contempt for breach thereof. There are two aspects to consider.
22. The Trust does not dispute that they were served with a copy of the decision and that the decision contained a clear time limit to comply within 35 days and they did not do so.

23. We find that the requirements of the Substituted Decision Notice were clear and unambiguous in so far as it set a deadline for compliance.
24. We have concluded that in not issuing its response to the Applicant until after the expiry of the deadline the Trust failed to comply with the direction of the Tribunal in EA/2018/0209; this amounts to an omission in relation to proceedings before the Tribunal.
25. The next aspect is whether that omission would constitute a contempt of court if those proceedings were proceedings before a court having power to commit for contempt.
26. The Trust has apologised to both Dr King and the Tribunal for the delay in its substantive response to Dr King which we have found was the result of the relevant staff member being on long-term sick leave.
27. We note that the Supreme Court has restated the principle that orders of courts and tribunals should be complied with as follows,

*“It is a well-established principle of our constitutional law that a court order must be obeyed unless and until it has been set aside or varied by the court (or, conceivably, overruled by legislation). The principle was authoritatively stated in *Chuck v Cremer* (1846) 1 *Coop temp Cott* 338; 47 ER 884, in terms which have been repeated time and again in later authorities”*

See R (on the application of Majera (formerly SM (Rwanda)) v Secretary of State for the Home Department [2021] UKSC 46, judgement given shortly after the hearing in this case on 20 October 2021.

28. The deadline set by the Tribunal was not complied with, this is not a technical breach, nor involuntary. The reasons for non-compliance are primarily relevant to whether to exercise the discretion to commit to the Upper Tribunal but we note that the Trust’s representatives had forwarded the decision to the Trust promptly and even though it would have been expected no provision was put in place to ensure receipt by the Trust in the absence of the nominated employee.
29. We find that the failure to comply with the deadline set amounts to an omission that would constitute a contempt of court if the proceedings were proceedings before a court having power to commit for contempt.
30. The second act or omission relied upon is the alleged failure to comply with the Substituted Decision Notice in not sending the requested material to Dr King.
31. We considered the terms of the substituted decision and noted that the Tribunal in EA/2018/0209 appeared to have directed the communication of the information

requested to Dr King. However, we have concluded that the Decision could not have been ordering the Trust to provide specific information because the Tribunal had not seen the information and was not therefore aware of whether it existed or not. The questions before that Tribunal were about whether the Commissioner fell into error of law when deciding if the request was vexatious pursuant to section 14 FOIA, not about whether any information was held nor yet whether any exemption under FOIA applied to that information. Therefore, even if the Tribunal had directed the material to be disclosed that would have been outside the scope of the appeal.

32. We accept the submission of the Trust that the Tribunal in EA/2018/0209 was requiring the Trust to comply with the requirements of s.1(1) of FOIA which provides as follows with emphasis added

1(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

33. Where Section 14 FOIA applies, "Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious". Compliance in this context includes informing a requestor whether information is or is not held.

34. The Tribunal in EA/2018/0209 could not have ordered the provision of material that had not been searched for at the time they took their decision and may not have existed.

35. It is generally no defence to an application for contempt that the order disobeyed should not have been made but we are obliged to consider whether it was clear and unambiguous.

36. With hindsight the Trust accepted that it might have been better to assess whether it was likely to hold the material requested upon receipt but that is not the usual order in which a public authority would deal with a request in these circumstances.

37. We have concluded that this aspect of the Substituted Decision Notice was unclear and ambiguous in appearing to direct the provision of material that the Tribunal could not have known existed and was outside the scope of the appeal. Therefore, we conclude that there is no omission by the Trust in this regard that would amount to a contempt of court were the proceedings to be before a court having power to commit for contempt.

Question B

38. We then considered whether to exercise our discretion to certify a contempt to the Upper Tribunal in relation to the failure to comply with the deadline.
39. Dr King did not direct the Tribunal's attention to any actual prejudice caused by the delay in compliance with the decision. She submits that the Trust was required to abide by the decision and to follow the law. Dr King is correct in principle, but contempt proceedings should not be used to punish technical or disproportionate breaches where there is no prejudice as a result of the act or omission relied upon.
40. Dr King suggested that the delay was deliberate and the result of dishonesty on an individual and/or institutional level.
41. We note that there were delays in correspondence on behalf of the Trust at earlier stages in the process and we have some sympathy with Dr King's suggestion that, when the staff member went on long term sick leave, arrangements should have been made for monitoring of the email account or a clearer automated message created so that those who sent emails that account would know their communication would not be dealt with.
42. We have examined all the evidence with care to determine what inferences can be properly drawn from the facts. Dr King asks us to find that the only inference to be drawn from the facts is that the Trust intended to disobey the Tribunal's directions and that they were acting dishonestly in doing so. However, we find that the inference sought by Dr King is not the only inference that can reasonably be drawn from these facts.
43. Our decision is that the Trust's failure to abide by the Decision was not wilful, but neither can it be characterised as accidental. The omission was the product of less than adequate administrative arrangements and it therefore falls in the range of culpability between accidental and wilful.
44. We have concluded that the administrative arrangements made by the Trust could have been better. However, the facts do not solely support either the allegation of dishonesty made by Dr King, nor intentional delay by any individual or the Trust as an institution. It is reasonable to infer from the facts that the Trust did not consider the implications of being unable to access the email of the staff member who was on sick leave when they were expecting the decision of the Tribunal. Steps could have been taken to notify their representatives to liaise with another member of staff and to send the decision to another email address, but they did not do so.
45. A response was sent to Dr King on 22 October 2019 and we have taken into account that as soon as the Trust realised they had not acted upon the decision they communicated via their representatives explaining the situation and started to compile the necessary response. The delay was approximately 5 weeks from the

deadline, which although less than optimum has not prejudiced Dr King. The Trust complied with the substance of the decision.

46. We note that the substituted decision notice did not carry a penal notice and although this does not preclude certification for contempt it is a relevant consideration at this stage.
47. We take into account that the Tribunal has an interest in ensuring that there is compliance with its orders. Punishment of those who do not comply with its orders clearly furthers that interest and the public interest in the administration of justice within the tribunal system.
48. Having considered all the circumstances, we have decided not to exercise our discretion to certify a contempt to the Upper Tribunal. In reaching this conclusion we place significant weight on our conclusion that the omission to act which amounted to a contempt, was not intentional. Certification in these circumstances would be disproportionate.
49. For all these reasons we refuse the application to certify a contempt of court to the Upper Tribunal.

Signed: *Lynn Griffin*

Tribunal Judge Lynn Griffin

Date: 20 May 2022