



Neutral citation number: [2024] UKFTT 727 (GRC)

Case Reference: EJ/2023/0006

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

**Decided without a hearing  
Decision given on: 8 August 2024**

**Before**

**DISTRICT JUDGE WATKIN**

**Between**

**STEPHEN DONKIN**

Applicant

**and**

**(1) SUNDERLAND CITY COUNCIL**

Respondent

**Decision:** The Application is struck out

### **REASONS**

1. The Application is struck out pursuant to Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the “**Rules**”) as the Tribunal considers there is no reasonable prospect of the Application succeeding.

### **The Background**

2. By Notice of Appeal to the Tribunal dated 1 January 2023, the Applicant appealed a decision of the Information Commissioner (“**ICO**”) dated 9 December 2023 in which the ICO had decided that the Sunderland City Council (the “**Council**”) had complied

with its obligations under section 1(1) of the Freedom of Information Act 2000 (“FOIA”) in responding to a request from the Applicant. The Appeal was allocated case reference number EA-2022-0460P.

3. The Appeal was heard on 6 July 2023 and a decision of the Tribunal was promulgated on 9 August 2023. The Tribunal allowed the appeal and issued a substituted decision (the “**Substituted Decision Notice**”) which directed that the Council:

*“Reconsider its analysis of the request in light of external materials provided by the Appellant (Mr Donkin) - including his email dated 14 September 2022 with attachments to the Council’s Governance Law Specialist - which point to the existence of further information within the Council which has not already been disclosed.”*  
**(Direction 1)**

*“Review the scope of the searches previously made within Council including the ‘service areas’ and individuals’ records examined.”* **(Direction 2)**

*“Rigorously and efficiently conduct further searches accordingly and provide to the Appellant details of the searches carried out and search terms used”. **(Direction 3)***

*“Provide a fresh response to the Appellant’s request, providing advice and assistance to the Appellant pursuant to the Council’s duty under section 16 of the Freedom of Information Act 2000 as to the terms of the request if necessary to elicit the information he seeks.”* **(Direction 4)**

4. On 20 September 2023, the Applicant submitted a Notice of application for Certification to the Upper Tribunal for Contempt of Court (the “**Application**”) stating:

*“I am seeking that Sunderland City Council should be found in contempt of court having failed to comply with the directions of the panel in case : EA-2022-0460P. Since the Tribunal i have received additional information which sheds further light on the matter and is attached.”*

5. On 13 October 2023, the Respondent’s Data Protection Officer, prepared a report (the “**DPO Report**”) outlining his review of the Directions provided and setting out his findings. He also prepared a fresh response to the Applicant’s request. The fresh response was set out as follows:

*"Dear Mr Donkin,*

*Thank you for your patience in relation to this case. Having concluded our review of your request in line with the Tribunal's directions, the Council's response to your FOI Request no 4738 is as follows:*

*"Under Freedom of Information can you confirm that:*

*1/ An investigation by DWP Counter Fraud into the Council took place during the period March to May 2021"*

*A forensic search of email systems covering the period March to the end of 2021 has produced no indication that the Council has received any information notifying that there had been such an investigation.*

*Enquiries with the Council's Senior Manager (Audit, Risk and Assurance), Principal Funding Officer (Funding and Commercial (sic)Team) and Senior Funding Officer (Funding and Commercial Team) have confirmed that none of these officers has any knowledge of such an investigation.*

*In the absence of information held, or pertinent knowledge amongst relevant officers, the Council is, therefore, unable to confirm that any investigation per your reference did or did not take place.*

*"2/ Provide a copy of any DWP report and/or recommendations, into the management of the process, based on the assumption that an investigation did take place."*

*The searches and enquiries referenced above have produced no indication that the Council holds or has ever received any report or recommendations arising from such an investigation. Accordingly, your request must be declined as relevant information is not held.*

*"3/ Any changes to the Council's CLLD process and management that were implemented, again, assuming an investigation did indeed take place."*

*The searches and enquiries referenced above have produced no indication that the Council holds or has ever received any report or recommendations arising from such an investigation that it could or would have been expected to act upon. Accordingly, your request must be declined as relevant information is not held.*

*The Council acknowledges the possibility that an investigation (per your request) may have taken place but concludes that your request was the first indication the Council has received that there may have been one. Based on an assumption that an*

*investigation did take place, and the apparent lack of knowledge of one by the Council's DWP ESF Contract Manager at the time (see Appendix 3), it would seem more likely than not that any relevant information or documentation would be held by GIAA / Counter Fraud and Investigation Team as they would be the originators of such material. It is therefore suggested that you approach GIAA at [Correspondence@giaa.gov.uk](mailto:Correspondence@giaa.gov.uk) if you wish to pursue your enquiries further.*

*I appreciate this may not be the response you had hoped for but trust that you can appreciate the Council's position on the matter.*

*You are, of course, free to approach the Information Commissioner for a view on the Council's handling of your request; we will be happy to assist the Commissioner as far as is possible with any enquiries his officers might wish to make.*

*Yours sincerely,  
Owen Thomas  
Deputy Data Protection Officer."*

6. On 30 October 2023, a Case Management Directions order was made by the Tribunal indicating that the Tribunal was considering striking out the Application for the following reasons:
  - a) The Application may not have reasonable prospects of success as there was no date for compliance set out in the Substituted Decision Notice and the Council had provided a response to the Substituted Decision Notice, albeit after the date of the Application; and
  - b) The Applicant's remedy may be to complain to the ICO and not to the Tribunal
7. By the Case Management Directions, provision was made for the parties and the ICO to provide submissions. Submissions in support of the Application were received contending that the search carried out by the Respondent was insufficient and neither rigorous nor effective (search terms limited and deliberately weak, specific documents not included, certain officers not considered, and places not considered). The Applicant considers that the response was not a fresh response but the same response.
8. The Respondent provided submissions in response dated 24 November 2024 contending that its response met the directions contained and had been provided in good faith based on a plain reading of the Substituted Decision Notice. Furthermore,

that the Applicant should direct any complaint to the ICO in the first instance and not the Tribunal (refers to paragraph 17(f) of the Tribunal Decision).

## LEGAL FRAMEWORK

9. Rule 8 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, includes:

- (2) *The Tribunal must strike out the whole or a part of the proceedings if the Tribunal –*
  - (a) *does not have jurisdiction in relation to the proceedings or that part of them;*  
*and*
  - (b) *does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.*

and

- “(3) The Tribunal may strike out the whole or a part of the proceedings if –*  
*...* 
  - (c) *the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.”*

10. The Tribunal’s jurisdiction in relation to a contempt application is set out in section 61 FOIA:

- “(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.”*

11. The Tribunal considers the analysis of the law as set out in the following cases to be useful:

- a. 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)  
 (“**Rotherham**”)

- b. JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2016] EWHC 192 (Ch), (“**Pugachev**”)
- c. Edward Nield v Loveday [2011] EWHC 2324 (Admin) (“**Nield v Loveday**”)
- d. Navigator Equities Limited v Deripaska [2021] EWCA Civ 1799 (“**Navigator**”)
- e. MD v Secretary of State for Work and Pensions (Enforcement Reference) [2010] UKUT 202 (AAC) (“**MD v Secretary of State**”)
- f. Kirk v Walton [2008] EWHC 1780 (QB) (“**Kirk v Walton**”)

12. In **Rotherham** Farbey J stated:-

*“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.”*

- 13. For the purposes of contempt proceedings, the act or the failure to act, must be proven to the criminal standard of beyond reasonable doubt. That is, the Tribunal must be sure of any fact before finding it proved. The burden lies on an Applicant to make clear and comprehensible allegations, see **Pugachev**, paragraph 41.
- 14. Even once an act or failure to act has been proved, the Tribunal then must consider whether to exercise the discretion to certify the contempt to the Upper Tribunal. In this regard, the circumstances will be relevant and, whether the conduct was intentional or reckless may be a factor and accidental, or unintentional non-compliance, may not carry the necessary quality of contumacy. In **Nield v Loveday**, the High Court held that that for an allegation of contempt to succeed:

*“in addition to knowing that what you are saying is false, you had to have known that what you are saying was likely to interfere with the course of justice”*

- 15. In **Navigator**, para 82, the Court of Appeal summarised the principles that must be applied in deciding whether a person alleged to be in breach of a court order should be treated as a contemnor as follows:

*“The following relevant general propositions of law in relation to civil contempts are well-established:*

*..*

*ii) A committal application must be proportionate (by reference to the gravity of the conduct alleged) and brought for legitimate ends. It must not be pursued for improper collateral purpose;*

*...*

*v) In order to establish contempt, it need not be demonstrated that the contemnor intended to breach an order or undertaking and/or believed that the conduct in question constituted a breach. Rather it must be shown that the contemnor deliberately intended to commit the act or omission in question. Motive is irrelevant;*

*..*

*ix) For a breach of order or undertaking to be established, it must be shown that the terms of the order or undertaking are clear and unambiguous; that the respondent had proper notice; and that the breach is clear (by reference to the terms of the order or undertaking).”*

16. In **MD v Secretary of State**, the Upper Tribunal said at paragraph 19:

*“Tribunals must make clear in plain English what things must be done. They must also make clear the possible consequences of any failure to do what the tribunal has required. In order to make clear what may happen if the necessary things are not done we think it highly desirable, at the very least, that a statement under rule 16(4)(b) of the SEC Rules of the consequences of a failure to comply with a summons or citation should spell out the penalties that may be imposed for failure to comply. In England and Wales these include imprisonment, a fine, and sequestration of assets.”*

17. Finally, in **Kirk v Walton**, the position was helpfully summarised by Cox J DBE:

*“29. I approach the present case, therefore, on the basis that the discretion to grant permission should be exercised with great caution; that there must be a strong prima facie case shown against the Claimant, but that I should be careful not to stray at this stage into the merits of the case; that I should consider whether the public interest requires the committal proceedings to be brought; and that such proceedings must be proportionate and in accordance with the overriding objective.”*

18. Rule 7A of the Rules deals further the certification of an office to the Upper Tribunal, in the interests of brevity, these are not repeated here, save that rule 7A(6) sets out that:

*“A decision disposing of the application will be treated by the Tribunal as a decision which finally disposes of all issues in the proceedings comprising the certification case and rule 38 (decisions) will apply.*

## **ANALYSIS AND CONCLUSIONS**

19. In considering whether to strike out the Application, the Tribunal considers whether:
- (a) it has jurisdiction in relation to the proceedings or that part of them; and
  - (b) the Application or any part of it has no reasonable prospects of it, or part of it, succeeding.

### **Jurisdiction**

20. Paragraph 5 of the Case Management Directions dated 30 October 2023, provides:
- “Furthermore, given the substituted decision notice was for the provision of a fresh response, the issue arises as to whether Mr Donkin’s remedy is to complain to the Information Commissioner rather than make an application to the tribunal to certify a contempt. If the appropriate remedy is via the Information Commissioner, then this tribunal may not have jurisdiction to deal with the application. I am therefore also considering whether to strike out this application on the basis that the tribunal does not have jurisdiction to deal with it and/or it has no reasonable prospect of success as it would not be proportionate to make such a certification where an alternative remedy is available.”*
21. In so far as the Applicant requests certification of an offence, this Tribunal does have jurisdiction. However, in so far as he is not satisfied with the outcome or content of the response and wishes to question whether his request has been dealt with correctly then he may apply to the ICO under s.50 of FOIA. As stated in the Case Management Directions, in light of this alternative approach, the Tribunal considers that it may be more proportionate for the Applicant to apply to the ICO.
22. The Applicant takes issue with several aspects of the DPO Report and seeks to include further information. For example, he refers to the search terms being inadequate and that the service areas considered should be broadened. These matters only fall within the jurisdiction of the Tribunal in relation to this Application for the purposes of considering whether there has been strict compliance with the terms of the Substituted Decision Notice dated 9 August 2023 and whether the Council has complied with it and, if not, whether certification for contempt is appropriate.
23. As the Tribunal accepts that it has jurisdiction to consider the Application in so far as the Applicant requests the certification of an offence to the Upper Tribunal, it does



not consider it appropriate for the Application to be struck out pursuant to Rule 8(2)(a).

### **Prospects of Success**

24. Additionally, the Case Management Directions indicated that the Tribunal would consider whether the proceedings should be struck out where there is no reasonable prospect of success.
25. In this regard, the Tribunal has a number of concerns:
  - a. The Substituted Decision Notice did not stipulate a date for compliance. Therefore, whilst the Respondent had not complied with the directions by the date of the of the Application, the Respondent cannot, by that date, have been breached as the date for their compliance had not passed.
  - b. No statement of the consequences of failure to comply with the directions was set out on the Substituted Decision Notice. Therefore, the Tribunal considers that it may be unduly harsh to certify any non-compliance for contempt and that the more appropriate approach may be to order to compliance by a given date. However, it is noted that the Council did provide a fresh response by 13 October 2023, albeit after the date of the Application.
  - c. The Applicants concerns could now be considered by the ICO. In the circumstances, the Tribunal does not consider that it is appropriate for it to exercise its discretion to certify where there is an alternative approach.
26. In relation to the question of whether there has been compliance with the Substituted Decision Notice, the Tribunal notes:

#### **Direction 1**

*“Reconsider its analysis of the request in light of external materials provided by the Appellant (Mr Donkin) - including his email dated 14 September 2022 with attachments to the Council’s Governance Law Specialist - which point to the existence of further information within the Council which has not already been disclosed.”*

- a) The DPO Report shows from its very existence, and the words contained within in, that the Respondent has reconsidered its analysis of the request as required.
- b) The email from the Applicant dated 14 September 2022 is referred to within the DPO Report which shows that it was also considered. Limited information is

provided in relation to further searches which arose as a result of the email or the attachments. However, Direction 1 is not specific in relation to how it requires any reconsideration to be set out.

## **Direction 2**

*“Review the scope of the searches previously made within Council including the ‘service areas’ and individuals’ records examined.”*

- c) In relation to Direction 2, the DPO Report contains details of the service areas most likely to hold the information. It sets out that it considered the Finance Department and the Funding and Commercial team to be appropriate service areas and Individual officers are identified. The Substituted Decision Notice does not specify that the review should produce any particular result. As such, it appears from the DPO Report that Direction 2 was complied with by 13 October 2023.

## **Direction 3**

*“Rigorously and efficiently conduct further searches accordingly and provide to the Appellant details of the searches carried out and search terms used.”*

- d) Direction 3 requires that further searches are carried out “*rigorously and efficiently*” and that details of these searches are provided. The DPO Report outlines that further searches were carried out from March 2021 onwards.
- e) An email search was carried out, due to it coinciding with a coronavirus lockdown which meant that there was an increase in electronic communication and, due to the Respondent’s deletion policy, software was used to conduct forensic searches for deleted emails, chosen search terms were provide and the emails identified were then examined for relevancy.
- f) Details of the results analysis are set out within the DPO Report. Thus, it is clear that further searches were carried out. Whilst it is difficult to understand precisely what was intended by “*rigorously and efficiently*”, the Tribunal accepts that it is arguable that these further searches were rigorous and efficient. Therefore, the Tribunal does not consider that it is likely to be provided “beyond reasonable doubt” that the searches were not rigorous and efficient.

#### Direction 4

*“Provide a fresh response to the Appellant’s request, providing advice and assistance to the Appellant pursuant to the Council’s duty under section 16 of the Freedom of Information Act 2000 as to the terms of the request if necessary to elicit the information he seeks.”*

- g) A further response was provided to the Application dated 13 October 2023, as such, the Tribunal considers that a “*a fresh response*” was provided. Whilst it is noted that the Applicant does not consider that the response was “fresh” as it reached the same conclusion as the previous response, without any further definition or guidance as to the meaning of “fresh”, the Tribunal considers that the Respondent was entitled to consider that it meant no more than a newly drafted response. As the Tribunal, in reaching its decision on 8 August 2023, would not have been able to predict whether any new response would have produced a different result to the first response, it cannot have intended the new response to necessary reach a different conclusion.
27. On balance, the Tribunal does not consider that the Application has a reasonable prospect of proving, to the criminal (or any other) standard of proof that the Respondent had failed to comply with the Substituted Decision Notice.
28. Even if the Respondent had failed to comply with the directions, this does not necessarily mean that a contempt has been committed, the Applicant would then need to prove, beyond reasonable doubt, that the officers of the Respondent considered that the failures by them (if there were any) interfered with the course of justice. Again, the Tribunal does not accept that this was the case.
29. Furthermore, as is required (per **Kirk v Walton**), the exercise of the Tribunal’s discretion in any application for an offence to be certified to the Upper Tribunal, contempt must be exercised with caution. The Tribunal cannot conclude that there is a strong prima facie case against the Respondent and whilst being careful not to stray into the merits, the Tribunal does not accept that, in relation to this matter, it would be in the public interest for the committal to progress and neither would it be proportionate in circumstances where the Respondent has made the effort to comply with the Substituted Decision Notice.
30. For the avoidance of doubt, in circumstances where the Substituted Decision Notice did not contain a date for compliance, the Tribunal does not consider that it is material that the Respondent did not comply until after the date of the Application.

31. For all the reasons provided, the Tribunal concludes that, pursuant to Rule 8(3)(c), it is reasonable and proportionate for the Application to be struck out.

Signed DJ Watkin

Date: 27 July 2024

Promulgated on: 8 August 2024