Case No. CO/15209/2009

Neutral Citation Number: [2010] EWHC 3076 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Monday, 1 November 2010

B e f o r e:

MR JUSTICE KENNETH PARKER

- -

Between:
THE QUEEN ON THE APPLICATION OF INNES

Appellant

v

INFORMATION COMMISSIONER

Respondent

- -

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The Appellant appeared in person
Mr Robin Hopkins (instructed by Information Commissioner's Office) appeared on behalf of the Respondent

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J U D G M E N T

1. MR JUSTICE KENNETH PARKER: This is an appeal against the decision of the Information Tribunal under Rule 10 (2) of the Information Tribunal (Enforcement Appeals) Rules 2005 ("the 2005 Rules"). The Rules have since been supplanted by other rules which provide for appeals against decisions of the Information Tribunal to be heard by the Upper Tribunal.

2. The background is as follows. Between 14 July and 6 November 2007 the appellant made a number of requests to Bedgrove Junior School under the Freedom of Information Act 2000 ("the FOIA"). The appellant Mr Mark Innes, who has appeared on his own behalf in this appeal, was dissatisfied with aspects of the school's responses and complained to the Information Commissioner. The Commissioner duly investigated these complaints and issued a decision notice on 30 July 2009. The Commissioner found the school to have breached a number of provisions of the FOIA but required no further information to be provided to the claimant Mr Innes.

3. The appellant appealed to the Tribunal against the decision notice. There were written submissions for consideration at the Tribunal hearing. As part of his response the Commissioner invited the Tribunal to dismiss the appellant's appeal summarily under Rule 10 of the 2005 Rules on the grounds that it had no real prospects of success. (I shall come back to Rule 10 in a moment.) The tribunal did so dismiss the appellant's appeal following a paper consideration of the case on 12 October 2009. That decision was dated 9 November 2009, no. EA/2009/0064. That is the decision of the Tribunal against which the appellant appeals.

4. So far as the relevant statutory framework is concerned, Section 1 (1) of the FOIA which creates a right of access to information held by a public authority provides:

   "(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."

   By Section 1 (4) the right of access created by Section 1 (1) applies to the information in question held at the time when the request is received. By Section 1 (2) this right of access is subject to - among other provisions - Section 9 which gives the public authority a right to charge a fee for compliance with the request for information, and Section 12 which exempts a public authority from complying with the request for information where the cost of compliance would exceed the appropriate limit determined in accordance with regulations.

5. Section 2 gives effect to the exemptions under Part II of the FOIA. For present purposes, Section 42 is one such relevant exemption allowing for the withholding of the personal data of third parties subject to conditions.

6. Also relevant to the appeal are Section 10, which stipulates the time within which a public authority must comply with a request, Section 16, which imposes on the public

authority a duty to provide the requester with reasonable assistance, a section to which I will be referring later, and Section 17 which sets out the conditions for a lawful refusal of a request for information.

7. So far as complaints to the Commissioner are concerned, Section 50 provides that -

> "(1) Any person ..... may apply to the commissioner for a decision whether, in any specified respect, a request for information made by a complainant to a public authority has been dealt with in accordance with the requirements of Part I."

8. Appeals to the Tribunal are dealt with by Section 57 (1) of the Act:

> "(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.
>
> (2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice."

9. The 2005 Rules provide at Rule 8 for the Commissioner to submit a reply to an appellant's notice of appeal against the Commissioner's decision notice. Rule 9 allows the Commissioner's reply to include an application for an appeal to be struck out. That occurred in this case. That rule provides as follows:

> "(1) Subject to paragraph (3) below, 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.
>
> (2) An application under this rule may be heard as a preliminary issue or at the beginning of the substantive appeal."

10. The Tribunal's treatment of such an application is governed by Rule 10 which provides:

> "(1) Where, having considered -
>
> (a) the notice of appeal, and
>
> (b) any reply to the notice of appeal,
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> the tribunal is of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith it may, subject to the provisions of this rule, so determine the appeal.
>
> (2) Where the tribunal proposes to determine an appeal under paragraph (1) above, it must first notify the appellant of the proposal.

(3) A notification to the appellant under paragraph (2) above must contain particulars of the appellant's entitlement set out in paragraph (4) below."

Those entitlements in sub-paragraph (4) are as follows:

"(4) An appellant notified in accordance with paragraph (2) above is entitled, within such time as the Tribunal may reasonably allow –

(a) to make written representations, and

(b) to request the Tribunal to hear oral representations against the proposal to determine the appeal under paragraph (1) above.

(5) Where an appellant requests a hearing under paragraph (4) (b) above the Tribunal shall, as soon as practicable and with due regard to the convenience of the appellant, appoint a time and place for a hearing.

(6) The proper officer shall send to the appellant a notice informing him of –

(a) the time and place of any hearing under paragraph (5) above which, unless the appellant otherwise agrees, shall not be earlier than 14 days after the date on which the notice is sent, and

(b) the effect of rule 20 below.

(7) The Tribunal must, as soon as practicable, notify the appellant and any other party if, having given a notice under paragraph (2) above, it ceases to propose to determine the appeal under paragraph (1) above."

11. As to appeals to this court at the relevant time for the purposes of this case -

"Any party to an appeal to the Tribunal under section 57 may appeal from the decision of the Tribunal on a point of law to the appropriate court ..... "

which, in the case of England, is the High Court.

12. There were two preliminary matters raised in this appeal. First, it was said that there was secret, or potential for secret, communication between a party or someone interested in the appeal with the Tribunal and that the provision of such secret communication would be wholly improper, should not take place and would be likely to be prejudicial. It emerged at the hearing that the grounds for this particular allegation arise out of circumstances occurring in another decision of the Tribunal, EA/2009/0046. In that case Mr Innes was the appellant and the Information Commissioner the respondent. The Tribunal in its decision in that case sets out in some detail what occurred in paragraphs 26 to 30. There had in that case been secret

communication. The Tribunal took the view that - whatever the propriety may be of such communication - it had not in fact influenced it in its decision making.

13. Mr Innes submits that it would be appropriate for this court to deal with the matter. With respect, I disagree with that submission. It appears to me that this matter has arisen in relation to another specific appeal in which there was evidence provided indeed by Mr Innes that such communication had occurred. There is no sufficient evidence before me that anything of that kind actually occurred in this case. It would seem to me improper on an appeal of this nature for this court to speculate as to what may or may not have happened in another case where there is no evidence. Therefore it seems to me that it would be outwith the jurisdiction of this court, on appeal, to investigate that particular aspect of the appeal.

14. That said, I can fully understand the concerns of Mr Innes in relation to what he contends is a practice adopted in this area of administration and which he says gives rise to potential risks and potential prejudice. Having that sympathy however does not lead me to seek to determine the particular point in the context of the present proceedings.

15. The second preliminary matter arises out of the application of Rule 10 (2) that I have recited at some length. Mr Innes submits that the tribunal in this case did not comply with Rule 10 (2) and that that failure is more than a mere technicality. He submits that that is the position because the provision for the summary dismissal is a very serious one for the appellant, namely that the Tribunal may very well conclude that there is really no serious case to be answered at all on the appeal and that the Rules are providing a mechanism that will allow the appellant to contend, both in writing or orally if he or she wishes, that the Tribunal must not be fully understanding the issues in the case if it has formed such a provisional view.

16. It is accepted by Mr Hopkins in his very helpful submissions for the Information Commissioner, who is the respondent to this appeal, that there may well not have been an express notification in the terms that are laid down by the Rules. However Mr Hopkins refers me to the initial directions of the deputy chairman on 21 August 2009. Those directions recite that the Tribunal has read the notice of appeal and the Information Commissioner's reply. I will set out the terms of the direction in full:

> "1 Unless either party provides to the tribunal within 7 calender days of the date of this order a written objection, there will be no preliminary hearing and the matter is set down for a final hearing on the papers on Monday 12 October 2009.
>
> 2 The parties are to use their best endeavours to agree no later than Monday 14 September 2009 a timetable to secure the final hearing on 12 October 2009.
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> 3 The Information Commissioner is to have submitted his proposed timetable for this no later than noon on Monday 14 September 2009 and - unless the appellant objects in writing and produces an alternative

timetable by the same date - the Deputy Chairman will confirm those arrangements to all parties on Tuesday 15 September 2009.

4 The final hearing on Monday 12 October 2009 will consider whether the appeal is summarily dismissed under Rule 10 of the 2005 Rules, dealt with on other grounds or allowed in part or wholly."

17. Mr Hopkins submits that paragraph 4 of that direction does refer in terms to the possibility that the appeal might be summarily dismissed under Rule 10 of the 2005 Rules and that the appellant has been given the opportunity to object to that in writing. Attractive though that submission may be, certainly if made in the context of proceedings that will almost inevitably be conducted by professional lawyers, it seems to me that there are some potential difficulties with it. First, paragraph 4 simply says that the summary dismissal under Rule 10 of the 2005 Rules is a possibility. It does not indicate what view the Tribunal may have formed when it gave that direction as to whether or not it seriously had in mind the summary dismissal of this appeal.

18. In my judgment, having regard to the fact that often lay persons will be involved in these appeals, it was incumbent on the tribunal - if it were so minded to dismiss this application summarily at this stage - to have alerted in clear terms the appellant that such a step was to be taken. However the matter does not end there. There is no clear explanation that if the Tribunal is indeed minded to dismiss summarily, it was to give the appellant the specific opportunity to object to that course being taken, and if the appellant wishes so to object the appellant may apply for an oral hearing on that matter.

19. I have therefore concluded that there was a breach of Rule 10 (2) of the procedural rules.

20. That then leaves open the question whether indeed the appeal tribunal's decision should be set aside by reason of that failure. There are many cases in which this court would not, in the exercise of its discretion, set aside the decision of an appeal body such as the body in this case simply because of a procedural failure. However it does seem to me that in this case there was the risk of real prejudice being suffered by the appellant. If I am right and insufficient notice was given, he was deprived of the opportunity of making meaningful representations, both orally and in writing, on the course that the Tribunal was about to take. Given the background I have explained, it seems to me that that is a very important protection for appellants in this kind of case because - and I repeat - it is a very serious matter for them to have appeals dismissed in this particular way. Therefore it is not, in my judgment, a case where this court can simply disregard a procedural failure and say that it really made no difference at all because at the end of the day there was no merit in this appeal.

21. Therefore I would be allowing this appeal on that narrow ground.

22. I have heard very helpful argument in relation to the substantive issues raised by the appellant. I believe that it would be wrong for me to express any views that I may have formed on the merits of such submissions. Therefore I decline to do so. In these

circumstances the appeal decision is set aside and this matter will have to be remitted to the appeal body for reconsideration.

23. Are there any further applications?

24. THE APPELLANT: No.