Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0049 and 0050
Information Commissioner's Ref: FS50081402 / FS50086298

Heard at Procession House, London, EC4
On 3 October 2007

Decision Promulgated
10/10/2007

BEFORE

DEPUTY CHAIRMAN

DAVID MARKS

and

LAY MEMBERS

MICHAEL HAKE

HENRY FITZHUGH

Between

I. C. FITZSIMMONS

Appellant

and

INFORMATION COMMISSIONER

Respondent

No representation: Application heard and disposed of on paper

The Tribunal strikes out both Appeals in the above Appeals number EA/2007/0049 and 0050.

1. This Application is made under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005 as amended by the Information Commissioner ("the Commissioner") with reference to two Notices of Appeal by the Appellant, namely Mr Fitzsimmons. It is, therefore, an application to strike out. The relevant Rule reads as follows, namely:

   "(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 written 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 this substantive appeal.

   (3) This rule does not apply in the case of an appeal under section 48(3) of the 1998 Act."

   This application which is in effect two applications only concerns the operation of sub rule (1) and sub rule (2). It can be seen from Rule 9(2) that the present applications can be heard as a preliminary issue, ie prior to the substantive appeal. That is the case with these applications. The applications have been dealt with by a fully constituted tribunal on the papers alone.

Background

2. The Appellant has made a number of requests under the Freedom of Information Act 2000 ("FOIA"). The BBC is the relevant public authority. The Tribunal feels there is no need to set out the details and contents of the requests which have been made by the Appellant. For present purposes it is sufficient to refer only in brief to two requests which have resulted in the two Notices of Appeal now the subject of these applications.

3. The Notice of Appeal which bears the number EA 2007/0049 was received by the Tribunal on 12 June 2007. In it the Appellant appeals against the Decision Notice of the Commissioner dated 27 February 2007. In that Decision Notice the Commissioner found that the BBC as the relevant public authority had correctly applied the exemption

regarding legal professional privilege set out in section 42 of FOIA. In the circumstances of the request, therefore, the Commissioner found that no steps needed to be taken by the BBC. It is fair, however, to point out that the Decision Notice added that the BBC had failed to state its reasons for claiming that the public interest in maintaining the exemption outweighed the public interest and disclosure pursuant to its obligations as a public authority under section 17(3)(b) of FOIA. However, the Commissioner went on to say that such breach had been superseded by the outcome of the Notice.

4. What is material for present purposes, however, is the content of paragraph 50 of the Decision Notice which is the last page of the Decision Notice and which page bears the signature of Graham Smith, the Deputy Commissioner, and which reads as follows:

> "50. Either party has the right to appeal against this Decision Notice to the Informational Tribunal. Information about the Appeal's process may be obtained from:
>
> Information Tribunal
> Arnhem House
> Support Centre
> PO 6987
> Leicester
> LE1 6ZX"
>
> There then followed the telephone number, fax number and email address of the Information Tribunal. In paragraph 51 which ended the Decision Notice the following passage appeared, namely:
>
> "51. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served."

5. The second Appeal which is the subject of the present applications to strike out is numbered EA/2007/0050. In this case the Decision Notice is dated 19 March 2007. In the Tribunal's view it is enough to describe the relevant content of the Decision Notice as incorporating a determination by the Commissioner that the Appellant's requests which were in issue were vexatious and in the words of the Notice "obsessive". Consequently, the Commissioner's decision was that the BBC as the public authority

dealt with the request in accordance with the Act and in particular in accordance with section 14 of FOIA.

6. The Tribunal notes at this point that the copy of the Decision Notice appended in Appeal number EA/2007/0050 to the Appellant's Notice of Appeal did not have a final page containing either the signature of the relevant Deputy Commissioner or other authorised person on behalf of the Commissioner's Office or more importantly the details concerning the terms and conditions of the Appeal process as was referred to in connection with Appeal EA/2007/0049. The Tribunal, however, does not find that any such omission is necessarily material given the fact that the relevant details concerning the appeal process was in the other Notice of Appeal as set out in the preceding paragraph. Indeed all the relevant details were also reflected in the correspondence which the Appellant received from the Commissioner.

7. The Decision Notice in Appeal EA/2007/0049 was sent according to the Commissioner on 22 February 2007. On 23 March 2007 the Commissioner sent a further letter to the Appellant stating that the Decision Notice in question "has been returned to the Information Commissioner's office" after not being collected from the Royal Mail. The letter went on to say: "Please find enclosed the Notice and the original covering letter." Reference to non collection reflected the fact that the Decision Notices in both Appeals had been sent by special or signed-for delivery, ie on the basis that a signature be provided by the Appellant as recipient. The original covering letter referred to of 22 February 2007 which was clearly seen by the Appellant referred to his right to appeal to the Tribunal as indicated above.

8. In the case of Appeal number EA/2007/0050 the letter of 19 March 2007 by the Information Commissioner enclosing the relevant Decision Notice similarly referred to the Appellant's right to appeal. That letter was also sent by special or signed-for delivery and was returned. The Decision Notice and covering letter was resent under cover of a letter dated 4 May 2007 which in fact referred to the two Decision Notices which are the subject of the two applications before the Tribunal. The letter of 4 May confirmed that all the documents had been sent by special delivery but had been returned being uncollected and unsigned for. The Tribunal notes that the copy of the 4 May letter appended to the Appellant's Notice of Appeal in Appeal EA/2007/0050 bears what can only be viewed as his own handwritten comment, namely "Rec'd 12 May".

Indeed the same handwritten comment appears on the Commissioner's letter of 19 March 2007 which re-enclosed the Decision Notice forming the subject matter in Appeal number EA/2007/0049.

9. The Appellant responded to the 4 May letter by a letter of 17 May 2007. In it he stated that:

   (1) he had received the 4 May letter on 12 May 2007;

   (2) he had received "no notification from the Royal Mail that they had tried to deliver any recorded delivery items";

   (3) he "could only conclude that you never sent them in the first place" adding "you must account for your duplicity in another court";

   (4) "as far as I am concerned the true date for their issue is 12 May, the date on which I received them"; and

   (5) he requested an "internal review" of both Notices.

10. In fairness the Tribunal appreciates the Appellant may have misunderstood part of the 4 May letter which is about other matters not relating to either Decision Notices and where an internal review was possible. In any event the Commissioner replied on 29 May 2007 stating that the Commissioner did not carry out internal reviews of Decision Notices and clearly pointed out the need to appeal should the Appellant disagree with either or both decision notices.

<u>The applicable rule</u>

11. Rule 5 of the Enforcement Appeals Rules states clearly that:

   "(1) Subject to paragraph (2) below, a notice of appeal must be served on the Tribunal within 28 days of the date on which the notice relating to the disputed decision was served or given to the appellant.

   (2) The Tribunal may accept that a notice of appeal served after the expiry of the period permitted by paragraph (1) above if it is of the opinion that, by reason of special circumstances, it is just and right to do so.

(3) A notice of appeal shall, if sent by post in accordance with rule 31(2) below, be treated as having been served on the date on which it is received or dispatched by the Post Office."

12. For the sake of completeness Rule 31(2) provides (without reciting the same in full) that a document or other notice required to be served or sent to any person and that is sent by post in a registered letter or by the recorded delivery service or is delivered by hand must be sent or delivered, in the case of an appellant, to him or his representative at the appropriate address for service.

13. There can be no doubt, therefore, that a Notice of Appeal must be served on the Tribunal within 28 days of the date on which in effect it is received by the Post Office for dispatch. Equally, the Tribunal may extend the time for appealing in respect of a Notice of Appeal served after expiry of the period if there exist "special circumstances" and by reason thereof "it is just and right to do so". On any view there can be no exhaustive list of those occasions or sets of facts which would constitute special circumstances, let alone the situations in which it would be just and right to allow such special circumstances to prevail: each case must, of course, be treated on its merits.

The Decision

14. The basic facts set out above strongly suggest that the Decision Notices were sent by special delivery in the case of Appeal EA/2007/0049 on 22 February 2007 and in the case of Appeal EA/2007/0050 on 19 March 2007. It would follow, therefore, that the 28 days period would run from those dates and on that approach 28 days would have expired on 22 March 07 and 16 April 2007 respectively. By those dates (or close thereto) the Decision Notices would have been or had in fact been returned, the Decision Notice in Appeal EA/2007/0049 having been returned by 23 March and that in Appeal EA/2007/0050 being returned on 18 April.

15. The Tribunal finds that nothing said by the Appellant with regard to the initial dispatch of both Decision Notices attracts any special circumstances and therefore it follows that it cannot be just and right to extend the time period. All the Appellant has ever claimed is that he had not received "notification" from the Royal Mail of any attempt to deliver the items. The Tribunal must assume that the method of service employed by the Commissioner operated in the normal way in both cases and that the Appellant did not

collect and/or sign for receipt of both Decision Notices on the basis that the he was either unwilling or unable to do so. In both of those cases the Tribunal would expect persons in the Appellant's position to have made appropriate arrangements for receipt or redirection of the items which have been sent. The Tribunal notes that the same protestation is made by the Appellant in not just one but in both cases and in neither case does the Appellant provide any reasons as to why he could not or chose not to collect the items, eg by indicating that he was absent on vacation or ill or some other similar reason. The Tribunal notes in this connection that over the summer period of 2007 he specifically notified the Tribunal in writing that he would be away on vacation from 30 July until 8 September 2007.

16. It follows that on this ground alone, ie failure to comply with the 28 day period running from the date of initial dispatch by special delivery of both Decision Notices the Appellant was out of time by filing both his Notices of Appeal in Appeals EA/2007/0049 and EA/2007/0050 respectively on 10 June 2007 which was a Sunday and, therefore, in practical terms he must be taken to have served his Notices of Appeal on the following day, 11 June 2007. It also follows from what is said above that the Tribunal finds no special circumstances which assist the Appellant with regard to that finding.

17. However, if the Tribunal were to take a generous view of the Appellant's contentions he nonetheless remained out of time on the basis that at the very latest the 4 May letter from the Commissioner was received by the Post Office for dispatch on 8 May and therefore the 28 day period would have concluded on 5 June 2007. The Appellant maintains in his letter of 17 May that he did not receive the 4 May letter until 12 May but the Rules make it explicitly clear that the date of receipt is irrelevant. Even if the Tribunal accepts that he "served" his Notices of Appeal on 10 June and particularly if the Tribunal accepts, contrary to the Rules, that the 28 days run, as the Appellant maintains from 12 May, in the context of the Appellant's own time frame, he remains out of time because dispatch of his Notices of Appeal on 9 June would also be outside the 28 day period running from 12 May.

18. Insofar as there could be said to be any special circumstances relating to the facts as characterised in the preceding paragraph, again the Tribunal finds great difficulty in identifying any such circumstances in the absence of specific reasons advanced by the Appellant himself. No such reasons have ever been advanced.

19. It should be noted that in the period leading up to the present consideration, albeit on the papers by the Tribunal, of the Commissioner's applications to strike out both Appeals, the Appellant has been reminded on more than one occasion by letter sent by the Tribunal that he had the opportunity to object not only to the consideration of these applications on a paper basis by the Tribunal but also to state his reasons relating to its objections. In particular the Appellant was informed of this by letter dated 24 July 2007 from the Tribunal's offices. Previously, in the letter sent by him to the Tribunal dated 20 July he had specifically asked that correspondence be sent to him "by surface mail". No response was ever received by the Tribunal to its own subsequent letter of 24 July and as noted above the Appellant had previously stated he would return from his holiday on or by 8 September. The Tribunal convened to consider these applications on 3 October 2007, some three clear weeks after his stated date of return.

20. The above reasons are sufficient in themselves in the Tribunal's own view to grant both applications in full and to strike out both Notices of Appeal under rule 9 at the instance of the Commissioner. The Tribunal stresses that the only ground for striking out is failure to abide by the relevant time limits on the primary bases set out above, namely that on a strict analysis the filing of the Notice of Appeal in one case was at the end of a period of about 48 days beyond of the stated period of about 28 days and in the other case at the end of a period of 28 days again beyond the stated time of 28 days. The Tribunal stresses that it is only on the Appellant's own case, which is rejected by the Tribunal, that he could be said to have exceeded the stated period by only 2 or 3 days.

21. The Tribunal is conscious that the Appellant may feel that no proper or any consideration has been afforded by the Tribunal to the merits of his Appeals. However, Rule 9(1) as quoted above makes it quite clear that in considering the present type of application the only question is whether the Commissioner has properly come to the opinion that an appeal "does not lie too, or cannot be entertained by, the Tribunal". In effect this is and remains a purely procedural issue.

22. Finally, the Tribunal invites the Commissioner to consider whether the latest date for appeal or response should be stated in terms and/or otherwise included in the body of the Decision Notice at an appropriate point. Many people who otherwise might engage in the appeal process under FOIA and the relevant Rules may well not understand the ramifications of the rules relating to service and therefore in the Tribunal's view it might

be preferable to state in clear terms the date or dates by which an appeal should be lodged.

Signed

Deputy Chairman

Date 10/10/2007