



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

Appeal Reference: EA/2020/0137

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50890713

Dated: 03 March 2020

Date of Hearing: 08 December 2020

**Before
JUDGE ROBERT GOOD**

Between

ANGELA POWELL

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Subject Matter:

Freedom of Information Act 2000 (FOIA),

S 40(2) (Personal Information)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

Factual background

1. The appellant, Ms Angela Powell has concerns about whether the Equality and Human Rights Commission (EHRC) implemented equal pay. More particularly, she believes that while she was working from the Birmingham Office, she did not receive equal pay or equal pay for equal value.
2. Ms Powell, who had been employed by the EHRC for about 9 years was made redundant, along with 5 colleagues in 2017. With the help of her union, she challenged the decision in the Employment Tribunal and these proceedings were settled on the advice of the union solicitors'.
3. Ms Powell believes that her claim to the Employment Tribunal was for both Unfair dismissal and Equal Pay. However, she does not recall going through any questionnaire procedure to identify a comparator for this process. In any event, the claim for Equal Pay was either settled or is now out of time. Ms Powell regrets agreeing to the settlement because what she really wanted was re-instatement into a role within the EHRC and she believes she was illegally underpaid for most, if not all, of her employment.
4. Ms Powell told the tribunal that she feels she was negligently advised to settle her claim and she wishes to explore the possibility of an action

against the union solicitor because of the advice she was given to settle. She views the request for information under FOIA as the first step in establishing such a claim. She believes that, if she was given the information she seeks, it would confirm that she had been illegally underpaid and such evidence could form the basis for a claim against her solicitor.

5. Ms Powell requested, under FOIA, from the EHRC the following information:

“Please find attached a table which requests details from the Birmingham EHRC office, Victoria Square Houses, namely by, employees in post by grade/name, job title and salary as at 9th February 2017.”

6. The EHRC responded refusing the request on the grounds that they viewed the information as personal information and relied on the exemption in S40(2) FOIA. However, it did provide some information. This was the number of employees at each pay grade and the details of the range of each pay grade.

7. Ms Powell then made an additional request for information:

“Can you apply EHRC’s pay gap method to the data and provide me with the results”.

This further request was made at the same time as she applied for an internal review of the first request. The request was also refused, although not within the time limits required in the legislation, citing the same personal information exemption.

8. Ms Powell made a complaint to the Information Commissioner (ICO), whose initial view was that the requested information was personal data and there was no lawful basis for providing it. This initial view did not

change following investigation and the ICO issued the decision on 3 March 2020 in the terms she initially set out.

9. Ms Powell appealed to this tribunal on 28 May 2020 and provided extensive grounds of appeal. These accept (para 63) that the information requested is personal data. The appeal sets out the background and argues that, despite the information being personal information, providing it would be lawful because “processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party,...(Article 6(f) General Data Protection Regulation 2016) (GDPR). This was the Article which the ICO considered was most applicable to Ms Powell’s request.
10. The ICO did not consider it was necessary to see the withheld information. Accordingly, there is no closed bundle. The ICO also stated that it would rely on written submissions and would not be attending the hearing. The EHRC was not joined as the Second Respondent.

The Hearing

11. Ms Powell requested a hearing so she could put forward her case in person. Due to the restrictions as a result of Covid-19, there have been no face to face hearings. This hearing took place via the CVP video, with the assistance of a clerk from the GRC office. The hearing was recorded.
12. Ms Powell had indicated that she would benefit from the support of a friend, Ms Timlin. However, due to restrictions on movement, her support was not available. The tribunal took a 15 minute break at 12.30pm and a break for lunch at 1.30pm. The hearing finished at 3.00pm.
13. The appeal papers run to 191 pages.

Findings, Reasons and Conclusions

14. Ms Powell strongly believes that she has been illegally underpaid for several years and wants the requested information because she believes the information will evidence this. She has used the FOIA because this is a possible route by which she could obtain this evidence. In her appeal she comments that her intention was to use the data “for private and personal means in relation to the unfair damage to her reputation.”
15. The tribunal accepts the findings of the ICO that the information requested is personal information. Ms Powell in her appeal and further submissions also accepts that this is the case. The first paragraph of her appeal document reads “I would like to appeal on the grounds of legitimate and necessary interests”. Further on in the same documents she specifically accepts that the information sought is personal data.
16. However, during the hearing she expressed some reservations as to whether her second request in May was a request for personal information. That request is for the EHRC apply the gender pay gap method to the data. She referred to her further submission of 20 August 2019 which attached the EHRC report ‘Our gender pay gap report’ of 31 March 2019. This is a published report which identified a mean gender pay gap of -7.5% in 2016/17 and a median gender pay gap of -3.0% in the same year.
17. Both the EHRC and the ICO took a different view. This is because, if the gender pay gap method was applied to the Birmingham office, which had only 8 people, it would be possible to identify the people involved. The Birmingham office had 3 women including Ms Powell and 5 men. It follows that, in this example, the median salary for men and women would

be the salary of an actual male and female employee. In contrast, Ms Powell estimated that the total workforce of the EHRC in 2017 was about 160. The tribunal accepts that the process of identifying the median and mean pay for the 8 employees at the Birmingham Office would allow for the identification of personal data. The process of establishing this is set out in the ICO's reasons for decision paras 31-35, which the tribunal accepts.

18. It follows that the tribunal find the exemption of S.40(2) applies to the request. The Data Protection Act requires that personal data can only be disclosed if it is lawful, fair and transparent to do so. In order for disclosure to be lawful, it must come within Article 6 of the GDPR. The tribunal agrees with the ICO that the applicable part of Article 6 is Article 6(1)(f). This states "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".
19. Ms Powell accepts that this is the correct approach as is clear from her grounds of appeal. In the hearing she did not suggest that the tribunal should consider any other paragraph than Article 6(1)(f). Her argument is that the information should be disclosed because the test of necessity is met.
20. Article 6(1)(f) requires two initial considerations. First, does the request arise from a legitimate interest? Second, is disclosure necessary to meet this legitimate interest?
21. The ICO accept that Ms Powell is pursuing a legitimate interest. Ms Powell believes that there was a gender pay difference at the Birmingham office. The data published by the EHRC for the whole organisation supports Ms Powell's view. As the ICO puts it, there is a "legitimate interest in ensuring

that the body responsible for policing the law is itself an exemplar of best practice". The tribunal accepts that Ms Powell has a legitimate interest in requesting the information.

22. Ms Powell told the tribunal that she just wanted the facts. She started work with the EHRC in 2009 and was appointed at the bottom of the level 3 scale and never progressed. She believes that those transferred from the legacy commissions (EOC, CRE, DRC) were transferred at the top of this scale. She told the tribunal that she regarded her request as necessary. She would have preferred to have her request met privately and she tried to resolve her grievance while in post. Ms Powell gave an example of the necessity for this disclosure by the fact that the EHRC can investigate and criticise the BBC but will not disclose its own shortcomings. In this respect, the EHRC is a special case because of its unique role of policing equality in other organisations.

23. Under current Gender Pay Gap Regulations, the EHRC is not obliged to publish gender pay information in respect of its workforce because it has under 250 employees. The organisation decided, because of its role, that it should publish this data and does so. The issue for the tribunal is whether it is necessary that the earnings details in respect of the 8 Birmingham office employees should be disclosed to the world at large. Ms Powell wants it to pursue a personal claim. The tribunal agrees with the ICO that the disclosure of this personal information is not necessary to pursue the legitimate interest of knowing how the EHRC is performing in regard to gender pay gaps. This interest is covered by the publication of figures in respect of the whole organisation. Because publication of the details from Birmingham office is not necessary, the tribunal agree with the ICO that the third step, a balancing exercise, does not arise. Such an exercise would only arise if publication was found to be necessary under Article 6(1)(f).

24. Ms Powell also submitted that the EHRC had failed in its duty to provide advice and assistance because the only advice it had given was to refer her to the website where the published data is set out. Ms Powell submitted that the EHRC should have given her more assistance. The ICO took the view that this was sufficient advice and assistance because The EHRC's view was that the information requested was personal information and that disclosure would be unlawful so the advice and assistance that could be given was limited. The usual types of assistance given is about limiting or re-framing the request so that it can be legally complied with. In this case, Ms Powell wants specific information about her colleagues pay in comparison to her own. This request was refused but references was made to the location of more general gender pay information for the organisation. This advice and assistance was, in the circumstances, reasonable.

25. Having considered the appeal papers and the submissions from Ms Powell, the tribunal upholds the ICO's decision and dismisses the appeal.

Signed

R Good

Judge of the First-tier Tribunal

Date: 15 December 2020

Date Promulgated: 16 December 2020