



Case Reference: EJ/2021/0014

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

Heard remotely by video conference

**Heard on: 17 June 2022
Decision given on: 23 June 2022**

Before

**TRIBUNAL JUDGE OLIVER
TRIBUNAL MEMBER ANNE CHAFER
TRIBUNAL MEMBER ROSALIND TATAM**

Between

DAVID JONES

Appellant

and

**(1) BISHOP'S CASTLE TOWN COUNCIL
(2) INFORMATION COMMISSIONER**

Respondents

Representation:

For the Applicant: In person

For the First Respondent: Ms A Khan, counsel

For the Second Respondent: Did not attend

Decision: The applicant's application to certify an offence to the Upper Tribunal is REFUSED.

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

Background

2. This application relates to the Tribunal’s decision dated 19 September 2021. The issue in this case was whether, on the balance of probabilities, Bishops Castle Town Council (the “Council”) held further information within the scope of the applicant’s request of 12 July 2019 under the EIR (“EIR”). The requested information relates to the felling of a birch tree on allotments owned by the Council.

3. The main hearing on 21 June 2021 was attended by the applicant only. The Tribunal decided it would not be possible to reach a fair decision without joining the Council as a party to the proceedings and asking them to answer a number of questions about points raised by the appellant. The Council replied to the Tribunal’s questions, and the applicant provided a response. The Tribunal sent further questions as the Council’s response had been unclear, and the applicant sent a further reply on 9 September. The Tribunal then reached its decision, and upheld the appeal in part on the basis that, on the balance of probabilities, further information was held.

4. The Substituted Decision Notice was as follows:

On the balance of probabilities, Bishop’s Castle Town Council did hold further information within the scope of the appellant’s request under the Environmental Information Regulations 2004 which it has failed to disclose. It is to conduct a further search and disclose all additional information within the scope of the appellant’s request (whether in emails, records of telephone conversations or other relevant records), **including but not limited to:**

- (a) Emails sent or received by the appellant’s wife.
- (b) Emails or records of other communications with the Tree Warden.
- (c) Emails to or from Councillor Carroll copied to other members of the Council, the Town Clerk or the Assistant Town Clerk.

5. The applicant complained to the Tribunal on 6 October 2021 that the Council has not complied with the Substituted Decision Notice. He was advised to consider making an application under Rule 7A. This application was accepted, and Case Management Directions were made on 21 October 2021. The Council provided a response to the Tribunal on 30 November 2021. There was a Case Management Hearing on 14 January 2022, which set out the issues for consideration by the Tribunal on this application.

Applicable law

6. Where the First-Tier Tribunal (“FTT”) has substituted a decision notice for that of the Commissioner, the FTT is responsible for enforcing that substituted decision. This was decided by the Upper Tribunal in ***Information Commissioner v Moss and the Royal Borough of Kingston upon Thames*** [2020] UKUT 174 (AAC) (“**Moss**”).

7. The relevant law is contained in the EIR and in the Freedom of Information Act 2000 (“FOIA”). Regulation 18(2)(b) EIR applies the appeal provisions of FOIA to decisions about environmental information. This includes enforcement by the Tribunal of its own decisions. The relevant provisions are in section 61 of FOIA:

“(1) *Tribunal Procedure Rules may make provision for regulating the exercise of rights of appeal conferred by sections 57(1) and (2) and 60(1) and (4).*

.....

- (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.*
- (5) *Where an offence is certified under subsection (4), the Upper Tribunal may –*
 - (a) *inquire into the matter, and*
 - (b) *deal with the person charged with the offence in any manner in which it could deal with the person if the offence had been committed in relation to the Upper Tribunal.”*

8. As confirmed in **Moss**, the FTT does not have power to actually commit for contempt, but does have the power under these provisions to certify an offence to the Upper Tribunal. Under section 61(4) FOIA, the FTT has a discretion to certify an offence to the Upper Tribunal only where it is satisfied that the requirements of both limbs of section 61(3) have been met i.e. that “a person” has done something or failed to do something in relation to proceedings before the Tribunal in appeals brought pursuant to sections 57 or 60 of FOIA and, if the proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court.

9. There is no mention in either section 61(3) or section 61(4) of FOIA, or indeed elsewhere in section 61, as to the required standard of proof by which the allegation of contempt must be judged. In the ordinary course, given the seriousness of contempt proceedings, the standard of proof by which the contempt must be demonstrated is the criminal standard of beyond reasonable doubt: see for example, Arlidge, Eady & Smith on Contempt, 5th Edition, 12-50 onwards and **SC Mezhdunarodniy Promyshelnniy v Pugachev** [2016] EWHC 92, at [41].

10. If such an offence is proven to the required standard, the Tribunal must then consider whether, in all the circumstances of the case, discretion should be exercised so as to certify the offence to the Upper Tribunal.

11. In **Navigator Equities Limited v Deripaska** [2021] EWCA Civ 1799, the Court of Appeal set out a helpful summary of general propositions of law in relation to contempt, which it considered to be “well-established”:

- (i) The bringing of a committal application is an appropriate and legitimate means, not only of seeking enforcement of an order or undertaking, but also (or alternatively) of drawing to the court's attention a serious (rather than purely technical) contempt. Thus, a committal application can properly be brought in respect of past (and irremediable) breaches.
- (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.
- (iii) Breach of an undertaking given to the court will be a contempt: an undertaking to the court represents a solemn commitment to the court and may be enforced by an order for

committal. Breach of a court undertaking is always serious, because it undermines the administration of justice.

- (iv) The meaning and effect of an undertaking are to be construed strictly, as with an injunction. It is appropriate to have regard to the background available to both parties at the time of the undertaking when construing its terms. There is a need to pay regard to the mischief sought to be prevented by the order or undertaking.
- (v) It is generally no defence that the order disobeyed (or the undertaking breached) should not have been made or accepted.
- (vi) Orders and undertakings must be complied with even if compliance is burdensome, inconvenient and expensive. If there is any obstacle to compliance, the proper course is to apply to have the order or undertaking set aside or varied.
- (vii) 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.
- (viii) Contempt proceedings are not intended as a means of securing civil compensation.
- (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).

12. In relation to construction of Court Orders and findings of contempt in relation to breach of an Order, the terms in which an Order was made are to be restrictively construed (see ***Federal Bank of the Middle East v Hadkinson*** [2000] 1 WLR 1695). The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order (***Hadkinson***) and the reasons given by the Court for making the Order at the time that it was made (***Sans Souci Limited v VRL Services Limited*** [2013] UKPC 6).

Issues and evidence

13. The issues were considered at a Case Management hearing conducted by Tribunal Judge Lynn Griffin on 14 January 2022, and are as follows:

A. Is Bishops Castle Town Council 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?

The Tribunal is likely to be assisted in the determination of the aforementioned issues by submissions on the following matters:

- a) Whether the terms of the Substituted Decision Notice in EA/2021/0004 were sufficiently clear and unambiguous so as to be capable of founding a finding of contempt for breach thereof;
- b) If so, what were the obligations imposed on the Bishops Castle Town Council by the Substituted Decision Notice?
- c) Whether the Bishops Castle Town Council's actions by way of email(s) in response were sufficient to comply with the decision of the Tribunal in EA/2021/0004?

B. If the Bishops Castle Town Council 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?

14. The specific issues that the applicant complains about are as follows:

- a. There are emails that the Council has both sent to and received from his wife which have not been disclosed, including in particular an email referred to in another email of 17 April 2019.
- b. There are missing emails or records of other communications with the Tree Warden, in particular those sent prior to an email from the Assistant Town Clerk of 28 May 2019.
- c. What actions will follow from the Council's failure to disclose the required information.

The applicant no longer has an issue about emails to or from Councillor Carroll, which was the other specific item in the Substituted Decision Notice.

15. We had a bundle of documents, which included additional disclosed emails, written submissions and a skeleton argument from the applicant, and a witness statement from Mr Gwilym Rippon (town clerk to the Council). We heard evidence from Mr Rippon. We had oral submissions from the appellant and from Ms Khan on behalf of the Council.

Discussion and Conclusions

16. ***Are the terms of the Substituted Decision Notice sufficiently clear and unambiguous so as to be capable of founding a finding of contempt for breach?*** This is important, as a contempt should only be found if the requirements were sufficiently clear that a party accused of breach could understand what was required of it. The Substituted Decision Notice needs to be clear and unambiguous as to what the Council was required to do, and by when.

17. We find that the actions the Council was required to take were sufficiently clear and unambiguous, taking into account the context and the wording of the Substituted Decision Notice. It states that the Council is to conduct a further search, and disclose all additional information. This is clear wording, and its meaning is also clear from the context of the decision itself which explains in what way the Tribunal believed the original searches were unsatisfactory and what the Council needs to do to rectify that. Although there is no penal notice which warns the Council about the consequences of non-compliance, this is not a requirement for a finding of contempt (although it is relevant to the Tribunal's discretion).

18. However, the Substituted Decision Notice does not give any time limit by which the Council was to comply with its terms. It would be usual for the FTT to give a time limit for compliance, often either 35 or 42 days from the date on which the decision is sent to the parties. We consider this to be a fundamental issue. If there is no time limit for compliance, the terms of the Substituted Decision Notice are not sufficiently clear and unambiguous. The Council was not told the deadline by which it was ordered to carry out a new search and disclose any additional information. Without a deadline, it is also not possible to say with certainty when (if at all) the Council has failed to comply with the Substituted Decision Notice.

19. We therefore find that the terms of the Substituted Decision Notice are not sufficiently clear and unambiguous so as to be capable of founding a finding of contempt for breach. This is the first hurdle in an application for certification for contempt. Our finding means that it is not necessary to decide the remaining issues and **the application fails**.

20. In order to do justice to the arguments and evidence from the parties, we have also considered whether the Council's actions were sufficient to comply with the decision of the Tribunal in any event. The applicant's position is that the Council has delayed throughout this matter. He accepts that the Council has now disclosed the emails he believed were missing, namely an email (or draft email) to his wife dated 31 March 2019, and a further email from the Tree Warden dated 22 May 2019 (as set out in paragraph 15 above). These were disclosed in January 2022, after these contempt proceedings had been started and in response to the case management hearing. He says that these should have been disclosed in response to his request in August 2019, he has been asking for them since then, he sees no reason why the Council's original searches would not have brought these to light, and he disagrees with the Council's explanations relating to a change of server/domain address.

21. Mr Rippon gave evidence that the Council performed a further electronic search after receiving the Substituted Decision Notice. They also requested the Councillors and Tree Warden to provide copies of any relevant emails. Mr Rippon said that they had performed searches a number of times, using different parameters, and this had produced different results which needed to be compared with each other. He was not able to explain why searches using the same keywords would produce different results, or why these specific emails had been missed. The emails provided in January 2022 were searched for after the case management hearing, when the Tribunal asked the Council to re-examine what had been sent to the applicant. He denied that the Council had been negligent or belligerent, and said that it had been open and tried to send what they could to the applicant.

22. We do accept Mr Rippon's evidence that further searches were carried out, and these resulted in additional information being disclosed to the applicant. In particular, the specific emails that the applicant had been asking for and he thought were missing from the original disclosure, as listed in the Substituted Decision Notice. Mr Rippon also made the point that the new emails disclosed contained only anodyne information, and there would have been no reason to intentionally withhold them. It appears to us that the Council did what it was required to do by the Substituted Decision Notice. The Council carried out further searches and disclosed what it had found. This took some time, and the two key items the applicant was asking for were not found until part-way through the contempt proceedings. However, in the absence of any deadline for compliance in the Substituted Decision Notice, the Council's actions have been sufficient to comply with the Tribunal's decision. Even if had we found the Substituted Decision Notice to be sufficiently clear and unambiguous, this means the application to certify for contempt of court would fail.

23. The applicant makes the point that the most recently disclosed emails should have been sent back in August 2019, and says there was an ongoing deliberate attempt to avoid sending certain emails to him. He still believes there may be more information that has not been disclosed, as the information he has identified as missing was that he could infer existed from other information. He says that the Council stated a number of times that they had provided everything, but more kept being disclosed later. He also says that, if the subsequent disclosures had been provided in the first place, the last 3 years could have been avoided.

24. We are also concerned that the Council has taken so long to complete adequate searches and provide this information to the appellant. We have had no satisfactory explanation of why these emails were missed in earlier searches. The evidence given at the hearing indicated that the Council has limited record-keeping and does not appear to have a process for recording and storing notes of telephone conversations, which gives the impression that email trails are incomplete when in fact verbal discussions may have taken place. We appreciate that searching for information can be burdensome for a small public authority. However, we hope that another similar request would be dealt with more thoroughly by the Council in the first place. The applicant has been quite clear as to which emails he thought were missing and why, and it appears the Council did not engage with this properly until during these contempt proceedings.

25. The Tribunal's powers are limited to issuing a Substituted Decision Notice and certifying an offence to the Upper Tribunal if the requirements in that notice are not complied with. For the reasons given above, we do not certify a contempt to the Upper Tribunal in this case. We dismiss the application.

Signed Judge Hazel Oliver

Date: 23 June 2022