IN THE FIRST-TIER TRIBUNAL **EA/2011/0060**
(GENERAL REGULATORY CHAMBER)
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No:
FS50304283
Dated: 7th. February, 2011

Appellant:	**GARY DUKE**
Respondent:	**THE INFORMATION COMMISSIONER ("THE ICO")**
Second Respondent:	**THE UNIVERSITY OF SALFORD ("SU")**

Before

David Farrer Q.C.
Judge

and

Paul Taylor
and
Jean Nelson

Tribunal Members

Date of Decision:	**9th. May, 2014**
Decision promulgated:	**21st. May, 2014**

Representation: Dr. Duke appeared with his McKenzie Friend, Mr. Eric Longley

Neither the ICO nor the University of Salford appeared.

Each submitted a written response and further argument.

Subject matter: Vexatious Requests. FOIA S.14

Reported Cases: ICO v Devon C.C. and Dransfield [2012] UKUT 440 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 9th. day of May, 2014

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

1 Dr. Duke appeals against a Decision Notice of the ICO upholding SU`s refusal to respond to a series of requests for information made between 2nd and 14th. November, 2009 on the ground that it was not obliged to comply with any of them because they were vexatious within FOIA s.14(1).

2. This appeal was dismissed by a First – Tier Tribunal on 26th. July, 2011 without an oral hearing. The Upper Tribunal granted permission to appeal and allowed the appeal on the sole ground that Dr. Duke was entitled to an oral hearing and had not consented to a determination based on written submissions. It remitted the appeal for oral hearing before a differently constituted panel.

The Background

3. Dr. Duke graduated at SU in 2002, studied thereafter for a Master`s degree and obtained a PhD in 2010. From 2007 until 2010 he was a part – time lecturer in International Studies. Throughout that time he was politically active, both in the university and the local community. In 2008 he began to serve as a staff representative in UCU (the University and College Union) and was elected union branch officer in April, 2009.

4. At about that time, faced with a serious reduction in funding from central government, SU planned to cut significantly the number of teaching posts in certain departments. UCU vigorously opposed job losses and argued that substantial economies could be made elsewhere, including the costs of maintaining the style and accommodation of the Vice – Chancellor and of a range of other expenses in respect of foreign travel and management functions. Clearly,

the issue provoked strong feelings on both sides. Dr. Duke evidently took a prominent role in promoting opposition to the proposed job cuts, as was natural, given his trades union role.

5. The merits of these disputes are no concern of the Tribunal. We record the facts of what clearly became very strained relations and of Dr. Duke`s trades union position as matters which could be relevant to the assessment of the requests with which we are concerned.

6. According to Dr. Duke, members of the academic staff complained of pressure, amounting to bullying and harassment, to accept voluntary severance. This was, he asserted, particularly prevalent in the SU Business School, which shared premises with the School of Languages where he worked. Linked to such concerns were claims that some staff, notably family members of certain academic staff, were favoured in recruitment and promotion. In particular, a female student, and part – time staff member, said to have a close personal relationship with the Head of School, was alleged by some to exercise an unjustifiable influence in such matters and to have been appointed to a full – time post for no sufficient reason. As branch secretary, Dr. Duke became involved in these matters.

7. From January to April, 2009 he published satirical leaflets entitled The Vice – Consul`s newsletters, which made serious accusations of improper conduct against the Head of the Business School, including references to his relations with the woman referred to in paragraph 6 and consequent advantages and immunities from disciplinary sanction that she was said to have enjoyed. This led to his suspension from his part – time staff position and to his dismissal in about October, 2009, following disciplinary proceedings.

8. Dr. Duke appealed to an Employment Tribunal (“The ET”).

9. In the first two weeks of November, 2009, he made to SU the series of requests for information, which form the subject matter of this appeal. At that time his appeal to the Employment Tribunal was pending and he was evidently preparing his case.

10. Shortly after that series of requests other similar requests from other parties, some using pseudonyms, were sent to SU from the same online platform ("WDTK" - "What do they know"). Some preceded and others apparently followed a blog, "The rat catchers of the sewers", issued by Dr. Duke, as he now acknowledges, encouraging FOIA requests on the matters summarised above. An issue for the Tribunal is whether these requests were linked to his own requests so that they should be taken into account in assessing the nature of the latter. The number and nature of all these requests, whether made by Dr. Duke or others, are dealt with at paragraphs 17 - 22 below.

11. A significant proportion of the evidence adduced by Dr. Duke and of the submissions made on his behalf were of no assistance to the Tribunal. They related to matters outside its remit or function.

12. In such a case as this it is most important that the Tribunal focus on its quite limited function and on what is relevant to the performance of that function. As indicated earlier, it is concerned with the unhappy history of Dr. Duke`s relationship with SU only in so far as that sheds light on his motivation in making the requests, the characterisation of which in the context of s.14 is its sole remit. The Tribunal is not concerned with the merits of the embittered disputes which are so clearly evidenced in the documents. Dr. Duke`s rights to conduct a campaign against job losses or, subject to the law of defamation and modern statutory restraints, any perceived impropriety in the conduct of SU`s affairs or to criticise the Head`s approach to university education, are not open to question. Nor is his right to perform fearlessly and vigorously his duties as a trades union officer. Whether he was fairly treated by SU as regards disclosure during preparation for employment and defamation litigation was a matter for the judges

concerned, not for us. The reasons for SU`s response to the requests are not material. On appeal, it is the Tribunal`s view, not the view of SU, that counts.

13. Equally, the decision of the Upper Tribunal to allow his appeal is relevant only in so far as it provides the reason for the rehearing. It is ironical that no oral evidence was given by any party at that rehearing, considering the ground on which the appeal succeeded. We indicated that we should not act on the witness statement of Matthew Stephenson nor his narrative account in correspondence with the ICO, given the decision of SU not to make him available for cross examination. Dr. Duke`s decision not to give evidence meant that he also was immune to questioning by the Tribunal so that any questions had to be answered through Mr. Longley and those answers had, strictly speaking, no evidential value.

14. Furthermore, the defamation proceedings and the findings of Eady J. have no bearing on this appeal.

15. The nature of the complaints against Reduce considered by the ET in determining his claim for unfair dismissal have some relevance to our decision but its findings and the outcome have none. Where an assessment of Dr. Duke`s conduct is required, the Tribunal forms its own view. It does not simply adopt that of judges in other fora hearing different evidence.

16. The relevance of the nature of the complaints derives from Dr. Duke`s statement that his information requests arose from the need to obtain such information to sustain his case before the ET.

17. As indicated at the start of the hearing, no member of the Tribunal read the original decision dismissing this appeal since each wished to approach the hearing without preconceptions.

The Requests

18. Dr. Duke submitted two requests on 3rd. November, five on 11th. November and six on 13th. November, 2009. They were itemised in an appendix to the Decision Notice.

    - The first on 3/11/09 requested, as to an SU visit to China and other parts of the Far East, details of the itinerary, itemised costing, the numbers and identities of those participating, the organisations providing funding and the name of any travel agency booking flights and accommodation;
    - The second sought broadly similar details as to SU management retreats in 2008 – 9.
    - The five requests dated 11th. November effectively repeated those of 3rd. November as to both the China visit and the management retreats, save that the request as to the travel agency was omitted
    - Of the six dated 13th. November, 2009, the first asked for the costs of works of art purchased for the office of the Registrar and Vice – Chancellor in each financial year from 2005 - 2009, the second for the costs of a glass door for that office in 2008 – 9 and the remainder for the costs of booking hotels for all management retreats between 2005 and 2009.

      All were submitted via the WDTK website.

19. In this case, whether or not SU was justified in treating these requests as vexatious, it was clearly sensible to respond to them compendiously since their submissions were almost concurrent and it is trite law that any one request may be viewed in the context of a cluster of which it forms part when the public authority is considering s.14. Dr. Duke was right, in our judgement, to take no point against this approach.

20. The first two requests were refused citing FOIA s.12 (the cost limit) and suggesting ways of refining them so as to overcome that problem. The five that

followed next were said to be refinements of the first two, designed to achieve that end. They were refused in reliance on s.14, namely on the ground that they were vexatious, as were the final six. SU also invoked s.14 as to the first two requests and both the ICO and the Tribunal have treated the s.14 objection as the only ground for refusal which required consideration.

21. These refusals were maintained by delayed internal reviews in April, 2010.

22. Between the end of October, 2009 and early February, 2010, SU received about 100 broadly similar requests for information, often covering topics raised in the Vice – Consul`s newsletters, all but three via the WDTK website. They came from thirteen requesters, some using pseudonyms. Those figures compared with 78 for the whole of the rest of 2009 and a total of 117 requests for the whole of 2008, submitted by 78 different requesters. SU claimed to the ICO that such requests displayed stylistic similarities with Dr. Duke`s literary output but we have seen no such comparison and disregard it.

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23. SU treated these requests in the same fashion, characterising them as vexatious. As noted above, they were submitted over the same periods as the publication of Dr. Duke`s "Rat catchers of the sewers" blogs which commented very critically on SU`s treatment of such requests and on the alleged hostility of the SU establishment to any idea of freedom of information.

<u>The complaint to the ICO</u>

24. Dr. Duke complained to the ICO on 29th. March, 2010, forestalling SU`s belated announcement of its internal review. Following investigation, the ICO in his Decision Notice concluded that the requests made by others over the same period were probably, but not certainly linked to those of Dr. Duke, in that he was party to their submission, whatever his precise role. He decided that, taken as a

whole, the requests satisfied a significant number of the tests generally applied to s.14 refusals and upheld SU`s decision. His decision predated the Upper Tribunal decision in *ICO v Devon C.C. and Dransfield [2012] UKUT 440 (AAC)* and the guidance which it provides. He confirmed procedural breaches arising from delay.

25. Dr. Duke appealed to the Tribunal. His grounds and subsequent written submissions, both to the original tribunal and to us, following the success of his appeal, were detailed and forceful. He incorporated a number of them in the witness statement that he served on the original tribunal. Mr. Longley added to them to a significant degree in oral argument in which he criticised a series of findings and observations in the Decision Notice and the ICO`s Response.

26. As indicated at the hearing, we did not consider all those submissions material to our decision. In particular, we are not strictly concerned with every stage of the ICO`s reasoning nor the processes by which SU arrived at its rejection of these requests as vexatious. The Tribunal`s task is to assess for itself, by way of rehearing, the character, purpose and effect of the requests that it deems relevant, having careful regard to the guidance contained in *Dransfield*, especially the need to look at the picture as a whole rather than measuring the facts against a rigid series of tests.

Dr. Duke`s submissions

27. Expressed summarily, Dr. Duke`s case amounted to this:-

(i) SU and its Deputy Vice – Chancellor treated “Dr. Duke et al” as vexatious requesters when applying s.14 rather than looking at the character of each request.

(ii) In the course of the libel and FOIA litigation, SU deliberately issued false information regarding Dr. Duke`s conduct, including the commission of criminal offences such as stalking, the use of a “hate” website (“Ratcatchers”) and the publication of grossly defamatory accusations against staff members. It wrongly characterised the newsletters and blogs as defamatory and motivated by malice.

(iii) The alleged links with other requests and requesters were unproven. The use of pseudonyms reflected the fear of reprisals from a bullying administration rather than an attempt to conceal an association with Dr. Duke.

(iv) The common use of the WDTK website has no bearing on allegations of common authorship or origin of the requests.

(v) The surge in requests to SU reflected a general alarm at job losses and wasteful expenditure, not a campaign orchestrated by Dr. Duke to overturn his dismissal.

(vi) The ICO favoured SU in conducting his investigation and made a wide range of errors in his assessment of the evidence in his Decision Notice.

(vii) The individual requests were made in order to obtain information required for the presentation of Dr. Duke` case to the ET. They had a serious purpose.

(viii) Moreover, they related to matters of public interest, namely SU expenditure at a time of serious financial constraints.

(ix) There was no connection between Dr. Duke`s legitimate campaign, as an officer of UCU, against job losses and his entitlement to make these requests pursuant to FOIA. In linking the two, SU threatened Dr. Duke`s rights to freedom of speech and of association under ECHR Articles 10 and 11.

(x) Dr. Duke did not intend to harass or overwhelm SU staff with these requests but to pursue a serious and lawful purpose, to obtain relevant information for his claim of unfair dismissal.

(xi) Inferences as to links with other requesters were not the same as direct evidence. They were speculative rather than probative.

(xii) The “Dransfield” test was not met, in particular because the requests had a legitimate and serious public purpose.

Our Decision

28. S..14(1) of FOIA reads –

"Section 1(1) (the right of the requester to be told whether the authority holds the information and, if it does, to have it communicated to him) *does not oblige a public authority to comply with a request for information if the request is vexatious".*

29. Unlike other areas of litigation, FOIA focuses on the character of the request, not the requester. *ICO v Devon C.C. and Dransfield [2012] UKUT 440 (AAC) ("Dransfield")* distilled previous first – tier tribunal authorities ("the FTT") and the ICO`s guidance as to what constituted a vexatious request. FOIA granted members of the public unprecedented access to the internal records of public authorities, subject to exemptions. It deliberately created burdens on those authorities in the interests of transparency and of a properly informed community of electors, taxpayers and consumers. It was designed to assist serious inquirers into matters of general public interest, whether national, local or parochial. Plainly such a regime is open to abuse by those bearing grudges, obsessed with conspiracy theories, bent on circumventing disclosure rules in other litigation or simply wishing to embarrass or overwhelm an authority with limited resources for some unfathomable mischievous reason. Such abuse is a serious threat to the proper exercise of the right to information. Hence the need for s.14.

30. *Dransfield* set out (paragraph 28) the four broad and familiar themes that run through the ICO`s guidance and the FTT jurisprudence in relation to s.14, namely, burden, motive, value or serious purpose and harassment of and distress to staff of the authority. At paragraph 45 the UT stressed *"the importance of adopting a holistic and broad approach . . . .emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a*

previous course of dealings, the lack of proportionality that typically characterise vexatious requests."

31. The first question to answer is whether the Tribunal should take account of the numerous broadly similar requests addressed to SU by others in the three – month period following Dr. Duke`s dismissal from his university post.

32. The proper test, as with all factual issues in this jurisdiction, is whether we judge it more likely than not that Dr. Duke was party to their submission, whether by direction, incitement or mild encouragement.

33. We find that he incited or encouraged such requests. We rely on a number of facts which justify such an inference.

34. The "surge" of requests related to topics closely linked to those covered by the thirteen requests from Dr. Duke. It was virtually concurrent with Dr. Duke`s requests. We do not accept that the surge was simply attributable to the campaign against staff cuts because that campaign had been running for a considerable time before the flood of requests referred to at paragraph 21 above. We consider the use of pseudonyms a significant pointer to such a connection. We note that at least one of those pseudonyms was referred to in the Rat Catcher blog, which was roughly contemporaneous to the other similar requests and of which Dr. Duke now accepts authorship. That blog encouraged use of the WDTK website from which nearly all such requests came.

35. That finding is relevant to the Tribunal`s assessment of the burden represented by Dr. Duke`s requests, the motive underlying them and their true purpose, whether they were a reasonable proportionate way of pursuing a legitimate quest for information.

36. Taken in isolation, each of the thirteen requests can be said to display a serious purpose, namely informing the community of how taxpayers` money was spent by SU. However, quite apart from their links to other requests discussed above, the Tribunal takes account of how many there were and the short time within which they were made. The five requests of 11th. November, 2009 are not refinements of the earlier requests in the sense of later requests that narrow their scope. They request almost all the same information (but in the form of five not two requests) and add the identities of all staff and partners who participated. Hot on their heels came the distinct requests of 13th. November, 2009, directed at expenditure involving the office of the Vice – Chancellor and the Registrar and the itemised costs of management retreats over a four – year period. The clear impression which they create, fortified by the finding as to the other requests, is of an attempt to flood SU with these repetitive requests. Such, indeed, would surely have been their effect, if SU had set out to provide the information. In forming that judgement we ignore issues of cost and the provisions of s.12 of FOIA.

37. As indicated above, Dr. Duke`s explanation for his requests was the that this information was material to the proper presentation of his claim for unfair dismissal and SU was concealing it. If that was so, the Tribunal asked, why did he not use the prescribed ET procedure for enforcing disclosure of relevant documents held by the other side, procedures which he had apparently successfully used in relation to other material? Through Mr. Longley, he gave no satisfactory answer to that question.

38. A still more pressing question was whether these requests were, to any substantial extent, relevant to the issues before the ET. Reading the ET`s Reserved Judgment it is quite plain that the central matters in issue were whether Dr. Duke had brought SU into disrepute by personal attacks on two members of staff in newsletters in early 2009 and whether procedural defects and unfairness in the disciplinary process vitiated the decision to dismiss him. The subject matter of his requests is not mentioned and had no bearing on the arguments advanced on those central issues. His submissions, set out at paragraph 13 were directed

exclusively to the issues identified above. Even those of his submissions as are recorded as abandoned (paragraph 3) are unrelated to the expenses referred to in the requests.

39. The Tribunal accordingly rejects Dr. Duke`s assertion as to the purpose of his requests. Again, its view is strengthened by the links with the other requests which could not possibly have been intended to seek disclosure in the ET proceedings.

40. In summary, the Tribunal concludes that this barrage of requests formed part of a personal vendetta, probably supported by some other colleagues and students, against particular officers of SU and perhaps its administration in general. Dr. Duke`s dismissal further fuelled his animosity. It had nothing to do with the perfectly legitimate union campaign against staff redundancies. It was not part of a considered strategy for the conduct of his ET claim. Indeed, its only possible impact on his case would have been adverse. The merits of his deep – seated disputes with SU are, as we have said already, no concern of the Tribunal. His requests were a plain abuse of the rights conferred by s.1(1) of FOIA. Viewed in the abstract they could have been regarded as serious requests for information of public importance. Seen against the background of this case and having regard to their number and timing, they were nothing of the sort.

41. This assessment amply justifies the finding that these requests were vexatious, adopting the *Dransfield* approach. We should have reached the same conclusion even if we had judged it right to disregard the other similar requests.

42. For these reasons we dismiss this appeal.

43. Our decision is unanimous.

Signed

David Farrer Q.C.

Tribunal Judge

9th. May, 2014

Promulgated 21st. May, 2014