Neutral citation number: [2023] UKFTT 00833 (GRC)

First-tier Tribunal
General Regulatory Chamber

Heard by: HMCTS Cloud Video Platform

Heard on: 2 October 2023
Decision given on: 13 October 2023

Before

TRIBUNAL JUDGE HUGHES

Between

REUBEN KIRKHAM

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: in person
For the Respondent: Oliver Mills (instructed by Gemma Garvey)
For the Appellant in EA/2022/0290: Mr Harron in person
Amicus curiae: Maurice Frankel OBE

Cases
Locabail (UK) LTD v Bayfield Properties LTD [1999] EWCA Civ 3004
Rv Gough [1993] AC 646

Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) [2019] UKSC 38
Barings plc v Coopers & Lybrand [2000] 1 WLR 2353

Decision: The application is allowed

An application for disclosure of records in respect of appeals EA/2022/0243, EA/2022/0096, EA/2022/0212, EA/2022/0211, EA/2022/0235, EA/2022/0319, EA/2022/0326, EA/2022/0377, EA/2022/0290, EA/2022/0263, EA/2022/0292

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REASONS

Preliminary issues

1. The Appellant challenged the competence of the Tribunal as constituted to decide the issue before it; arguing that these were Information Rights proceedings and accordingly a judge sitting alone was not able to make a ruling determining the application.

2. The practice direction "Composition of the First-tier Tribunal in relation to matters that fall to be decided by the General Regulatory Chamber" made by the Senior President of Tribunals of 19 May 2023 determines the question of composition:-

    - Paragraph 3 sets out the composition for "a decision that disposes of proceedings" in respect of the various jurisdictions of the GRC- (a) and (b) for specific Information Rights matters, (c) charities cases, (d) environment cases etc.
    - Paragraph 4 determines the tribunal composition "Where the Tribunal has given a decision that disposes of proceedings ("the substantive decision"), any matter decided under, or in accordance with, rule 5(3)(l) or Part 4 of the Rules or section 9 of the Tribunals, Courts and Enforcement Act 2007 must be decided by one judge.." However these are not (contrary to Dr Reuben's assertion) Information Rights proceedings since they are not appeals against decisions of the Information Commissioner, rather they are applications to the Tribunal for information which it holds in relation to such proceedings. Nor does this application fall within rule 5(3)(1) or Part 4 of the Rules or section 9 of the Tribunals, Courts and Enforcement Act.
    - Paragraph 5 provides: "Any other decision must be made by one judge."

3. Dr Kirkham applied to the President of the GRC for disclosure of documents and the decision on disclosure fell to be decided by the General Regulatory Chamber. I am satisfied that Dr Kirkham's application is one of those residual matters falling within Paragraph 5 of the Composition Statement and accordingly the tribunal is properly constituted.

4. Dr Kirkham applied that I recuse myself and that a High Court Judge hear this application. He asserted that the tribunal was protecting itself from disclosing documents that it believed to be embarrassing, that since my remuneration was controlled by more senior judges I was biased. In a somewhat intemperate e-mail (which at the time I had interpreted as exuberant rhetoric) he had criticised a case management direction I had made and drawn inferences as to my suitability from that criticism. In the light of his oral application I have considered his arguments and am satisfied that no grounds for recusal has arisen. While it may be that he was asserting an actual bias through a financial interest – judicial remuneration under the control of senior judges; this is a misapprehension, remuneration is an administrative issue giving rise to no financial interest and I have no actual interest in the subject matter of the application.

5. His argument arising from my service as a judge in the General Regulatory Chamber and acquaintance with persons whose decisions are challenged is also problematic. The effect of acceding to his request would be a move towards creating a category for automatic disqualification – membership of the same judicial chamber. As Lord Woolf noted in *Gough* (at page 673) the courts should hesitate long before creating any other special category of automatic disqualification: *"since this will immediately create uncertainty as to*

what are the parameters of that category and what is the test to be applied in the case of that category."

6. In the consideration of the question of bias, Lord Goff (in (*Gough)* (at page 670) laid down the criteria for decision:

   for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..."

7. The Court in *Locabail* endorsed the robust approach of Australian courts (paragraphs 22-24):

   "We also find great persuasive force in three extracts from Australian authority. In Re JRL, ex parte CJL (1986) 161 CLR 342 at 352, Mason J., sitting in the High Court of Australia, said:

   "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

   In Re Ebner [1999] FCA 110, the Federal Court asked (in paragraph 37):

   "Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by the setting aside of a judgment on the ground that the judge is disqualified for having such an interest?"

   In the Clenae case, above, Callaway JA, at paragraph 89(e) of the judgment, observed:

   "As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application ...""

8. I am therefore satisfied that there is no proper basis for Dr Kirkham's application that I recuse myself on the grounds of bias, actual or perceived. Accordingly, I am satisfied that it is my duty to hear and determine this application.

The application and response.

9. In a series of emails in January 2023 Dr Kirkham applied to the President's Office of the First-tier Tribunal (General Regulatory Chamber) for a copy of the documents ("the materials") that were before the First-tier Tribunal when it disposed of the appeals in each of

the above referenced 11 matters ("the 11 matters"). Dr Kirkham was not a party to any of the 11 matters. In accordance with its procedure the tribunal advised Dr Kirkham that he should seek the consent of the parties to each of the proceedings as to their wishes as to whether the material should be disclosed to a third party; the tribunal facilitated that contact and the Appellant consulted the parties as to their wishes with respect to the proposed disclosure of documents. The Information Commissioner (the Respondent to these appeals) refused consent.

10. The Appellant sought disclosure of the papers before a judge who was considering applications by the Information Commissioner to strike out appeals against decisions made by the Commissioner under rule 8 of the Tribunal's rules which provides (inter alia):

    "(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
    (a) does not have jurisdiction in relation to the proceedings or that part of them; and
    ....
    (3) The Tribunal may strike out the whole or a part of the proceedings if—
    .....
    (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
    (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

11. In his emails the Appellant (who has held an academic appointment at Open Lab in Newcastle University and is now a lecturer in inclusive technologies in the Faculty of Information Technology at Monash University, Australia, as well as a fellow of the Australian Centre for Justice Innovation.) argued that the strike outs were wrong in law, that the tribunal should take a more active role; questioning the position of the public authority more sceptically and he attacked the competence of the judge and the professional conduct of the lawyers representing the Information Commissioner.

12. The Tribunal President drew the Appellant's attention to judicial dicta on such disclosures from the Supreme Court decision in Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38 (paragraph 38) that:

    "...although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so. As was said in both Kennedy, at para 113, and A v British Broadcasting Corpn, at para 41, the court has to carry out a fact-specific balancing exercise. On the one hand will be "the purpose of the open justice principle and the potential value of the information in question in advancing that purpose"

13. In resisting the request the Information Commissioner explained the background to the request which was that the strike out rulings were made on the papers, without an oral hearing. He set out the background and his reasons for opposing the application:

    "The Documents

In the 11 cases the Commissioner provided a Response to the appeal which included within it an application for the appeal to be struck out under rule 8(3)(c) of the Tribunal Rules. In some cases the Commissioner also provided additional documentation, such as the correspondence relating to the request for information exchanged between the appellant and the relevant public authority, and copies of the Commissioner's guidance.

Stated reasons for the applications

The Commissioner has been told that the third party has said that they are making the application for the Documents as they (the third party) maintain there is an error of law in the decision and 'the strike out applications may amount to professional misconduct by the representatives of the [Commissioner] who made them'.
The third party also says their request is 'to understand how the Tribunal handled these cases' and to further scrutinise the decisions in the context of the documents before the judge. (emphasis added)

Commissioner's Representations

The Tribunal's decisions provide sufficient information for the parties to know why, in these cases, the matter has been struck out. The Documents were placed before the Tribunal, along with other documents. The points in those documents were not ventilated in a public hearing (as the matters were dealt with on the papers). However, the parties to the appeal would have known which documents would have been before the Tribunal. If an appellant themselves had arguments about anything within the application on behalf of the Commissioner then they would be able to respond to those points under rule 8(4) prior to the Tribunal's consideration of the application.

If a third party is concerned that there is an error of law in the Tribunal's decision it is, with respect, unnecessary for them to see the Documents.

The Commissioner would respectfully further say that seeking to impugn the professional conduct of his legal representatives is not a legitimate aim under the Chamber President's guidance.

Disclosure of appellants' information

The Commissioner adds that his responses to the appeals will include both the Commissioner's position on the grounds of appeal and other matters pursuant to rule 23 of the Tribunal Rules, and an application or request for the Tribunal to strike out that appeal.

An application to strike out an appeal is very much based on the reasons set out in the response which in turn will rely on the information provided by the appellant (whether in correspondence or in their appeal documentation) which will include personal information about the appellant."

14. In his submissions the Appellant repeated his allegations against the solicitors employed by the Commissioner. He argued that the appellants whose cases had been struck out were appalled and had a sense of injustice. He stated that, in any event, he had most of the material already.

15. Mr Harron (who had made a number of requests of Rotherham MBC arising out of Jay report into the sexual exploitation of children in Rotherham) argued that the judge had made a grievous mistake in striking out his appeal against a decision by the Information Commissioner that the name of an external expert it had consulted should not be disclosed and that other information requested was not held. His statement in support of his appeal was "I hope after many mistakes and clearly evidenced failures to adequately scrutinise responses by Rotherham Council to Freedom Of Information Act Requests (FOIARs) that the Information Commissioner will review the Decision with minimal involvement of the GRC FTT." He was a litigant in person with no access to legal help.

16. Solicitors for Rotherham MBC wrote indicating that, in their analysis the decision to strike out was correct:

    "Dr Kirkham does not, however, even attempt to engage with the reason for the Tribunal's decision to strike out the appeal, which is that the Appellant was seeking a remedy that the Tribunal did not have jurisdiction to award. Dr Kirkham refers to the Tribunal's "power to encourage consent order…or for the Commissioner to confess error in a case." Neither of these points, however, disclose any error in the Tribunal's decision to strike out the appeal for want of jurisdiction. The Tribunal's lack of jurisdiction meant that the strike out was mandatory under rule 8(2)(a)."

17. Counsel for the Commissioner addressed the discussion of the principle of open justice as laid down in *Dring*. The principle purposes were to allow scrutiny of individual cases and to enable the public to see how the system works. The default position was that the public were allowed access; however it was a right of the court to grant access, the third party applicant had no right. It was for an applicant to demonstrate a good reason and there was a balancing exercise to be carried out reviewing potential harm to the judicial process, the impact on the rights of others, the practicalities and costs of giving access against the benefits of disclosure. He noted that the Appellant had asserted that he had a right to the material and that disclosure would assist with his critique of the tribunal and one judge in particular. However open justice was served by the fact that the decisions were available on line and accordingly he had the information to identify any serious issues; he had claimed that he had enough for a damning critique and it was therefore hard to see what benefit came from disclosure. The criticism of the Commissioner's lawyers was not a proper part of open justice. There was an attempt to hold the Commissioner to a higher standard, however the Commissioner was a respondent in every appeal. The Commissioner was concerned that such a practice would create disproportionate costs in ensuring that there was no inadvertent disclosure, such as the inappropriate naming of individuals. The Commissioner was concerned that the process could lead to public authorities being less forthcoming in dealing with the Commissioner. It was entirely possible to criticise the process without access to the Commissioner's submissions.

18. Mr Frankel drew attention of the difficulty of unrepresented individuals in appealing against the Information Commissioner's decisions and presenting their case in a way which addressed the overlapping issues raised by different provisions of FOIA such as s12 (cost of a request) and s14 (vexatious requests). He drew attention to dicta of the Upper Tribunal to the effect that a litigant in person should not be bound by the strict standards of a lawyer and there was ample authority for the proposition that allowances should be made and the tribunal should adopt a more inquisitorial approach. The tribunal had a wide jurisdiction to consider the merits of an appeal and should not take technical points of pleading against an

unrepresented party. The value of disclosure of the Commissioner's strike out applications was to illuminate the role of the judge in formulating the approach adopted in the strike out by considering the approach put forward in the application. A distinction could be drawn between the burden of disclosing an entire bundle and the burden of disclosing a statement of case. With respect to one case he argued that the claim that a public authority had concealed material could be a legitimate question for a hearing.

19. In responding to Mr Frankel's points, Counsel argued that disclosure would give the right of access to every case and Mr Frankel had been able to identify issues without seeing the Commissioner's submissions.

20. In reply Mr Frankel distinguished between the value of seeing the full submissions and the summary adopted by the judge.

21. The Appellant noted that he had the consent of 10 out of 11 Appellants to disclosure. There was nothing impractical in the Commissioner splitting submissions between open submissions and those subject to a rule 14 application to maintain confidentiality. It was of value to apportion responsibility for decisions which he felt were mechanical, and he indicated that they were incorrect.

Consideration

22. I consider the personal criticism of the solicitors acting for the ICO wholly inappropriate and unjustified. They, like all those appearing before courts and tribunals, strive to represent their client to the best of their ability. The failure to recognise the concept of a legitimate difference of opinion is to be deprecated. The criticism of the judge is a matter for argument not abuse.

23. The starting point for examining this application as expressed Lord Woolf in *Barings plc v Coopers & Lybrand [2000] 1 WLR 2353* at paragraph 43, is:

    "As a matter of basic principle the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings."

24. The provisions which allow judges to strike out cases which appear ill-conceived or without prospect of success are a necessary part of case management to enable the resources of courts and tribunals to be deployed most effectively on cases which merit thorough consideration. The over-riding objective of the Rules of the tribunal (including rule 8 which permits the striking out of a party's case) are to enable the Tribunal to deal with cases fairly and justly.

25. The idea of open justice is old and goes back to a time when courts were entirely oral in their processes and any person could (in theory) attend a hearing. The striking out of a case is as Lord Woolf said *the efficient resolution of litigation* however that efficiency should not detract from transparency. While the large-scale litigation in *Dring* created large quantities of information and difficulties in managing it; the processes of a strike out are far more modest and present little difficulty in terms of management, furthermore the fact that decisions are made on paper or looking at screens makes the practical question of access simpler and cheaper. Furthermore the issue in *Dring* was determining whether information

in the numerous evidence and other bundles could assist many hundreds of individuals who had contracted mesothelioma to learn whether they had been harmed by tortious concealment of the risks of asbestos. The strike out issue is directly concerned with understanding the judicial process itself – a question at the heart of open justice. If the strike out case had been conducted centuries ago it would in theory have been open to view, why with the benefits of technology available should it not be accessible? As Bentham wrote Open Justice is *the very soul of justice* and it is clearly essential to promote that openness. While *Dring* encourages an approach which looks at the benefits and costs of openness, some caution must be exercised in looking too hard for costs. We should recognise that criticism may often be intemperate or ill-informed but as Milton wrote in Areopagitica *"Where there is much desire to learn, thereof necessity will be much arguing, much writing many opinions; for opinion in good men is but knowledge in the making"*.

26. In a recent speech *Open Justice Today (10 September 2023)* the Lord Chief Justice commented:

    "Secondly, openness requires those present at a hearing to be able to discuss, to debate, and to criticise what was said and done by the parties and the judge, and even the judgment. As the Privy Council put it pithily in 1936, if in in archaic language, in Ambard v Attorney General for Trinidad and Tobago,
    'Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men. "

27. I accept Mr Frankel's point that understanding the relationship between the terms if the application and the decision is a valuable exercise in open justice. I therefore direct the disclosure of the applications to strike out made by the Commissioner in these cases. I direct the disclosure of material submitted by appellants in these cases – these are the pleadings put forward by individuals seeking redress from a tribunal which would, if a hearing had been held, would have been held in public.

Signed Hughes Date: 8 October 2023