Shipton v Information Commissioner and Dorset CC
[2023] UKUT 170 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2023-000048-GIA**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Between:

Gary Shipton

Appellant

- v -

The Information Commissioner

1st Respondent

- and -

Dorset County Council

2nd Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 12 July 2023
Decided on consideration of the papers

Representation:

Appellant:	In person
1st Respondent:	Mr Michael White of Counsel, instructed by the Information Commissioner
2nd Respondent:	Mr John Fitzsimons of Counsel, instructed by Dorset County Council

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal dated 28 November 2022 under number EA/2021/0034 involves an error of law. However, the First-tier Tribunal's decision is not set aside. This decision is made under sections 12(1) and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The sole issue on this appeal to the Upper Tribunal

1. This appeal concerns the proper composition of a First-tier Tribunal (FTT) in the General Regulatory Chamber in proceedings under the Freedom of Information Act (FOIA). More particularly, the issue is whether, with the consent of the parties, the FTT can hear evidence in the absence of one of the panel members who later views the recorded evidence and rejoins the tribunal for its deliberations.

The outcome of the appeal

2. The appeal to the Upper Tribunal is technically allowed, as the FTT's decision involves an error of law. However, the FTT's decision is not set aside. It follows that the FTT's decision stands.

The parties to this appeal

3. The Appellant is the FOIA requester, Mr Gary Shipton. The Respondent is the Information Commissioner ('the Commissioner'). The Second Respondent, the public authority concerned with Mr Shipton's FOIA request, is Dorset County Council ('the Council').

The FOIA request and the Information Commissioner's Decision Notice

4. On 21 August 2019 Mr Shipton wrote to the Council requesting all the information it held on himself and his wife and on two properties they had purchased from the Council (both former public conveniences). The Council replied on 6 September 2019 to the effect that it held no additional information beyond that which had already been previously provided to the Shiptons' solicitor. However, notwithstanding this assurance, further information was in fact identified and disclosed following an internal review by the Council. Mr Shipton remained dissatisfied and lodged a complaint with the Commissioner. Responding to that complaint, Decision Notice IC-42416-N9Q3 (dated 7 January 2021) concluded that "on the balance of probabilities, the council has disclosed all the relevant information that it holds and complied with section 1 of the FOIA" (paragraph [27]). Accordingly, the Commissioner did not require the Council to take any steps.

A chronology of the proceedings in the First-tier Tribunal

5. It is fair to say the proceedings in the FTT were somewhat protracted. The following account is a sufficient summary for present purposes.

6. On 26 January 2021 Mr Shipton lodged a notice of appeal with the FTT against the Commissioner's Decision Notice. In doing so, the Appellant questioned the credibility of the Council's responses. In short, he argued that the Council had failed to disclose the truth as it did not wish to be found to have mis-sold a property or breached the law. Mr Shipton further alleged that the Council was deliberately withholding and indeed destroying relevant information.

7. The Commissioner's initial response was to oppose the Appellant's appeal to the FTT. However, the Commissioner later noted that during the appeal process the Council had provided further relevant information in response to a separate FOIA request made by Mr Shipton. On 24 November 2021 the Commissioner therefore wrote to the FTT, proposing that the appeal be ended by a consent order, requiring the Council to issue a fresh response. For reasons that need not detain us, the parties were unable to agree the terms of a consent order. As a result the original hearing date of 6 January 2022 was vacated, with the Council being joined as a party to the FTT proceedings.

8. Joinder of the Council was followed by further case management directions and written submissions from the parties. This process was followed by two hearings, held respectively on 27 July 2022 and 17 August 2022.

9. The first FTT hearing on 27 July 2022, before a panel comprising Judge Brian Kennedy KC and specialist members Mrs Anne Chafer and Mr Dan Palmer-Dunk, was abortive for reasons explained in its final decision:

> 36. A CVP hearing was arranged for 27 July 2022 however, unfortunately, no witness statements or evidence were supplied by the Council prior to the hearing although three members of staff were present to answer questions. This placed both the Appellant and the Tribunal at a disadvantage as there was no opportunity to prepare for cross examination or questions…

10. The FTT noted at the time both that there several deficiencies in the Council's case and that the parties had "made further efforts to draw up a Consent Agreement for approval, which unfortunately proved elusive" (paragraph [38]). In the event the FTT agreed to the Council's application for an adjournment, remarking as follows:

> 39. The Tribunal reminded the parties of their obligations under Rule 2 and the Tribunal was persuaded by the Second Respondent that it was their intention to try to reach an appropriate arrangement or agreement with the Appellant, if at all possible or be ready for a full oral hearing with their witnesses and adequate evidence to commence on the 17 August 2022.

11. In subsequent case management directions dated 17 August 2022, issued after that final hearing, the FTT observed as follows (emphasis added):

> 1. The Tribunal sat on Wednesday 17 August 2022 to hear the material and important oral evidence of four witnesses and has now adjourned for final written submissions (on the evidence heard today), from the Appellant and the Second Respondents. The written submissions from both parties should be served on the Tribunal on or before the close of business on Thursday 15th September 2022. **One panel member (Mr Palmer-Dunk) was unavailable to attend today but with the parties' consent the case proceeded in his absence and again with their consent that panel member will be made privy to the recorded evidence and continue to deliberate on the appeal.**

12. The FTT's final decision included a brief observation to similar effect:

> 49. The Tribunal sat on the 17 August 2022. I sat with Mrs Chafer in the absence of Mr Palmer-Dunk with the consent of the parties that Mr Palmer-Dunk would be absent to hear the evidence and questions arising from the witness statements as summarised below. It was also agreed that Mr Palmer-Dunk would be part of the Panel for their deliberations following this hearing.

13. So far as the outcome of its substantive decision was concerned, the FTT allowed Mr Shipton's appeal on the basis that the Council held certain information which fell within the scope of his FOIA request that it had not originally provided to him. However, the FTT also held that the Council did not hold certain further information within the scope of the request which Mr Shipton had alleged was held and should be disclosed.

The Upper Tribunal's grant of permission to appeal

14. The Appellant applied to the Upper Tribunal for permission to appeal, permission having been refused in the first instance by the FTT judge.

15. The Appellant's application to the Upper Tribunal for permission to appeal itemised a total of 16 proposed grounds of appeal. These included the hopeless argument that the fact that the same FTT judge who had presided at the hearing had also ruled on the original application for permission to appeal constituted a breach of his human rights. The Appellant also made an unparticularised allegation that his human rights had been abused by the Council, whose officers he accused of perjury. The FTT's findings of fact were also said to be perverse. I refused permission to appeal on 15 such grounds and certified all such 15 grounds as being totally without merit within the meaning of rule 22(4A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

16. I gave limited permission to appeal to the Upper Tribunal on one ground only. That ground of appeal was framed by the Appellant in the following terms:

> Panel member Dan Palmer-Dunk was unable to be present at the hearing. Although the Appellant did agree to go ahead with the hearing in his absence, the consequences of his absence were not explained to the Appellant (Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings).

17. The FTT judge and panel members involved in this case have not been asked for any further elucidation as to what took place on (or after) the final hearing on 17 August 2022. However, I take the FTT's case management directions at face value. I therefore now proceed on the basis that Mr Palmer-Dunk was indeed "made privy to the recorded evidence", as the FTT's directions stated, and moreover that as a result he viewed that recorded CVP evidence, albeit not 'in real time'.

18. Plainly if that were not the case, and Mr Palmer-Dunk had <u>not</u> viewed the recorded evidence at all but had still participated in the FTT's deliberations, then the FTT would necessarily have erred in law. At the very least, such an irregular state of affairs would have amounted to a breach of natural justice and in

particular the principle of *audi alteram partem*. It would also have been inconsistent with the terms of the judicial oath (or affirmation) to “do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will” – the “laws and usages of this realm” including such basic tenets as deciding cases on the evidence.

19. In this context more generally I drew the parties’ attention to the decision of the Court of Appeal in *R (on the application of Hill) v Institute of Chartered Accountants* [2013] EWCA Civ 555; [2014] 1 WLR 86 and invited submissions on its relevance, if any, to the present circumstances. The general rule was expressed in these terms by Longmore LJ (at [22]):

    > “If there is a hearing with live witnesses giving their evidence orally, it will normally be a breach of rules of natural justice for a member of the tribunal (in the absence of agreement) to absent himself while a witness is giving evidence and later return to participate in the decision.”

20. The facts of *R (on the application of Hill)* were somewhat unusual (although perhaps not as unusual as the present appeal). The case concerned a disciplinary hearing before an internal professional regulatory panel that was hearing charges against an accountant, Mr Hill. The panel comprised two accountants and a third independent member. The hearing lasted several days. One of the members was unavailable to sit past 5 pm on one of the days, and with the parties’ agreement the hearing continued until 6.30 pm that day in his absence, with the full panel reconvening on the next occasion. In the High Court, Lang J ruled that there had been a breach of the rules of natural justice but that the breach had been waived by Mr Hill’s solicitor. The Court of Appeal, however, held that there had been no breach of the rules of natural justice by virtue of the parties’ agreement to the procedural adjustment, a consent which had been “voluntary, informed and unequivocal”.

The proceedings before the Upper Tribunal

Introduction

21. All three parties have made detailed written submissions on the appeal. There has been no application from any party for an oral hearing of the Upper Tribunal appeal. In any event, I am satisfied that it is fair and just to proceed to a decision on the papers.

The Appellant’s submissions on his notice of appeal

22. The Appellant’s notice of appeal is economically drafted and for the most part set out in ‘bullet point’ format. Mr Shipton asserts that the consequences of Mr Palmer-Dunk’s absence were not explained to him. However, he neither provides any details as to the exchange that took place at the FTT hearing nor does he explain what were the ‘consequences’ of the absence of the missing panel member, nor how they were capable of making a material difference to the outcome or the fairness of the proceedings.

The Information Commissioner’s submissions in response

23. The Commissioner, in his Response drafted by Mr White, opposes the appeal, making six main points. First, the Commissioner accepts that for one panel member to absent themselves during evidence but to return for deliberations

will, absent agreement (which must be "voluntary, informed and unequivocal", per *R (on the application of Hill*)) be a breach of the rules of natural justice. Second, the Commissioner emphasises the importance of procedural flexibility in tribunals. Third, the Commissioner contends that on the facts Mr Shipton's agreement was indeed "voluntary, informed and unequivocal". Fourth, the Commissioner argues that Longmore LJ's observation in *R (on the application of Hill*) (at [23]) is equally applicable here, namely that "there is something peculiarly unattractive" in a litigant agreeing to a course of action, continuing with the hearing and only then alleging a breach of natural justice when the decision is adverse. Fifth, the Commissioner submits that the FTT's approach was not contrary to either the letter or the spirit of the Tribunals, Courts and Enforcement Act (TCEA) 2007. Finally, the Commissioner argues that Mr Shipton should have obtained a transcript of the FTT hearing to demonstrate how it was that he said he was under-informed as to the consequences of the proposed course of action.

The Council's submissions in response

24. The Council stands four-square behind the Commissioner in his response to the appeal, with Mr Fitzsimons adopting and fully endorsing Mr White's submissions. In addition, the Council makes three further points. The first is the contention that the Appellant's grounds do not come close to discharging the burden of showing that his consent to the course of action adopted by the FTT was other than "voluntary, informed and unequivocal". The second is the submission that a litigant in person cannot rely on that status after the event to overturn an outcome with which they are dissatisfied, as that would be both undesirable in principle and unfair to the other parties. The third is the argument that it would not be fair now for the Appellant to raise an alleged unfairness in circumstances where it was clear to him how the FTT would proceed and he had made no request to vary that procedure or object to it.

The Appellant's submissions in reply

25. The Appellant, in reply, states that he "felt pressured to consent in order to prevent further delay". In particular, he "felt duty bound to agree to this procedural irregularity" given the FTT's specific reminder to the parties to have regard to the overriding objective and their obligation to co-operate with the Tribunal (see paragraph 10 above). The Appellant adds that during the hearings he had felt that the FTT judge "unduly favoured" the Council but it was not until he received the final decision "that this became fully evident". As such, he argues that "the absence of Mr Palmer-Dunk did have the effect of 'Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome of the fairness of the proceedings', as he should of [sic] brought some equality to the proceedings." Finally, the Appellant contends that the combination of the consequence of the panel member's absence being not clearly explained to him and the pressure on him to agree to the unusual procedural arrangement meant that his consent was not voluntary, informed and unequivocal.

26. That said, for the most part the Appellant's reply is devoted to re-arguing the other grounds of appeal on which permission to appeal has been refused and

which have been certified as totally without merit. Those submissions are accordingly irrelevant and have not been further considered.

Analysis

Introduction

27. I consider first the rules governing the composition of the FTT and then the natural justice arguments raised by *R (on the application of Hill)*.

The rules governing the composition of the First-tier Tribunal

28. The starting point must be the legislation. Section 3(1) of TCEA 2007 provides for the establishment of the First-tier Tribunal. Section 4 makes provision for judges and other members of the FTT, and Schedule 2 to the Act deals with their appointment and related matters. As to the composition of tribunals, paragraph 15(1) of Schedule 4 to TCEA 2007 requires the Lord Chancellor by order to make provision "in relation to every matter that may fall to be decided by the First-tier Tribunal … for determining the number of members of the tribunal who are to decide the matter." Article 2 of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (SI 2008/2835), at least as originally enacted, in effect provided for the Senior President of Tribunals to stipulate the number of members for any particular category of case by way of a practice statement.

29. The paperchase then continues with the Senior President's Practice Statement on the *Composition of Tribunals in relation to matters that fall to be decided by the General Regulatory Chamber on or after 6 March 2015* (this has since been replaced and revised by a Practice Direction). The 2015 Practice Statement (which was in force at the material time) provided that "a decision that disposes of proceedings … must be made as set out in the following paragraphs" (paragraph 3). Those paragraphs included paragraph 10(1), providing that (subject to certain exceptions which do not apply here) a FOIA appeal must be determined by "one judge and two other members, where each other member has substantial experience of data protection or of freedom of information (including environmental information) rights". The default position in such cases is thus a three-person FTT.

30. However, paragraph 15(6) of Schedule 4 to TCEA 2007 provides an exception as follows:

> (6) Where under sub-paragraphs (1) to (4) a matter is to be decided by two or more members of a tribunal, the matter may, if the parties to the case agree, be decided in the absence of one or more (but not all) of the members chosen to decide the matter.

31. The effect of paragraph 15(6) is that a party can agree to a case being decided by a 'short' tribunal comprising two judicial office holders rather than the usual three-member panel. The mischief at which the provision is directed is obvious – a case may be listed before a three-person tribunal but at the last minute (such that a substitute cannot be called up) one panel member is unable to be present, e.g. because of illness or severe travel problems (see e.g. *PH v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 553 (AAC)). However, on one reading at least, paragraph 15(6) does not envisage that a

missing member can then either join or re-join the panel later (even assuming that they have access to a transcript or recording of the missing session).

32. A similar (but not identical) provision was in issue in *R (on the application of Hill)*. The Institute's Bye-laws provided for a three-person internal tribunal to hear disciplinary complaints. Bye-law 19(2) provided that if any panel member was "for any reason unable to attend the hearing", or was "in the course of the hearing unable to continue to so attend", then "the remaining members, if not less than two in number, may at their discretion proceed or continue with the hearing; but if the defendant is present or represented at the hearing, they shall do so only if he or his representative consents". The applicant's argument on appeal was that since Bye-law 19(2) was the only provision dealing with departure, it must follow that departure and return of a member was not allowed, even if the parties agreed.

33. Longmore LJ, giving the lead judgment in the Court of Appeal, rejected this submission in the following terms (NB: Mr Hamer was counsel for the applicant, Mr Mander was the 'absentee' panel member):

> 11. I cannot accept this argument. In the first place it would be surprising if there were no power at all for a disciplinary tribunal (with its relatively informal procedures) to permit one member to depart and return if all parties agreed. That would introduce a degree of rigidity into the proceedings which would be undesirable.
>
> 12. Secondly, the fact that express power is given to a tribunal to carry on as a tribunal of a lesser number if one member is "unable to continue… to attend" does not to my mind preclude a member absenting himself and returning. The power is given so that, if a member cannot continue at all, the tribunal itself can continue rather than reconstitute itself and start all over again. That is an example of a lack of rigidity in the proceedings, not its opposite. Mr Hamer relied on the principle that an express provision in a bye-law implies the opposite of its alternative (more pithily expressed in the Latin phrase *expressio unius exclusio alterius*). But I do not see temporary absence and return as a true alternative to an "inability to continue to attend". "Inability" implies a permanent state the alternative to which is a continuing attendance. Mr Mander was unable to attend for a comparatively short time in the six day hearing. The Bye-laws just do not provide for that situation. Of course any procedure designed to cope with the problem must be fair but if it were not there would anyway be a breach of regulation 48.
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> 13. Thirdly I agree with Stanley Burnton LJ in *Virdi v Law Society* [2010] 1 WLR 2840 paras 28-31 that when one is dealing with bye-laws and regulations of professional disciplinary bodies one cannot expect every contingency to be foreseen and provided for. The right question to ask of any procedure adopted should therefore be not whether it is permitted but whether it is prohibited. If one asks that question in this case after rejecting any application of the *expressio unius* principle, the answer is that the procedure adopted is not prohibited. It must, of course, still be fair and that to my mind is the critical issue in this appeal.

34. Mr White, for the Commissioner, supported by Mr Fitzsimons for the Council, submits that Bye-law 19(2) and paragraph 15(6) of Schedule 4 to the TCEA 2007 are essentially analogous, and that the Court of Appeal's analysis of Bye-law 19(2) (as extracted above) is directly applicable in the present context, at least so far as paragraphs 11 and 12 of the Court's judgment are concerned (it being acknowledged that the factor identified in paragraph 13 has no purchase in the current circumstances).

35. I find this submission unpersuasive for two main reasons.

36. First, although the two provisions may be similar in effect, they are by no means drafted in identical terms. As such, I do not accept that there is a direct read-across to the instant case from the Court of Appeal's reasoning in *R (on the application of Hill)*.

37. As to paragraph 11 of the Court of Appeal's judgment, while tribunals may not be as formal as courts, they are creatures of statute in a way that most internal disciplinary tribunals are not. I would venture to suggest that most judicial office holders in tribunals would be very surprised to be told that their informal procedures permit "one member to depart and return" even if all parties agreed.

38. As to paragraph 12 of the Court of Appeal's judgment, this turns on the specific language of Bye-law 19(2), with its focus on an "inability" to attend. Longmore LJ specifically noted that on the facts of that case the missing member "was unable to attend for a comparatively short time in the six day hearing. The Bye-laws just do not provide for that situation." By contrast, Mr Palmer-Dunk was absent for the whole of the one effective hearing day of Mr Shipton's appeal and missed hearing all the live evidence in real time. The statute, again in contrast, does provide for just such a situation in paragraph 15(6) of Schedule 4 to the TCEA 2007.

39. The second reason turns on the language of paragraph 15(6) itself. The usual rule for this type of case, as we have seen, is that the FTT must comprise a judge and two specialist members. Paragraph 15(6) provides an exception or easement to that requirement. It permits, with the parties' consent, the matter to "be decided in the absence of one or more (but not all) of the members chosen to decide the matter". Here the use of the verb "decide" is significant. The concept of decision-making in tribunals has been described as a "seamless web" by Upper Tribunal Judges Mesher and Ward in *MB v Secretary of State for Work and Pensions (ESA & DLA)* [2013] UKUT 111 (AAC); [2014] AACR 1 at paragraph 27:

> In reality the whole process of decision-making forms a seamless web, starting with the pre-reading of the documents sent to the members chosen to sit in a case. At that stage initial and provisional views will be formed, gaps in the evidence or legal arguments identified and potential questions formulated. That will feed into the pre-hearing discussion and preparation among the members on the day of the decision, into the questions and points raised by the members during the hearing, into each member's evaluation of the evidence and submissions and eventually into the formulation of the decision on the appeal and the reasons for it. In our

judgment none of those stages can be separated out as not being a part of the function of deciding the matter in issue in an appeal.

40. In the present case Mr Palmer-Dunk had been engaged in the pre-hearing process of preparation and the earlier abortive hearing on 27 July 2022. To that extent he had already been involved in the decision-making process of Mr Shipton's appeal. For whatever reason, he was then not available for the main effective hearing on 17 August 2022. At that point, given Mr Palmer-Dunk's absence, the FTT judge should have invoked paragraph 15(6) to establish whether the parties were prepared to continue with a two-person tribunal. There is no sensible reading which allows paragraph 15(6) to be read so as to allow a tribunal member to stay on board but to dip in and out of a hearing.

41. This construction does not involve undue formality or rigidity. The Practice Statement, made under the authority of statute, requires a three-person tribunal panel to hear most FOIA appeals. Paragraph 15(6) provides for an exception to that otherwise mandatory requirement. It does not give a licence for a tribunal panel's composition to morph over time, even with the parties' consent, from a three-person panel to a two-person panel and then back again to a three-person panel. If this were permissible on one occasion there is no reason why it should not be permissible on more than one occasion, which would plainly be undesirable. I accept that the missing member in this case was able to view a CVP recording of the 17 August 2022 hearing, but that may well have prompted questions that he wished to explore with the witnesses but had no opportunity effectively to do so.

42. I therefore conclude that the FTT erred in law by failing to have regard to paragraph 15(6) of Schedule 4 to the TCEA 2007 in deciding how to proceed once Mr Palmer-Dunk's non-availability for the hearing on 17 August 2022 had become an issue. Having made that finding, I deal later with the appropriate mode of disposal of this appeal.

43. Before leaving this aspect of the appeal, I should make it clear that nothing that I have said in this decision should be taken in any way as a criticism of Mr Palmer-Dunk personally.

44. In the event that I happen to be in error on the issue of the FTT panel's composition, based on the legislative context, I need to address the natural justice aspect of Mr Shipton's appeal.

The natural justice point

45. It will be recalled that the general rule was expressed by Longmore LJ in *R (on the application of Hill)* as follows (at [22]):

> "If there is a hearing with live witnesses giving their evidence orally, it will normally be a breach of rules of natural justice for a member of the tribunal (in the absence of agreement) to absent himself while a witness is giving evidence and later return to participate in the decision."

46. Furthermore, and as already noted above, such agreement must be "voluntary, informed and unequivocal" (at [31]) if it is to prevent what would otherwise be a breach of the rules of natural justice.

47. There are undoubtedly several significant differences on the facts between those in *R (on the application of Hill)* and the circumstances of the present case. It will be sufficient to note just three. First, here we are dealing with a statutory tribunal and not an internal disciplinary tribunal. Second, *R (on the application of Hill)* was concerned with a relatively short-term absence in a six day hearing, whereas here the absence was for the whole effective hearing day (at least in real time). Third, the accountant was legally represented while Mr Shipton was a litigant in person. However, none of these factors undermines the basic principles set out by the Court of Appeal. At most they might point to a different conclusion on the facts.

48. There is no dispute but that Mr Shipton gave his consent to the unusual procedure adopted by the FTT. The issue, therefore, is whether that agreement was "voluntary, informed and unequivocal".

49. Was it *voluntary*? Mr Shipton contends that his agreement was not voluntary because he was in effect put under undue pressure to consent by the need to avoid delay and by the FTT's reference in its directions to the requirement that the parties co-operate with the tribunal. This argument is wholly unpersuasive. Throughout these proceedings Mr Shipton has shown himself able and willing to pursue his submissions with determination and vigour. The suggestion that his will was overborne is frankly risible. I am satisfied Mr Shipton's consent was voluntary.

50. Was Mr Shipton's consent *informed*? Mr White and Mr Fitzsimons argue that Mr Shipton had failed to explain in his notice of appeal how it is said that his consent was not informed. In my view that criticism may not be entirely fair, not least as the terms of the decision in *R (on the application of Hill)* had not been drawn to his attention at that stage. In his reply, Mr Shipton argues (see paragraph 25 above) that during the hearings he had felt that the FTT judge "unduly favoured" the Council but it was not until he received the final decision "that this became fully evident". As such, he contends that "the absence of Mr Palmer-Dunk did have the effect of 'Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome of the fairness of the proceedings', as he should of [sic] brought some equality to the proceedings." There are at least two reasons why this submission is misconceived.

51. The first is that Mr Shipton, like the Council, was perfectly well informed as to the course of action that was proposed. Mr Palmer-Dunk was unable to attend on 17 August to hear the evidence in real time. However, Mr Palmer-Dunk would be made privy to the recorded evidence and continue to deliberate on the appeal. Mr Shipton was as informed as the Council as to how the procedure would work going forward.

52. The second is that there is in any event simply no evidence that the FTT judge or the FTT panel as a whole "unduly favoured" the Council. As Mr Justice Rimer once said, this type of argument is in essence "no more than the deployment of the fallacious proposition that (i) I ought to have won; (ii) I lost; (iii) therefore the tribunal was biased" (see *London Borough of Hackney v Sagnia* [UKEAT0600/03, 0135/04, 6 October 2005] at paragraph 63). The FTT approached the appeal in an even-handed manner and indeed did not draw

back from making some serious criticisms of the Council. At paragraph [77] of its decision, the FTT recorded its concerns as follows:

> The Tribunal wish to record their concern about the poor manner in which this request has been handled since it was received in 2019 and note the repeated apologies by the Public Authority. In all the circumstances the Tribunal find that the Council had an inefficient and ineffective system for retrieving information. We do not accept that the amalgamation of a number of Councils is an adequate excuse for this and we find evidence that the Council was either incompetent or unwilling to properly facilitate this request from the outset, The Tribunal also note their concern in relation to the lack of understanding regarding claiming a FOIA s.12 exemption and particularly the activities which can be included in the preparation of a cost estimate.

53. It follows that Mr Shipton suffered no prejudice and his consent was informed.

54. Was Mr Shipton's consent *unequivocal*? There is nothing to suggest Mr Shipton's agreement was other than unequivocal. In *R (on the application of Hill)* the accountant's solicitor at the hearing had requested an assurance that the missing member would have access to a transcript of the session for which he was absent. We do not have a record of the full exchange that took place at the FTT, but Mr Shipton received an assurance in writing that Mr Palmer-Dunk would be privy to the CVP evidence of the hearing. I am satisfied Mr Shipton's consent was unequivocal.

55. As to the natural justice argument more generally, Mr White submits in the Commissioner's response that the Appellant's "late reliance on this point appears to be cynical and opportunistic – in short, an unfair attempt on his part to get a second bite of the cherry by resiling from a (fairly) agreed position". Mr Fitzsimons, for the Council, essentially makes the same point, arguing that the appeal is in reality a challenge to the merits of the FTT's decision "dressed in the cloak of a complaint about an alleged procedural irregularity that was not a concern of the Appellant during the appeal process or indeed at the time the Decision was made".

56. For the reasons above, I am bound to agree. Mr Shipton's consent to the procedural modification was voluntary, informed and unequivocal. As such, and applying the principles set out in *R (on the application of Hill)*, I conclude there was no breach of natural justice.

57. Finally, I turn to how to dispose of the appeal given the findings above.

Disposal

58. Section 12(1) and (2) of the TCEA 2007 provide as follows:

> **Proceedings on appeal to Upper Tribunal**
>
> **12.—**(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either—

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.

59. Thus, if the FTT's decision involved the making of an error on a point of law, I have a discretion to exercise in that the Upper Tribunal "may (but need not) set aside the decision of the First-tier Tribunal" (section 12(2)(a)).

60. My conclusion, as set out above, is that the FTT's decision involves an error of law in relation to panel composition. However, my consideration of the natural justice ground of the appeal is that there has been no breach or unfairness. In those circumstances, and given that all the remaining grounds of appeal have been certified as totally without merit, it would be quite unreasonable and indeed wholly disproportionate to set aside the FTT's decision for the purposes of either remittal or re-making. Accordingly, I exercise the discretion in section 12(2)(a) so as not to set aside the FTT's decision. The net effect is the FTT's decision of 28 November 2022 stands.

Conclusion

61. I conclude that the decision of the First-tier Tribunal dated 28 November 2022 involves an error of law. I therefore allow the Appellant's appeal. However, for the reasons explained above, I do not set aside the First-tier Tribunal's decision. (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Approved for issue on: 12 July 2023