HM Courts & Tribunals Service

Upper Tribunal (Administrative Appeals Chamber)
5th Floor Rolls Building
7 Rolls Buildings, Fetter Lane
London EC4A 1NL

Tel: **020 7071 5662**
Fax: **0870 324 0028**
Typetalk: **18001 020 7071 5662**
Email: **adminappeals@hmcts.gsi.gov.uk**
Website: **www.justice.gov.uk**
DX: **DX 160042 STRAND 4**

First-tier Tribunal (Information Rights)
PO Box 9300
Leicester
LE1 8DJ

Our Ref: GIA/1988/2013

20 Nov 2013

Dear Sir/Madam,

Re: Dransfield v Information Commissioner and Devon County Council

Please find enclosed a copy of the Upper Tribunal's decision in the above application for permission to appeal, together with your original papers.

Yours faithfully,

Agnieszka Czachor
Clerk to the Upper Tribunal

Enc.

THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/1988/2013
[2013] UKUT 0550 (AAC)

PARTIES

Alan Dransfield
v
the Information Commissioner
and
Devon County Council

DECISION ON AN APPEAL AGAINST A DECISION OF A TRIBUNAL

UPPER TRIBUNAL JUDGE: EDWARD JACOBS

This front sheet is not part of the decision and is issued only to the First-tier Tribunal and the parties.

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 23 May 2013 under reference EA/2010/0152) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the proceedings in Mr Dransfield appeal to the First-tier Tribunal are not stuck out.

REASONS FOR DECISION

A. Overview

1. In 2009, Mr Dransfield made a request to Devon County Council under the Freedom of Information Act 2000. The Council responded that the cost of retrieving the information would exceed the statutory limit of £450. Mr Dransfield complained to the Information Commissioner. During the course of the Commissioner's enquiries, the Council argued that the request was vexatious. The Commissioner accepted that argument and Mr Dransfield exercised his right of appeal to the First-tier Tribunal. The tribunal decided that the Council did not hold the information requested. Mr Dransfield exercised his right of appeal to the Upper Tribunal. Upper Tribunal Judge Wikeley allowed the appeal on procedural grounds and directed a rehearing: see *GIA/1053/2011*. The First-tier Tribunal then struck out the proceedings. I gave Mr Dransfield permission to appeal to the Upper Tribunal.

2. I have received submissions from Mr Dransfield, the Commissioner and the Council. I am grateful to all concerned for their submissions.

B. The First-tier Tribunal's rules of procedure

3. Before I deal in detail with what led the First-tier Tribunal to strike out the proceedings, I set out the legislation that the tribunal had to apply. It is contained in the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976). The relevant provisions are rules 2, 5, 7 and 8:

> **2 Overriding objective and parties' obligation to co-operate with the tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

5 Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Upper Tribunal may regulate its own procedure.

(2) The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction. ...

7 Failure to comply with rules, practice directions or tribunal directions

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include-

(a) waiving the requirement;

(b) requiring the failure to be remedied;

(c) exercising its power under rule 8 (striking out a party's case); ...

8 Striking out a party's case

(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated

that failure by the appellant to comply with the direction would lead to the striking out of the proceedings or that part of them.

(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

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(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.

(5) If the proceedings, or part of them, have been struck out under paragraph (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to that party. ...

C. Why the tribunal struck out the proceedings

4. The judge explained why the tribunal was striking out the proceedings. He had first warned Mr Dransfield by a direction on 11 January 2012 that his emails 'are taking on an unfortunate – and perhaps unintentionally - hectoring tone which would be inappropriate if it continues.' He emphasised the importance of respecting judicial proceedings and the possibility of a contempt of court. He quoted rule 8(3)(b) and concluded: 'Co-operation, in this context, includes using moderate language and an appropriate tone.'

5. He reinforced that warning orally at a hearing on 30 January 2013. And on 29 April 2013, he sent an email referring to recent emails and warning that the proceedings would be struck out if there was any further failure to co-operate.

6. On 12 May 2013, Mr Dransfield emailed the First-tier Tribunal. I am not going to set it out in full. It is sufficient to say that Mr Dransfield accused the

Commissioner and Council of 'conniving and colluding to pervert the Course of Justice' and of producing 'a pack of lies and deception'. He later referred twice to a 'wider conspiracy to pervert the course of justice' and said that there was sufficient evidence to justify arresting the Commissioner's legal representative and Judge Wikeley for conspiracy to pervert the course of justice. The reference to Judge Wikeley refers to another case in which that judge dismissed Mr Dransfield's appeal to the Upper Tribunal.

7. The tribunal decided to strike out the proceedings 'looking at the totality of his myriad emails generally and in the light of the language and allegations mentioned' in the email of 12 May.

D. Directions given by the Upper Tribunal

8. In *GIA/1053/2011*, Judge Wikeley remitted the case to the First-tier Tribunal and directed that there should be an oral hearing. That did not deprive the First-tier Tribunal of its powers under its rules of procedure. The tribunal was entitled to exercise all its powers and, if appropriate, strike out the proceedings, even if that would have the effect of depriving Mr Dransfield of the hearing.

9. The Upper Tribunal's powers are governed by section 12 of the Tribunals, Courts and Enforcement Act 2007:

> **12 Proceedings on appeal to Upper Tribunal**
>
> (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, ...
>
> (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also—
>
> ...
>
> (b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.

10. Section 12(2)(b)(i) and (3)(b) both refer to directions that the Upper Tribunal may give to the First-tier Tribunal. The former refers to directions for reconsideration. This covers matters such as the law that has to be applied. It might, for example, include a direction on how to interpret a particular legislative provision. The First-tier Tribunal has no power to vary or disregard these directions. The latter refers to procedural directions in connection with the reconsideration. This covers the way in which the First-tier Tribunal deals with

the case. These directions have to take effect in the context of the First-tier Tribunal's case management powers and as the circumstances at the time justify or require. In short, a direction under section 12(2)(b)(i) tells the tribunal what it has to do, whilst a direction under section 12(3)(b) tells the tribunal how to do it.

11. Judge Wikeley's direction on an oral hearing was a procedural direction that left the First-tier Tribunal free to exercise its case management powers. That included the power to strike out the proceedings. There is nothing inconsistent in principle between Judge Wikeley's direction and the use of the strike out power.

E. The nature of the strike out jurisdiction

12. There is a reciprocal relationship between the power to strike out and the overriding objective with related duty to co-operate. The express provision of rule 8(3)(b) refers to the overriding objective and the parties' duty to co-operate in rule 2. In addition, rule 2(3)(a) requires the tribunal to apply the overriding objective when its exercises the power to strike out proceedings. The result is that all aspects of the overriding objective have to be taken into account when a tribunal is considering exercising its power to strike out. Two elements in particular are relevant to this case. First: the duty to be flexible in the proceedings. Second: the duty to *ensure* (I emphasise that word), so far as practicable, that the parties are able to participate fully in the proceedings.

13. As a case management power, rule 8 should not be used for other than case management purposes. In *Ul-Haq v Shah* [2010] 1 WLR 616, the Court of Appeal decided that exaggeration should not deprive a claimant of his right to the remedy to which he was properly entitled. As Toulson LJ explained at [50]:

> To have struck out the claims of the first and third claimants would have been to invoke a case management power not for a legitimate case management purpose (in other words, for the purpose of achieving a just and expeditious determination of the parties' rights, or avoiding an unjust determination where a party's conduct had made a safe determination impossible), but for the very different purpose of depriving those parties of their legal right to damages by way of punishment for their complicity in the second claimant's fraudulent claim, which in my judgment he had no power to do.

This decision was overruled by the Supreme Court in *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004, but not on this point. Indeed, the Court said that this would usually be the correct approach: at [50]-[51].

14. Although rule 8 is a case management power, it is also a method of final disposal. As such, it should only be used as a last resort. As Lord Woolf MR explained in *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926 at 1933:

> There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking

> out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result.

What is true of delays is true of other forms of conduct as well. The other powers to which Lord Woolf referred include the tribunal's power under rule 5 to regulate its procedure and to give directions as to the conduct of the proceedings, and the power under rule 7 to waive a failure to comply or to require it to be remedied. There is also a practical consideration. As the Supreme Court noted in *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004 at [52], exaggeration can reduce the party's credibility generally.

15. The Upper Tribunal is usually reluctant to interfere with a tribunal's exercise of its case management powers. As I explained in *RM v St Andrew's Hospital* [2010] UKUT 119 (AAC) at [7]:

> ... Appellate courts are supportive of these decisions and discourage appeals against them. They often have to be made with little time for analysis or reflection. Appeals can disrupt the proceedings, produce inefficiency and increase costs. They are capable of being used for tactical purposes. Ultimately, the judge dealing with the case is probably best placed to make a judgment on how best to proceed in the context of the proceedings. Challenges are best considered at the end of the proceedings, when it is possible to judge whether the decision adversely affected the outcome.

Those considerations do not apply to strike out decisions as they are made after the tribunal has had time for analysis and reflection, and they bring the proceedings to an end.

F. Analysis

16. Most appellants correspond with the tribunal only when necessary, make moderate criticisms and allegations, and express themselves politely. There is, however, a small body of appellants who are persistent in their correspondence which contains wild allegations that are expressed in an intemperate or aggressive tone. This is true of all the tribunals I have been involved in over the last quarter of a century and is probably true of all judicial bodies.

17. It is usually possible to deal with that small minority of appellants without resorting to the power to strike out proceedings. It is possible to ban a party from using emails and direct that any that are sent will be ignored. Another way is to limit a party to communicating in writing and only when requested, with other letters being filed but ignored. At a hearing, it is possible to limit the time allowed to a party or, if necessary, to require a party to leave the hearing room. In my experience, measures such as this are usually effective. The tribunal is also able to protect the other parties by directing that all correspondence be channelled through the tribunal. These are just examples; they are not intended to be exhaustive.

18. The tribunal specifically mentioned the content of the last email and their total number. As to the content, this type of allegation is regularly made in appeals before this Chamber and just as regularly ignored by the judges. As the psychologist William James said: 'the art of being wise is the art of knowing what to overlook.' As to the number, the remedy was simply to ban the use of emails and not to read any that were sent.

19. In conclusion and despite the submissions of the respondents, I consider that the tribunal was not entitled to take the draconian step of striking out the proceedings in Mr Dransfield's appeal. This had the effect of bringing proceedings to an end and shutting him out from having a judicial consideration of his right to the information he had requested. This was not a proportionate response to his behaviour. There were more flexible responses that could have been employed. Mr Dransfield's behaviour could have been managed in ways that were just as effective. The tribunal could have protected itself, its staff and the other parties without depriving Mr Dransfield of his right of appeal. That is why I have set aside the First-tier Tribunal's decision and re-made it to provide that his appeal to that tribunal is not struck out.

G. The future

20. Just to avoid any misunderstanding, this does not mean that the First-tier Tribunal can no longer strike out the proceedings in this case. It retains that power, which it may exercise if the circumstances justify it. All that I have decided is that in the circumstances obtaining in May this year it was not fair and just to exercise that power.

Signed on original
on 8 November 2013

Edward Jacobs
Upper Tribunal Judge