Angela Powell v Information Commissioner
[2023] UKUT 221 (AAC)

IN THE UPPER TRIBUNAL **Case No. UA-2021-002105-GIA**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Angela Powell

Appellant

- v -

Information Commissioner

Respondent

Before: Upper Tribunal Judge Zachary Citron

Hearing date: 3 August 2023
Hearing venue: Rolls Building, London EC4

Representation:

Appellant: represented herself
Respondent: Oliver Jackson of counsel

DECISION

The appeal is **allowed**.

The decision of the First-tier Tribunal under reference EA/2020/0137, promulgated on 16 December 2020, involved the making of an error in point of law.

Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a panel of the First-tier Tribunal (General Regulatory Chamber) in accordance with the following directions.

Directions

i. This case is remitted to a freshly constituted panel of the First-tier Tribunal for reconsideration at an oral hearing.

ii. There will be a complete re-hearing of the appeal in all respects.

iii. If any party has any further evidence to put before the First-tier Tribunal this should be sent to the First-tier Tribunal within one month of the date on which this decision is issued.

iv. A copy of this decision shall be added to the bundle to be placed before the panel of the First-tier Tribunal hearing the remitted appeal.

v. These directions may be supplemented by later directions by a tribunal judge, registrar or caseworker in the General Regulatory Chamber of the First-tier Tribunal.

REASONS FOR THE DECISION

1. References in what follows to

   a. "**sections**" or "**s**" are to sections of the Freedom of Information Act 2000 (unless otherwise indicated)

   b. the "**FTT**" are to the First-tier Tribunal

   c. the "**FTT decision**" are to the FTT decision under reference EA/2020/0137, promulgated on 16 December 2020, and dismissing the appeal under s57 of the Appellant ("**Ms Powell**") against a decision notice (the "**IC decision notice**") of the Respondent ("**IC**") dated 3 March 2020

   d. numbers in square brackets are to paragraphs of the FTT decision

   e. "**EHRC**" are to the Equality and Human Rights Commission

2. This is an appeal against the FTT decision, which found that the IC decision notice was in accordance with the law. The FTT decision followed a hearing (by video) on 8 December 2020.

3. The IC decision notice related to certain information requested by Ms Powell from EHRC (a public authority), as follows:

   a. on 15 March 2019, Ms Powell wrote to EHRC asking for "details from the Birmingham EHRC office, Victoria Square House,

namely by, employees in post by grade/name, job title and salary as at 9 February 2017";

EHRC responded on 25 March 2019, providing the number of employees at each pay grade and the details of the "width" of each pay grade. EHRC refused to provide more detailed information, relying on s40(2);

b. on 3 May 2019, Ms Powell submitted (to EHRC) what the IC decision notice called "a further request for information":

> "Can you apply EHRC's pay gap method to the data and provide me with the results"

EHRC responded on 28 August 2019; per the IC decision notice, EHRC stated that it held the information requested, but that it was exempt from disclosure under s40(2).

4. The background to Ms Powell's requests was set out at [1-4]: Ms Powell was employed by EHRC for about nine years and was made redundant, along with five colleagues, in 2017. She challenged this in the employment tribunal but those proceedings were settled on the advice of the union solicitors advising her. Per the FTT decision, Ms Powell believes she was unlawfully underpaid for most, if not all, of her employment by EHRC. Ms Powell told the FTT that she was negligently advised to settle her employment tribunal claim and that she wished to explore the possibility of legal action against the union solicitor. The FTT decision said that Ms Powell believed that, if the information sought were provided to her, it would confirm that she had been unlawfully underpaid and that could form the basis of a claim against her solicitor. At [14], the FTT decision stated that Ms Powell strongly believes that she has been illegally underpaid for several years, and wants the requested information because she believes this information will evidence this.

5. The IC decision notice concluded that the information requested was personal data (of which Ms Powell herself was not the data subject) and that the first condition in s40 (*personal information*) was satisfied by reason of s40(3A)(a) being satisfied – and so the requested information was exempt information which EHRC was entitled to withhold. It also concluded that EHRC complied with s16 (*duty to provide advice and assistance*).

The exemption in s40(2), first condition

6. Under s40(2), any information to which a request for information relates is exempt information if

a. it constitutes personal data which does not fall within s40(1) (personal information of which the applicant is the data subject); and

b. the first, second or third condition is satisfied.

7. The "first" condition is that disclosure of the information to a member of the public otherwise than under the Freedom of Information Act 2000

a. would contravene any of the data protection principles, or

b. would do so if the exemptions in s24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded

The above is set out at s40(3A).

Grounds on which permission to appeal was given, and their context

8. Following a hearing on 25 October 2022 (attended by Ms Powell; IC was not represented), I gave permission to appeal on grounds limited to certain arguable errors of law in the FTT decision. To put these in context, I now summarise the FTT decision's reasoning in the passages that feature in the grounds on which permission to appeal was given.

Summary of FTT's reasoning as regards the requested information being personal data

9. [14-25] fall under the heading "Findings, Reasons and Conclusions".

10. At [15], the FTT decision states that Ms Powell "in her appeal and further submissions" accepted that the information requested was "personal information" (that term being the heading to s40). At [16] the FTT decision states: "However, during the hearing [Ms Powell] expressed some reservations as to whether her second request in May was a request for personal information". The FTT decision says that Ms Powell referred to an report by EHRC called *Our gender pay gap report* of 31 March 2019. The FTT decision states that "this is a published report which identified a mean gender pay gap of -7.5% in 2016/17 and a median gender pay gap of -3.0% in the same year".

11. At [17], the FTT decision states that EHRC and IC "took a different view" (about whether the requested information was personal data). That was because "if the gender pay gap method was applied to the Birmingham office, which had only 8 people, it would be possible to identify the people involved. The Birmingham office had 3 women including Ms Powell and 5 men. It follows that, in this example, the median salary for men and women would be the salary of an actual male and female employee. In contrast, Ms Powell estimated that the total workforce of the EHRC in 2017 was about 160".

12. [17] continued, stating the FTT's view as follows: "The tribunal accepts that the process of identifying the median and mean pay for the 8 employees at the Birmingham office would allow for the identification of personal data. The process of establishing this is set out in [the IC decision notice] paras 31-

35, which the tribunal accepts". [18] then states in the first sentence: "It follows that the tribunal find the exemption of s40(2) applies to the request".

13. Paragraphs 31-35 of the IC decision notice concern the statistical data required by the "Gender Pay Regulations" (defined at paragraph 29 as the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017). Paragraphs 29 and 30 explain that those regulations require that organisations employing 250 or more people publish

a. the mean and median hourly rates of pay for both male and female employees,

b. the proportion of men and women in each quartile, and

c. a range of other statistics

and that EHRC had not carried out such an exercise for its Birmingham office, but could in theory do so, as it held the raw data to produce the *statistics*.

14. Paragraph 31 of the IC decision notice stated that IC noted that the statistics would, at least to some extent, mask the raw data. However, IC considered that, because of the numbers of employees involved, the statistics could be unravelled sufficiently to reveal the raw data.

15. Paragraph 32 of the IC decision notice stated that the Gender Pay Regulations required the publications of six distinct statistics; and that IC considered that a person who was aware of the gender split in the Birmingham office would be able to combine that information with the pay band information disclosed by EHRC, to work out at least some of the individual salaries. Paragraph 33 explained how a *median* from a data set is found; based on this, paragraph 34 stated that if the Birmingham office had (for example) five female and three male employees, the median salary of both males and females would be an actual salary of a male and female employee.

16. Paragraph 35 of the IC decision notice stated that IC was not convinced that the statistical manipulation proposed by Ms Powell would be sufficient to mask the underlying data; IC therefore consider there to be a risk that individuals could be identified and that the information is therefore personal data

Summary of FTT's reasoning as regards s16 (duty to provide advice and assistance)

17. [26] summarises IC's view that, because the requested information was personal data within s40(2), the assistance that could be given (by EHRC) was limited. It then stated: "The usual types of assistance given is about limiting or re-framing the request so it can be legally complied with. In this case, Ms Powell wants specific information about her colleagues' pay in comparison to her own. This request was refused but references was made to

the location of more general gender pay information for the organisation. This advice and assistance was, in the circumstances, reasonable.”

Summary of FTT decision’s reasoning when considering whether processing (what it found to be) personal data was necessary for the purposes of the “legitimate interests” pursued by Ms Powell

18. [21] states that IC accepted that Ms Powell was pursuing a legitimate interest; that Ms Powell believed that there was gender pay difference at the Birmingham office and that data published by EHRC for the organisation as a whole supported her view. It quoted the IC decision notice (paragraph 46) as saying that there is a legitimate interest in ensuring that the body responsible for policing the law is itself an exemplar of best practice”. It then stated: “the tribunal accepts that Ms Powell has a legitimate interest in requesting the information”.

19. [23] states that the issue for the FTT was whether it was necessary that the earnings details in respect of the eight Birmingham office employees be disclosed to the world at large. It states that the FTT agreed with IC that disclosure of this “personal information” was *not* necessary to pursue the legitimate interest of knowing how *EHRC* was performing in regard to pay gaps – that interest was covered by the publication of figures in respect of EHRC as a whole.

The grounds on which permission to appeal was given

20. The grounds on which permission to appeal was given were the following arguable errors of law in the FTT decision:

a. that the FTT decision did not adequately explain why

- its finding (at [17]) that the *process* of identifying the median and mean pay for the 8 employees at the Birmingham office of EHRC would allow for the identification of personal data,

meant that

- the information in Ms Powell’s “additional” request for information (that of 3 May 2019 – that EHRC apply its pay gap method to the data and provide *the results*) constituted personal data.

As the italicised words in the foregoing indicate, arguably, it is not clear (and the FTT decision does not adequately explain) why information comprising the *results* of applying the pay gap method (typically in the form of a percentage, as was given, for EHRC as a whole, at [16]) would include information used in the *process* of obtaining those results.

The permission decision noted that, in making its finding at [17], the FTT decision referred to, and accepted, paragraphs 31-35 of the IC decision notice, which, the FTT decision said, set out "the process of establishing" the median and mean pay in question. Paragraphs 31 and 35 of the IC decision notice stated that IC considered that the pay gap "statistical analysis" "could be unravelled sufficiently to reveal the raw data" behind it, and that such analysis would not be sufficient to "mask" the underlying raw data. However, it is arguable that these paragraphs, read with the three paragraphs between them, do not adequately explain why the *results* of the pay gap analysis, in the form of a percentage, could be so "unravelled" so as to constitute personal data.

b. that it was perverse, in its reasoning at [24] as to whether EHRC gave Ms Powell the advice and assistance required under s16, for the FTT decision to have found that Ms Powell wanted (only) "specific information about her colleagues' pay in comparison with her own": this appears to ignore Ms Powell's 3 May 2019 request for information – that EHRC apply its pay gap method to the data and provide the results. To some extent, this arguable error may be a consequence of the arguable error described above, in that the FTT decision had found that the "additional" request for information could be "unravelled" to disclose personal data. However, it is arguable that, even if the arguable error described above was not made out, it was in any case perverse, given the terms of Ms Powell's 3 May 2019 request, to find that Ms Powell wanted only specific information about her colleagues' pay, rather than information in more generic form. Such an error would arguably have been material in that it prevented the FTT from going on to consider whether advice or assistance was provided in the format in which, the FTT found in its reasoning at [24], it was usually given: "limiting or re-framing the request so that it can be legally complied with".

c. that the FTT decision's reasoning at [23], when considering whether processing (what it found to be) personal data was "necessary" for the purposes of the "legitimate interests" pursued by Ms Powell, was inconsistent with its findings at [21] as to what those legitimate interests were: at [21], the decision "accepted" that Ms Powell had "a legitimate interest in requesting *the information*" (emphasis added, as the information she requested concerned the Birmingham office of EHRC (only)) – however, in [23] the FTT decision referred to the "legitimate interest of knowing how the EHRC is performing in regard to gender pay gaps. This interest is covered by the publication of figures *in respect of the whole organisation*" (emphasis again added, to illustrate that in [23] the FTT decision regarded Ms Powell's legitimate interests as limited to pay gap information

about EHRC *as a whole*). Such an error would arguably have been material as, had the FTT decision adopted a view of Ms Powell's legitimate interests consistent with its finding at [21], it may have found that processing *was* "necessary" for the purposes of those interests – in which case the FTT would have had to go on to conduct a "balancing exercise" (which, due its conclusions at [23] about "necessary", it failed to do).

Dicta on adequacy of reasons

21. Ground a. concerns adequacy of reasons in a tribunal's decision. In *IC v Miller* [2018] UKUT 229 (AAC), Upper Tribunal Judge Markus QC reminded herself "that a certain degree of restraint is to be exercised by an appellate court or tribunal in its examination of a tribunal's reasons, as explained by me in *Oxford Phoenix Innovation Limited v IC and MHRA [2018] UKUT 192 (AAC)* at paragraphs 50-55. The Upper Tribunal should not subject the reasons of the FTT to narrow textual analysis. The question it should ask is "whether the Tribunal has done enough to show that it has applied the correct legal test and in broad terms explained its decision": *UCAS v IC and Lord Lucas* [2014] UKUT 557 (AAC) at [59].

22. The relevant explanation in *Oxford Phoenix Innovation Limited v IC and MHRA* was as follows:

> **Grounds 2 and 3: General principles on findings and reasons**
>
> 49. Grounds 2 and 3 are both principally concerned with the adequacy of the FTT's findings of fact and reasons. It is helpful therefore to preface my consideration of those grounds with a summary of the established principles as to the approach to be taken by the Upper Tribunal in such appeals
>
> 50. In *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48, at [25], Lord Hope said:
>
>> "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."
>
> 51. In *Re F (Children)* [2016] EWCA Civ 546 Sir James Munby P explained the position as follows:
>
>> "22 Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and

analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in *SP v EB and KP* [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."

23 The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis"."

52.These principles have been applied by the Upper Tribunal in a number of information rights cases. I was referred to one, *UCAS v IC & Lord Lucas* [2014] UKUT 557 (AAC), in which at [59] the Upper Tribunal said that "it is unrealistic to expect a Tribunal to set out every twist and turn in its assessment of the evidence and its consequential reasoning". Applying *Jones*, the question was "whether the Tribunal has done enough to show that it has applied the correct legal test and in broad terms explained its decision".

53. Moreover, the FTT is an experienced specialist jurisdiction which routinely considers certain questions under FOIA, including under sections 14 and 40. As Upper Tribunal Judge Wikeley commented in *Department for Work and Pensions v IC & Zola* [2014] UKUT 334 (AAC) at [27]:

> "… the relevant standard is well known to the Tribunal and to the parties, being part of the normal currency of information

> rights litigation, and so the Tribunal did not need to articulate all its dimensions fully…."

54. To similar effect on appeal ([2016] EWCA Civ 758 at [34]), Lloyd Jones LJ said

> "Given such expertise in a Tribunal, it is entirely understandable that a reviewing court or Tribunal will be slow to interfere with its findings and evaluation of facts in areas where that expertise has a bearing. This may be regarded not so much as requiring that a different, enhanced standard must be met as an acknowledgement of the reality that an expert Tribunal can normally be expected to apply its expertise in the course of its analysis of facts."

Upper Tribunal's consideration of ground a.

Basic law regarding what is "personal data"

23. Section 3 of the Data Protection Act 2018 defines personal data (including for the purposes of s40) as any information relating to an identified or identifiable living individual; and 'identifiable living individual' means a living individual who can be identified, directly or indirectly, in particular by reference to—

> (a) an identifier such as a name, an identification number, location data or an online identifier, or
>
> (b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

24. Recital 26 of the preamble to the General Data Protection Regulation (EU) 2016/679 states:

> (26) The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous

information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes.

25. In *NHS Business Services Authority v IC and Spivack* [2021] UKUT 192 (AAC), Upper Tribunal Judge Jacobs said as follows:

> 3. I have to decide whether any person was identifiable from the data withheld by [the public authority] when taken together with other information by someone who was motivated to identify one or more of the persons within the data using all the means reasonably likely to be used …
>
> …
>
> *Just looking at the legislation*
>
> 12. Section 3 of the 2018 Act creates a binary test: can a living individual be identified, directly or indirectly? If the answer is 'yes', the data is personal data. Otherwise, it is not. That is what the Act says, and it is consistent with the Regulation. There is no mention of any test of remoteness or likelihood.
>
> 13. The test has to be applied on the basis of all the information that is reasonably likely to be used, including information that would be sought out by a motivated inquirer, as in this case. That derives from Recital 26.

26. *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 concerned a process of anonymisation of data, called "barnardisation". The House of Lords said that it was a "question of fact" (for the Scottish information commissioner, in that case) "on which he must make a finding" as to whether, through barnardisation, the information became data from which a living individual could no longer be identified. "If barnardisation can achieve this, the way will then be open for the information to be released in that form because it will no longer be personal data" within the meaning of s1(1) of the Data Protection Act 1998 (paragraph 27 of the judgement).

IC's submissions on ground a.

27. IC submitted that the information requested on 3 May 2019 comprised

a. six percentage figures that make up a "gender pay gap analysis" under the Gender Pay Regulations (as defined in the IC decision notice – see paragraph 13 above); and

b. the mean and median salary figures that typically make up an "equal pay analysis"; in this regard, IC pointed to page 4 of EHRC's *Our gender gap report (snapshot date 31 March 2019)*,

which was in the FTT's bundle of papers, headed *Gender pay gap data*, and which states the mean hourly rate (£23.12 for both men and women) and the median hourly rate of pay (£21.63 for both men and women).

28. IC's primary argument was that the median salary figure was included in the "equal pay analysis" and this, as the FTT decision explained at [17], could lead to identification of the pay of one male and one female employee.

29. IC's secondary argument was that, even if "equal pay analysis" was not part of the requested information, Ms Powell would still be able to ascertain personal data by combining percentage figures from the "gender pay gap analysis" with information about salary bands disclosed by EHRC. In its "response" of 12 December 2022, IC set out two ways in which this could be done:

a. the first used the "pay quartile" percentage figures (i.e. percentage of men and women, respectively, in each of the four pay quartiles). IC submitted that, because of the relatively small number of employees in Birmingham, someone with familiarity with the broad job ranking within the office could probably identify some individuals with one of the pay band ranges that had been disclosed by EHRC

b. the second used the "gender pay gap" percentage figures i.e. the difference between men's and women's pay (either mean or median), as a percentage of men's pay. IC submitted that from the "gender pay gap" percentage, based on **mean** salary, combined with the figure for total spend on annual salaries for the EHRC Birmingham office (as disclosed by EHRC), one could produce figures for mean annual salary for both men and women. That could be multiplied by three (the number of female employees) to derive the total salaries paid to women. Ms Powell could then subtract her own salary and would then know the total of the salaries of the other two women. At this point, the IC's submission surmised that Ms Powell "would have been highly likely to have known" the salary of at least one of her two female colleagues, so enabling her to derive the salary of the third woman. Having worked out the pay of each of the female employees, Ms Powell could then, per IC's submissions, work out the **median male salary**, using the median "gender pay gap percentage"; this would correspond to an individual's actual salary, and, IC argued, given the small number of employees and Ms Powell's knowledge of the office, she would be able to identify the individual in question.

30. IC further submitted that there were likely to be other ways in which an individual and his or her salary could be identified, were the percentage figures from the "gender pay gap analysis" to be made public. In this regard, IC asserted that Ms Powell was likely to have knowledge of at least some

salaries other than her own (although IC acknowledged there was no evidence to this effect).

Upper Tribunal's conclusions on ground a.

31. Under s1, the general right of access to information held by public authorities attaches to information of the description specified in the relevant request. In this case, it is reasonably clear that Ms Powell's 3 May 2019 request was for the results of a "gender pay gap" analysis akin to that in EHRC's *Our gender gap report (snapshot date 31 March 2019)*. Those "results" comprised not a single piece of information, but several, including

a. median pay for men and women,

b. mean pay for men and women, and

c. the "gender pay gap" analysis on both median and mean pay bases (expressed in terms of percentages).

32. Both Ms Powell's rights (under s1), and the various exemptions (including that in s40), must be applied to each of the different pieces of information requested. Information within an exemption is exempt; information falling outside an exemption is not. If, hypothetically, Ms Powell's request had been for 10 pieces of information, of which 9 were exempt information, that would not prejudice her s1 rights in relation to the single piece of non-exempt information.

33. [17] adequately explains why the FTT concluded that *median pay information* comprised information relating to an identifiable individual, and so was "personal data" (because it would be the salary of an actual employee in a small office); it does not, however, adequately explain why the *other information* requested (such as the mean pay, and the percentages produced by the "gender pay gap" analysis) comprise information relating to an identifiable individual; it does, however, refer to the IC information notice at paragraphs 31-35 as setting out the process for identifying the median and mean pay which, it says, "would allow for the identification of personal data".

34. Those paragraphs of the IC decision notice (again) adequately explain why median pay information comprises information relating to an identifiable individual – see paragraphs 33 and 34 in particular. Paragraph 31 asserts that the "statistics" produced in the "gender pay gap" analysis could be "unravelled" to reveal the raw data (i.e. individuals' pay). But it does not explain how. Paragraph 32 asserts that these "statistics", together with pay band information, in the hands of someone aware of the gender split in the office, would lead to the working out of at least some individual salaries; but, again, it is not explained how this would be done.

35. IC's counsel sought to fill these gaps in written and oral submissions: as set out in more detail at paragraph 29 above, IC's counsel submitted that the "quartile" pay information (produced by the "gender pay gap" analysis),

together with the pay band information, could lead to identifying someone's salary; and, in a more complicated way, that the mean pay information could lead to identifying the pay of the other two women in the office, if Ms Powell knew the pay of at least one of the other women; and that this information could then be used to find the median pay for men.

36. These submissions do not, however, assist as regards the inadequacies of the reasons in the FTT decision identified above, because:

a. they rest on factual assertions about what information (in particular, about colleagues' salaries) Ms Powell already had, or could reasonably have acquired, and what means were reasonably likely to be used (by her) to identify living individuals – yet the FTT decision itself makes no findings of fact on these matters; I recognise the FTT decision's findings as to Ms Powell's *motives* in making the information request (being, to prove that she was underpaid relative to her peers), but that is a different matter to what information she actually had, or could reasonably acquire, or, indeed, what means of identification were reasonably likely to be used); and,

b. unsurprisingly in the light of the preceding point, there is nothing to suggest that *IC's counsel's* detailed and logical reasoning, as to why the requested information (apart from median pay) related to an identifiable individual, was *the FTT's* reasoning for reaching that (critical) conclusion; and so Ms Powell is not given to understand why she lost on this critical point in her appeal.

37. In the words of the dicta on inadequacy of reasons cited above, the flaw here is not discovered by narrow textual analysis; it is that the FTT decision does not do enough to show, as regards information other than median pay, that it applied the correct legal test (did *that information* relate to an identifiable individual?) and that the FTT has not, even in broad terms, explained its decision (that such information *did* relate to an identifiable individual). Nor can this gap in the reasons given be attributed to the FTT's expertise: though s40 will have been familiar to the FTT, manipulating "gender pay gap" statistics, so as to identify individuals, is not an expertise of the FTT; on the contrary, [17] indicates, in its incorporation of paragraphs 31-35 of the IC decision notice by reference, that the FTT was relying on one of the parties (IC) for its understanding of how exactly this could be done.

38. I thus find ground a. to be made out; and that, because it is a material error, as regards the information requested apart from median pay, the FTT decision falls to be set aside.

39. I consider below, after considering the other two grounds of appeal, whether to re-make the decision or remit the case to the FTT.

Upper Tribunal's consideration of ground b.

40. IC's submissions on ground b. were, in essence, that each piece of information in the requested information was information that related to an identifiable person – and so there was no way of limiting or re-framing the request so as to avoid disclosure of personal data.

41. Since I have found that ground a. to be made out, and consequently that the FTT decision falls to be set aside for material error of law, it seems to me that ground b. will be subsumed in the new decision. In other words, the new decision will decide whether any piece of the requested information was *not* personal data; and so, *not* exempt under s40(2); and this may affect consideration of s16.

Upper Tribunal's consideration of ground c.

42. I am satisfied that, reading [21] and [23] together and in context, the "legitimate interest" identified by the FTT was the legitimate interest in the gender pay gap position for EHRC as a whole (numbering about 160, per [17]), rather than for the Birmingham office (comprising just eight people) alone. The FTT decision says this expressly at [23]. I am satisfied that where the FTT decision at [21], in the last sentence, says that FTT accepted that Ms Powell has a legitimate interest in requesting "the information", it was not expressing a different view (particularly as, in context, that sentence follows the FTT decision citing the IC decision notice to the effect that the legitimate interest related to "the body responsible for policing" equality law i.e. EHRC as a whole).

43. Ground c. is accordingly not made out.

Upper Tribunal's consideration of whether to re-make or remit

44. IC's counsel invited me to re-make the FTT decision, rather than remit the case to the FTT for reconsideration, on the basis of his detailed arguments that all the requested information (not just the information about median pay) related to identifiable individuals, was "personal data", and fell within the rest of the FTT decision's reasoning (as to which, I have not found there to be any error of law).

45. As I observe at paragraph 36 a. above, IC's counsel's arguments rest on factual assertions on which the FTT decision made no findings. More generally, and as was said in *Common Services Agency*, the question of whether information relates to an identifiable individual is a finding of fact to be made by the fact-finding body. An appropriate panel of the FTT is best placed to make the relevant necessary factual findings in this case. I have therefore decided that the case should be remitted to the FTT for reconsideration, with the directions as set out above.

Zachary Citron
Judge of the Upper Tribunal

Authorised for issue 7 September 2023