IN THE UPPER TRIBUNAL **Appeal No. UA-2023-000497-GIA**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 119 (AAC)**

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

Between:

Dr T Cutler

Appellant

- v -

Information Commissioner

1st Respondent

&

Equality and Human Rights Commission

2nd Respondent

Before: Upper Tribunal Judge Mitchell

Decision date: 12 April 2024
Decided on consideration of the papers

Representation:

Appellant:	represented himself
1st Respondent:	Richard Bailey, Solicitor to the Information Commissioner
2nd Repondent:	Leo Davidson, of counsel, instructed by the Legal Department of the Equality and Human Rights Commission

DECISION

The decision of the Upper Tribunal is to allow the appeal.
The decision of the First-tier Tribunal, taken on 21 February 2023 under case reference EA 2022/02124, involved an error on a point of law. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal sets aside the First-

tier Tribunal's decision and, under section 12(2)(b)(ii), re-makes the First-tier Tribunal's decision as follows:

(1) The Appellant's appeal against a decision notice given by the Information Commissioner on 13 July 2022 does not have a reasonable prospect of succeeding;

(2) Under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the whole of the proceedings on the Appellant's appeal against the Information Commissioner's decision notice are struck out.

REASONS FOR DECISION

Background

1. On 7 April 2021, the Appellant made what was styled as a request for information under the Freedom of Information Act 2000 (FOIA), addressed to the Equality and Human Rights Commission (EHRC). The request was in the following terms:

> "[1] Your use of the formulation 'set out the effect' of Ken Livingstone's comments suggests that you are treating this letter not as a submission by a particular organisation but rather as unequivocal evidence of a factual situation ('the effect' etc), is this what you intended or was there a drafting error here?
>
> [2] As you are aware the issue of 'antisemitism' in the Labour Party is a divisive one not only within the Party but also amongst different Jewish groups affiliated to the Party and, in particular Jewish Voice for Labour (which submitted evidence to the EHRC, Report:5) has a radically different view of the issue to the Jewish Labour Movement, would you regard Jewish Voice for Labour as not part of 'the Jewish Community'? The Report (106) refers to 'Labour members' who told the EHRC 'that Ken Livingstone's comments caused shock and anger among Jewish Labour Party members who felt they were appalling…and made them feel uncomfortable and unwanted in the Labour Party."

2. The report referred to in the Appellant's request was the EHRC's October 2020 report *Investigation into Antisemitism in the Labour Party*. The Appellant's case cannot

be understood without reference to p.106 of the EHRC's report, so I shall reproduce it here:

> "In a letter dated 15 February 2017, the Jewish Labour Movement set out the effect of Ken Livingstone's comments (including other comments not cited above) on the UK's Jewish community. The letter stated that his comments had 'caused immeasurable damage', and that the effect of his remarks on the relationship between the Labour Party and the Jewish community had been 'devastating'.
>
> We have seen resignation letters from Labour Party members in which they cited Ken Livingstone's comments, and the failure of the National Constitutional Committee (NCC) to expel him in April 2017, as the reason for their resignation.
>
> Labour Party members told us that Ken Livingstone's comments caused shock and anger among Jewish Labour Party members who felt they were appalling, highly offensive, very distressing and made them feel uncomfortable and unwanted in the Labour Party.
>
> They told us they thought Ken Livingstone's statement, that scrutiny of Naz Shah's conduct was part of an apparent smear campaign by 'the Israel lobby', was a classic antisemitic trope. They said that the Jewish community and Jewish Labour Party members were raising very clear concerns about Naz Shah's comments. Instead of taking their concerns seriously, Ken Livingstone dismissed them as acting on behalf of a foreign power. They considered that this was clearly antisemitic.
>
> Labour Party members said the effect of these comments was humiliating, denied the victims' experience, diminished the issue, had the effect of stirring up and fuelling hatred for Jews and contributed to the creation of a hostile and intimidating environment for Jewish Labour Party members.
>
> **Labour Party complaint handling**
>
> The Labour Party investigated complaints about these matters as alleged antisemitic conduct.
>
> On 4 April 2017, the NCC upheld the complaints against Ken Livingstone and found that he made the comments outlined above. He was given a two-year

> suspension, which included the time he had been administratively suspended from April 2016 pending the investigation. There was a seven-month delay between the NEC referral to the NCC and the NCC laying charges.
>
> Ken Livingstone resigned from the Labour Party on 21 May 2018."

3. The EHRC informed the Appellant that they did not hold information falling within the scope of his request. The Information Commissioner rejected the Appellant's subsequent complaint that the EHRC, in responding to the Appellant's request, failed to comply with their obligations under FOIA. The Appellant appealed against the Commissioner's decision notice to the First-tier Tribunal.

Proceedings before the First-tier Tribunal

4. The EHRC were made a Respondent to the Appellant's appeal and applied for the proceedings to be struck out on the ground that the appeal did not have a reasonable prospect of success. The EHRC's application argued that the Appellant's notice of appeal did not address the issues raised by the appeal, there was no prospect of the First-tier Tribunal finding that the EHRC did in fact hold information within the scope of the request, and that the Tribunal had no jurisdiction to consider whether the EHRC should have addressed the prohibitions on disclosure provided for by section 44 of FOIA.

5. As required by rule 8(4) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (2009 Rules), the First-tier Tribunal gave the Appellant the opportunity to make representations in relation to the proposed striking out.

6. The First-tier Tribunal granted the EHRC's application and struck out proceedings on the Appellant's appeal. However, this was not for a reason relied on in the EHRC's response to the appeal. Rather, the Tribunal found as follows:

> "7…it follows from the opaque nature of the original request that there was never a clearly identified range of recorded information which was to be searched for by the public authority. In my view, any case in which there has been a search for insufficiently particularised is bound to fail because the Tribunal will never be able to make a finding whether any such search was adequate or inadequate.

> 8. I conclude that this is not an appeal which is fit for a full hearing as its prospects of success are fanciful…
>
> 9…I agree with the Registrar that this matter should be struck out…"

7. The First-tier Tribunal granted the Appellant permission to appeal to the Upper Tribunal for the following reason:

> "…the grounds are arguable because, in taking a point about the Appeal's likelihood of success that had not been raised by the parties, I consider it arguable that they should have first been given an opportunity to comment on the new point. The arguable ground of appeal is one concerning natural justice…"

Legislative framework

Freedom of Information Act 2000

8. Section 1(1) of FOIA provides as follows:

> "(1) Any person making a request for information to a public authority is entitled—
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him."

9. I observe that a person's entitlements under section 1(1) are contingent on the making of a "request for information".

10. Section 8(1) of FOIA identifies elements of a "request for information" for the purposes of the Act:

> "(1) In this Act any reference to a "request for information" is a reference to such a request which—
>
> (a) is in writing,
>
> (b) states the name of the applicant and an address for correspondence, and
>
> (c) describes the information requested."

The Tribunal's procedural rules

11. Rule 8 of the 2009 Rules provides as follows:

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

The Arguments

Appellant

12. While the First-tier Tribunal granted the Appellant permission to appeal on the ground that proceedings were arguably conducted unfairly, the Appellant's notice of appeal focuses on his case that he did make a sufficiently particularised request for information to the EHRC. The EHRC never objected to his tribunal appeal, or request, on the ground that his request was insufficiently particularised, and their assertion that the information was not held was inconsistent with an insufficiently particularised request. The Appellant argues that the Upper Tribunal, having set aside the First-tier Tribunal's strike-out decision, should remit this case to that Tribunal so that it may determine his appeal against the Commissioner's decision notice on its merits.

13. The Appellant's reply to the Respondents' written responses advances further arguments in support of his case that he did make a valid request for information to the EHRC:

(a) the underlying issue of concern for the Appellant was whether there was a drafting error in p.106 of the EHRC's report;

(b) it may safely be assumed that the EHRC's published report into allegations of anti semitism within the Labour Party was preceded by draft reports and associated email discussions amongst EHRC staff. Those drafts and emails must have been 'held' by the EHRC at some point and the Commissioner's own guidance shows that they must constitute 'information' for the purposes of FOIA. I think the Appellant's argument is that such draft reports and emails fell within the scope of his request;

(c) the only way in which that information (drafts and emails) could have been ceased to be held, at the date of the Appellant's request, was though deletion by the EHRC. The Appellant has not been told whether the information was deleted. Had the Information Commissioner carried out a proper investigation, the EHRC would have been asked to provide evidence of deletion. Alternatively, if the Commissioner had evidence of deletion, that should have been recorded in his decision notice;

(d) the Commissioner's decision notice stated that the EHRC had confirmed that the relevant passage in p.106 of the report was not a drafting error. One way of substantiating that claim would have been to compare the final draft with earlier drafts. But, if the information was not 'held', what source did the Commissioner consult and what was done to verify the source? This supports the argument that there was uncertainty as to the information held by the EHRC verify the claim that it was not held;

(e) there is an inconsistency between the Commissioner's reading of p.106 of the report and the actual text. This demonstrates a further failure on the part of the Commissioner to present 'full and final' information which engenders an unclear picture of what information is or is not held by the EHRC. The necessary clarification can be addressed by a hearing of the substantive issues before the First-tier Tribunal.

Information Commissioner

14. The Commissioner supports this appeal, and submits that the First-tier Tribunal erred in law by unfairly determining the strike-out application on a ground introduced by the tribunal itself and in relation to which the Appellant was not given the opportunity to make representations.

15. The Commissioner draws my attention to the Court of Appeal's decision in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 in which the Court specified certain errors that might be made by a tribunal, which are capable of amounting to errors of law, including that "the Tribunal made a procedural error". The Court went on to hold that a specified error amounts to an error of law where it was "capable of making a material difference to the outcome or fairness of the proceedings". The Commission argue that the present tribunal made such an error, and:

> "in the circumstances, the Commissioner would be content for the appeal to be allowed and for the Upper Tribunal to remit the matter back to the First-tier Tribunal to make a fresh decision on the strike out application."

Equality and Human Rights Commission

16. The EHRC do not concede that the First-tier Tribunal's involved an error on a point of law. The EHRC's response to the Appellant's notice of appeal argued that there was not, and could never be, any information held within the scope of the Appellant's request and, to the extent that the EHRC explained that fact to the Appellant, it had done so "outside of its duty under section 1 FOIA". The issue before the First-tier Tribunal was really a question of jurisdiction. The Tribunal acted in accordance with the overriding objective of its procedural rules (to deal with cases fairly and justly), despite making its strike-out decision "without further procedural steps" because, since the issue was one of jurisdiction, "in reality there was nothing of substance which the Appellant could have usefully added by way of representation".

17. The EHRC's alternative submission, if the Upper Tribunal finds that the First-tier Tribunal's decision did involve an error on a point of law, is that the Upper Tribunal should not remit the case to that tribunal. Instead, the Upper Tribunal should re-make the First-tier Tribunal's decision and, in doing so, hold that the Appellant's appeal against the Information Commissioner's decision notice is struck out because it does not have a reasonable prospect of success. The Appellant did not make a request for information, within the meaning of FOIA, so that his appeal to the First-tier Tribunal cannot possibly succeed.

Why the First-tier Tribunal erred in law

18. No party requests that the Upper Tribunal holds a hearing before deciding this appeal. I am satisfied that the appeal may be decided fairly without a hearing. The point at issue is a narrow one and has been adequately addressed in written submissions.

19. As required by rule 8(4) of the 2009 Rules, the First-tier Tribunal invited the Appellant to make representations in relation to "the proposed striking out". The 'proposed striking out' was that sought by the EHRC (the Tribunal did not propose a strike on its own initiative). In the absence of any indication that the Tribunal considered it necessary for the Appellant to address additional matters, the only reasonable

interpretation of the Tribunal's invitation is that representations were sought on the EHRC's grounds for resisting the Appellant's appeal. It was these grounds, argued the EHRC, that demonstrated that the appeal had no reasonable prospect of success. Those grounds did not include the argument that the Appellant's communication of 7 April 2021 could not properly be considered a request for information within the meaning of FOIA.

20. The First-tier Tribunal, in holding that the Appellant's appeal did not have a reasonable prospect of success, did not rely on the EHRC's grounds for resisting the Appellant's appeal. The Tribunal found that "this case has proceeded on a confused basis from the start" because the Appellant's letter to the EHRC of 7 April 2021 was "not properly to be regarded as requests for recorded information". Given the history of the tribunal proceedings, I do not think that the Appellant could realistically have anticipated that the First-tier Tribunal might hold that his appeal did not have a reasonable prospect of success because his communication of 7 April 2021 was not a 'request for information' within the meaning of FOIA. The tribunal proceedings were therefore conducted unfairly (or in breach of natural justice) and its decision involved an error on a point of law. I set aside the Tribunal's decision under section 12(1) of the Tribunals, Courts and Enforcement Act 2007.

21. Neither Respondent argues that a breach of natural justice does not amount to an error on a point of law in circumstances where an appeal was bound to have failed even if proceedings were conducted fairly. But the underlying merits of the Appellant's appeal against the Commissioner's decision notice are relied upon by all parties in their submissions about how these proceedings should be disposed of if the appeal succeeds (as it has).

Disposal of the appeal

22. Where the Upper Tribunal allows an appeal and sets aside a decision of the First-tier Tribunal, section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 requires the Upper Tribunal either to remit the case to the First-tier Tribunal for reconsideration or re-make the tribunal's decision. All parties have made submissions about how this appeal might be disposed of if it succeeds. These include the Appellant's written submissions in response to the EHRC's argument that the Upper

Tribunal should re-make the First-tier Tribunal's decision. Those submissions addressed the question whether the Appellant's communication of 7 April 2021 was a request for information within the meaning of FOIA. Thus, the Appellant has been afforded, and taken, the opportunity that was not given to him in proceedings before the First-tier Tribunal.

23. As mentioned above, no party requests a hearing before the Upper Tribunal decides this appeal. However, the Appellant's final written submissions argue that there should be a hearing of the appeal which he made to the First-tier Tribunal. I take that as a request that his case (the appeal made to the First-tier Tribunal) should proceed to a substantive hearing before the First-tier Tribunal, that is without further consideration of whether the appeal has a reasonable prospect of success. I refuse to dispose of this case in the manner suggested which I consider unnecessarily wasteful of tribunal resources. There is a genuine issue as to whether the Appellant's appeal to the First-tier Tribunal has a reasonable prospect of success, and the issue has been addressed in written submissions before me. I do not know whether the First-tier Tribunal, if this case were remitted to it, would reconsider the EHRC's strike out application or simply proceed to a substantive hearing. I suspect it would be the former, but it does not really matter. In my view, there is no real possibility that the First-tier Tribunal at a substantive hearing would allow the Appellant's appeal. This case should be determined sooner rather than later, and I am in as good a position as the First-tier Tribunal to do so. A disposal hearing is unnecessary. The Appellant has in these proceedings taken the opportunity denied to him by the First-tier Tribunal – to make representations as to whether his appeal does not have a reasonable prospect of because he made no request for information within the meaning of FOIA – and oral submissions would not be of further material assistance.

24. And so I have decided to re-make the First-tier Tribunal's decision. My decision, acting under rule 8(3)(c) of the 2009 Rules is that the Appellant's appeal against the Information Commissioner's decision notice does not have a reasonable prospect of success and his case is struck out in its entirety. In my judgment, no properly instructed tribunal could determine that the Appellant made a request for information within the meaning of FOIA. I now explain my reasons for that conclusion.

25. The first part of the Appellant's communication of 7 April 2021 concerned how the EHRC, in conducting its investigation and preparing its report, treated a letter dated 15 February 2017 from the Jewish Labour Movement. It seems to me that the Appellant's underlying concern is quite clear. He thought that the EHRC may have treated the

views expressed in that letter, about the effect on the UK's Jewish community of certain comments made by Ken Livingstone, as 'unequivocal evidence of a factual situation' rather than a submission by an interested organisation containing an unproven factual assertion. The Appellant's concerns might be valid, or they might not. But what is, to my mind, obvious is that the Appellant was not seeking information. He was either expressing doubt as to the robustness of the EHRC's fact-finding or asking the EHRC whether the relevant passage at p.106 of the EHRC's report contained a finding of fact. If the former, the Appellant was merely expressing his own opinion. If the latter interpretation is correct, the Appellant was asking the EHRC to clarify whether the passage in p.106 of the report was simply narrative or ranked as a finding of fact. The Appellant was trying to cause information to come into existence rather than requesting information already held.

26. The Appellant also asked the ECRC whether the relevant passage at page 106 of the report was a drafting error. Subsequently, the EHRC informed the Commissioner that it was not. The Appellant, as I understand his case, now argues that the Commissioner should not have taken what the EHRC said at face value. But that is not, for present purposes, relevant. The Appellant did not request information from the EHRC about the internal EHRC processes which culminated in publication of the final report. He simply asked, 'was this a drafting error?' I am solely concerned with whether the communication of 7 April 2021 might rank as a request for information, and it is not legitimate for me to proceed on the basis that 'was this a drafting error?' really meant 'please provide me with those drafts of page 106 that preceded the final report and any associated internal email discussions, and tell me whether any relevant emails have been deleted'.

27. The Appellant submits that, since the EHRC informed him that the information sought was not held, he must have made a request for information falling within FOIA. I understand why it may seem odd to the Appellant that a communication that was dealt with as a valid request for information is now described as nothing of the sort. However, the fact a public body treats a communication as a FOIA request is not a conclusive determination of status under FOIA. The question whether a particular communication amounts to a FOIA request for information is an objective matter to be determined by whichever body, invested with decision-making powers under FOIA, is called upon to address it.

28. The second part of the Appellant's communication with the EHRC of 7 April 2021 did a number of things. It assumed that the EHRC knew that 'the issue of 'antisemitism'

in the Labour Party was divisive for the Party and 'different Jewish groups affiliated to the Party'. It asserted that two of these groups had 'a radically different view of the issue'. And it ended by quoting a passage from page 106 of the EHRC's report. None of these come close to making a request for information. That leaves the question asked about halfway through the second part of the communication, namely whether the EHRC would regard Jewish Voice for Labour as not part of 'the Jewish Community'. A request to consider an issue and offer a view is not a request for information. It follows that nothing in the second part of the Appellant's communication with the EHRC could properly be regarded as a request for information.

29. I decide that the Appellant's appeal against the Commissioner's decision notice does not have a reasonable prospect of success, and the proceedings on that appeal are struck out in their entirety. In fact, I do not consider the appeal to have even a fanciful prospect of success because, in my judgment, no properly instructed tribunal could find that the communication of 7 April 2021 met the requirement of section 8(1)(c) of FOIA to describe the information requested because no reasonable tribunal could find that the communication contained a request for information. In the absence of a request for information, FOIA conferred no rights upon the Appellant so that asking the First-tier Tribunal to vindicate his FOIA rights was a pointless exercise.

Upper Tribunal Judge Mitchell

Authorised for issue on 12 April 2024.