



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Case No. UA-2023-001249-GIA
[2024] UKUT 00125 (AAC)**

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

Between:

Paul John Calvert

Appellant

- v -

Information Commissioner

First Respondent

and

Chief Constable of Northumbria Police

Second Respondent

Before: Upper Tribunal Judge Zachary Citron

Decision date: 18 April 2024
Decided on consideration of the papers

Representation:

Appellant: by Mrs Sharon McGurk, a “lay” representative
(until 28 January 2024)
First Respondent: by their Solicitor
Second Respondent: by their Legal Department

DECISION

The appeal is allowed.

The decision of the First-tier Tribunal under reference EA/2022/0201, made on 22 June 2023, involved the making of an error on a 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. The panel reconsidering the remitted case shall be freshly constituted (meaning, made up of persons other than those who sat on the panel in the decision that has been set aside).
- ii. There will be a reconsideration of the appeal in all respects.
- iii. If a party wishes to make representations as to (i) whether there should be an oral hearing of the remitted appeal (as opposed to determination “on the papers”) and/or (ii) reasonable adjustments that should be made to enable full participation in the proceedings by all parties (bearing in mind that the appellant is a litigant in person, and may have health difficulties), these should be sent to the First-tier Tribunal so as to be received no later than one month after the date on which this decision is issued.
- iv. If any party has any further evidence to put before the First-tier Tribunal this should also be sent to the First-tier Tribunal so as to be received no later than one month after the date on which this decision is issued.
- v. 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.
- vi. These directions may be supplemented by later directions (including as to the matters mentioned at direction iii above, following the expiry of time for the parties to make representations) 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
 - b. the “**FTT**” are to the First-tier Tribunal
 - c. the “**FTT decision**” are to the FTT decision under reference EA/2022/0201, issued on 22 June 2023, and dismissing the appeal under s57 of the Appellant (“**Mr Calvert**”) against a decision notice (“**IC’s decision notice**”) of the First Respondent (“**IC**”) dated 19 July 2022

- d. numbers in square brackets are to paragraphs of the FTT decision
 - e. “**Northumbria police**” are to the Second Respondent.
2. This is an appeal against the FTT decision, which found that IC’s decision notice was in accordance with the law. Mr Calvert was unrepresented in the FTT proceedings.
3. The FTT decision provided the background, as follows:
- a. Mr Calvert requested certain information from Northumbria police (on 20 November 2021);
 - b. Northumbria police confirmed that they held some of the requested information but refused disclosure in reliance upon s12(1) (exemption where costs of compliance exceeds appropriate limit);
 - c. Mr Calvert complained to IC;
 - d. IC’s decision notice
 - i. recorded that Mr Calvert had requested information about the classification of crimes and crime numbers associated with a particular incident number;
 - ii. found that Northumbria police had appropriately applied s12(1) to the request; and they had complied with their obligations under s16(1) to offer advice and assistance. IC required no steps to be taken;
 - iii. noted that the appropriate costs limit for Northumbria police was £450, effectively imposing a time limit of 18 hours at £25 per hour. It accepted Northumbria police’s estimate that determining whether the requested information was held, locating it, retrieving it and extracting it would exceed the costs limit;
 - iv. one of the information requests related to incidents involving a particular employer (North East Ambulance Service NHS Foundation Trust) and/or its employees. Northumbria police explained that they do not record a person’s employer details in a standard field when recording an incident. This meant that the requested information could not be identified with electronic searches and would require a manual search of 838,700 records at an estimated 3 minutes per record. IC’s decision notice noted that Mr Calvert did not dispute the number of records to be searched but maintained that they could be searched more quickly using a computerised search method. IC’s decision notice noted that even if the

search time could be reduced to one minute per record, the cost would exceed the limit;

- v. concluded that Northumbria police's estimate was a reasonable one in all the circumstances and that Northumbria police were entitled to rely on s12(1) in refusing to comply with the request.
4. [20], under the heading *Submissions and Evidence*, refers to Northumbria police's response (to Mr Calvert's appeal) dated 25 January 2023, and its being "supported by two witness statements from Hayley Young dated 26 January 2023 and 16 February 2023 respectively. Ms Young is the Head of the Information Management Department at Northumbria Police, where she has worked for 16 years". [20] and [21] go on to summarise Ms Young's witness statements.
 5. [23] states that Mr Calvert had not "filed any evidence to contradict Ms Young's evidence" and "did not request an oral hearing at which to test her evidence before the Tribunal." The first of these statements is somewhat qualified by the last sentence of [25], where the FTT decision says, having observed that, as a litigant in person, Mr Calvert may not have appreciated the difference between his submissions and his own evidence, that it had "taken into consideration" what he said, "despite these difficulties".
 6. The FTT decision's conclusions were set out at [24-32]; they can be summarised as follows:
 - a. the question for the FTT was whether Northumbria police had made a reasonable estimate of the costs legitimately involved in conducting the relevant search;
 - b. Mr Calvert had challenged the reasonableness of Northumbria police's estimate, and IC's acceptance of it, with reference to his own claimed knowledge and experience of Northumbria police's computer systems;
 - c. Mr Calvert's statements about the extent of his knowledge of Northumbria police's computer systems were contradicted by Ms Young's second witness statement. This said that Mr Calvert had some basic knowledge of the systems but that he had not been trained in the use of its advanced search capability;
 - d. the FTT decision noted that Mr Calvert did not file further evidence or submissions after Ms Young's second witness statement. Mr Calvert also did not request an oral hearing at which to challenge her evidence. The FTT concluded that Ms Young's evidence was unchallenged;
 - e. the FTT decision said that it followed that the FTT did not accept that Mr Calvert's own experience of Northumbria police's computer

systems was as extensive as he had suggested, and the FTT accepted Ms Young's evidence that Mr Calvert did not have the relevant expertise to conduct the searches which he submitted could have been conducted within the costs limit. For this reason, the FTT decision discounted Mr Calvert's "claimed expertise" in assessing the reasonableness of Northumbria police's estimate;

- f. having considered Northumbria police's estimate in the round, the FTT decision concluded that it was a reasonable one and that IC's decision notice was correct to accept it. The FTT decision accepted that a manual search would have been needed to locate and extract the information requested and that doing so would have exceeded the relevant costs limit;
- g. the FTT decision accepted Ms Young's evidence that she tried to search for the requested information using Mr Calvert's suggested method and that this was not only unsuccessful but would also have engaged s12(1) in any event;
- h. the FTT decision concluded that there was some merit in Mr Calvert's submission that Northumbria police did not provide him with adequate advice and assistance pursuant to s16: more could have been done by Northumbria police to explore the refinement of a very broad request at the initial stage. Nevertheless, the FTT decision agreed with IC's decision notice that no steps need be taken in this regard;
- i. the FTT was thus satisfied that s12(1) was properly engaged; The FTT decision found no error of law in IC's decision notice.

The grounds on which permission to appeal was given

7. In a decision (the "**permission decision**") issued by the Upper Tribunal on 4 November 2023, I gave permission to appeal (restricted to the grounds (the "**permitted grounds**") explained in that decision) because I considered it realistically arguable that the FTT decision erred in law
 - a. in treating Ms Young's evidence as "unchallenged" and, consequently, discounting Mr Calvert's "claimed expertise"; and
 - b. either in failing to consider whether, or in failing adequately to explain why, it was satisfied that it could properly determine the issues without a hearing (as was required by rule 32(1)(b) of the FTT's procedure rules).
8. In the permission decision, I made the following observations, based on the FTT papers:
 - a. Northumbria police's 25 January 2023 response appears to have been made pursuant to the FTT's directions of 5 December 2022

(which joined Northumbria police in the proceedings). Directions 7-9 of these, under the heading *Progress of Case*, said as follows:

“7. Rule 23(1)(b) of the GRC Rules sets the date for the Northumbria Police response as “28 days after the date on which the Northumbria Police receives the notice of appeal” and all correspondence received so far.

8. Rule 24(1) of the GRC Rules gives Paul John Calvert the opportunity to reply to each response within 14 days after the date on which the respondent sends the response to him. Paul John Calvert is permitted to make one reply to the responses of the First and Second Respondents should he decide to reply.

9. I am currently of the view that the latest date for the response/reply stages to be completed should be 23 January 2023; if parties need longer than this they should explain why”;

- b. it appears that Ms Young’s first witness statement was an “annex” to Northumbria police’s response of 25 January 2023 (even though it was dated a day later, 26 January 2023) (see paragraph 11 of the response, which first refers to the witness statement). There is no reference in that response to the Ms Young’s *second* witness statement (which is not surprising, as it appears to be a response to Mr Calvert’s reply of 30 January 2023);
 - c. there do not appear to be any directions of the FTT governing Ms Young’s second witness statement;
 - d. Mr Calvert was a litigant in person and had said in his notice of appeal that he was suffering with anxiety and depression.
9. The permission decision then said that in my view, it was arguably an error of law for the FTT decision to have treated Ms Young’s evidence as unchallenged on the bases that Mr Calvert did not file evidence or submissions after Ms Young’s second witness statement, or request a hearing, since
- a. it was unclear whether Mr Calvert had such right of reply to Ms Young’s second witness statement (or, indeed, whether Northumbria police had the right to put in evidence at that stage) – the directions of 5 December are, at best, “silent” on the issue, or, arguably, expressly restricted Mr Calvert to *one* reply to the second respondent’s response (which he had already made, on 30 January 2023) (see direction 8, quoted above, second sentence);

- b. similarly, it was arguably unclear whether Mr Calvert, having said in his notice of appeal stating that he did not want a hearing, could change his mind at this later stage;
 - c. Mr Calvert could, of course, have applied to the FTT for permission to respond to Ms Young's second witness statement (and/or to "change his mind" about wanting a hearing) – but, arguably, as an "enabling" tribunal, and given that Mr Calvert was not legally represented (and claimed to have some mental health conditions), the onus was on the FTT to spell out to the parties a fair and just procedure in this regard, rather than "passively" observing that Mr Calvert did not respond to Ms Young's second witness statement, or reconsider his initial preference not to have a hearing of his appeal; and
 - d. it was arguably clear enough from Mr Calvert's' 30 January 2023 response that he was challenging Ms Young's evidence.
10. The permission decision then said that the arguable error outlined above is, arguably, material, in that it caused the FTT to "discount" Mr Calvert's evidence (see [28]). The FTT decision says at [29] that having considered Northumbria police's estimate "in the round", it concluded that it was reasonable; however, arguably, this reasoning was tarnished by the "discounting" of Mr Calvert's evidence (in turn caused by the arguable error just described).
11. The permission decision then said that I also considered it arguable that the FTT decision erred in law either in failing to consider whether, or in failing adequately to explain why, it was satisfied that it could properly determine the issues without a hearing. The point is touched on at [2], where the FTT decision states that it was agreed amongst the parties and by the FTT that the matter was "suitable for determination on the papers in accordance with rule 32". However, it is clear from [27-28] that the absence of challenge to witness evidence in Ms Young's second witness statement was an important factor in the determination of the appeal; arguably, in these circumstances, and with an unrepresented party (with claimed mental health conditions), the FTT needed to explain why it concluded that the appeal could "properly" be determined without an oral hearing, bearing in mind the overriding objective of dealing with cases fairly and justly.
12. In this regard, I said that I had in mind a decision of the Upper Tribunal in a social security appeal, *MM v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 334 (AAC), where Upper Tribunal Judge Mesher said:

"11. ... There was nothing in any documents apart from the statement of reasons to indicate that the tribunal addressed its mind to rule 27(1) [a similar rule to rule 32] or to whether or not it was fair and just to adjourn for a hearing to take place (or possibly, to give the claimant a further

opportunity to make written representations or put in further evidence without there necessarily being a hearing). Then there was nothing in the statement of reasons to indicate that that had been done either. That was an error of law. In my judgment, for the reasons put forward of behalf of the Secretary of State, this was not a case in which no reasonable tribunal would have done other than proceed to make a decision on the papers on 17 September 2011. Accordingly, the error is one that requires the setting aside of the tribunal's decision.

12. It might be objected that that is to require a tribunal to go through an empty technicality, in that the tribunal here plainly did consider that it was able to decide the claimant's appeal without a hearing and that it was fair and just to do so, because that is what it did. It could then be said that it would not have helped the claimant's understanding of matters in any way if the tribunal had simply recited in its statement of reasons what could be a meaningless mantra about rule 27(1) and about the overriding objective in rule 2. However, that would in my judgment be to overlook the force of the requirement in rule 27(1) that there is to be an oral hearing in all cases where the proceedings are disposed of unless both of conditions (a) and (b) are satisfied. It is not good enough for a tribunal in the statement of reasons simply to record that the claimant has opted to have his appeal dealt with without a hearing. It is necessary for the tribunal to acknowledge explicitly that it has considered both of the necessary conditions for excluding the duty under rule 27(1) to have a hearing and to give some reasons (which may, in appropriate circumstances, be very shortly expressed) for its conclusion."

13. I made the permission decision having considered Mr Calvert's application form for permission to appeal to the Upper Tribunal, as well as the papers that were before the FTT, of which I had sight, but without holding a hearing

14. Neither IC nor Northumbria police opposed the appeal in relation to the permitted grounds (this was indicated in their responses to the appeal, received on 19 December 2023 and 5 January 2024 respectively). They suggested that the FTT decision be set aside (as it involved an error of law) and that the case be remitted to the FTT for rehearing by a differently constituted panel.

15. Northumbria police's "response", received on 5 January 2024, should have been received by 19 December 2023. They subsequently gave reasons for that lateness (17 days, over the Christmas/new year period), which I found to be cogent; in my view it is fair and just that I "extend time" for, and so have regard to, that response.

Mr Calvert's "expanded" grounds of appeal as put forward by Mrs McGurk

16. It became evident from representations made by Mr Calvert's then-representative, Mrs McGurk, following the permission decision, that Mr Calvert wished to pursue grounds of appeal broader than the permitted grounds. The essence of these "expanded" grounds was that because, Mrs McGurk said, Northumbria police had, in September 2023 (i.e. subsequent to the FTT decision), disclosed some of the information that had been requested by Mr Calvert, it followed that Northumbria police had "misled" Mr Calvert and IC (and, Mrs McGurk alleged, the FTT) in their response to Mr Calvert's information

request. It was suggested, by implication, that this was a (further) ground on which to set aside the FTT decision by reason of error of law.

17. In case management directions issued on 12 December 2023 (and so prior to the respondents' responses, indicating that they did not oppose the appeal on the permitted grounds), I made observations to the effect that it would be fair and just to hold a "rolled up" hearing (before me) of both (i) the substantive appeal on the permitted grounds and (ii) an oral reconsideration hearing of the application for permission to appeal on "expanded" grounds. The case management directions invited comments from the parties on this proposal (as part of the respondents' "response" and Mr Calvert's "reply"). In the event, the respondents did not support the proposal, as they favoured allowing the appeal on the permitted grounds and remitting the case back to the FTT. Mrs McGurk favoured an oral reconsideration hearing in respect of the "expanded grounds", but did not want it to be "rolled up" with a substantive hearing on the permitted grounds (and wanted it to be before a different Upper Tribunal judge).
18. I stated in case management directions issued on 26 January 2024 that the Upper Tribunal had not received a letter of 18 December 2023 from Mrs McGurk (that Mrs McGurk referred to in later correspondence). In response, Mrs McGurk sent a further copy of that letter, and also evidence that the letter had, in fact, been received at the Rolls Building in London (where the Upper Tribunal is based). I record this here to reassure Mr Calvert that (1) the Upper Tribunal has taken into account Mrs McGurk's letter of 18 December 2023 and (2) I accept that the letter was received in the Rolls Building – what appears to have happened is that it did not make its way to the fifth floor, where the administration staff of the Upper Tribunal sit. I apologise for that administrative failing.

Why I have decided not to hold an oral reconsideration hearing of Mr Calvert's "expanded" grounds

19. Given that the appeal on the permitted grounds is unopposed, that I was minded to allow the appeal on those grounds, and that, if allowed on those grounds, the appeal would (as the permitted grounds involved procedural unfairness) very likely result in the case being remitted to the FTT for reconsideration "afresh" at a hearing, I decided that it would not be fair and just to hold an "oral reconsideration" hearing on Mr Calvert's "expanded" grounds of appeal. Holding such a hearing would, in all likelihood, result in unnecessary delay, and be a disproportionate allocation of the parties', and the tribunal's, resources.

Why I have decided to allow the appeal on the permitted grounds, and remit the case to the FTT for reconsideration

20. I have concluded that the making of the FTT decision involved the making of errors of law and the Upper Tribunal should set it aside. This is because the arguable errors identified in the permission decision are, in my view, made out. In summary, the essence of the procedural unfairness here is that, in the circumstances of this case, Mr Calvert was not fairly given an opportunity to challenge the evidence in Ms Young's second witness statement. The circumstances to which I refer include that Mr Calvert was a litigant in person

who, apparently, had health difficulties; in my view, in such circumstances, it was not procedurally fair to, in effect, “assume” Ms Young’s evidence to be “unchallenged”, simply because Mr Calvert had not applied to the FTT for permission to make further representations and/or to change his position (per his appeal form) and ask for an oral hearing.

21. In terms of the materiality of this legal error – I am satisfied that the FTT’s treating Ms Young’s second witness statement as “unchallenged” did materially influence its decision to dismiss the appeal. It is, of course, impossible to say what “would have happened” (i.e. what decision the FTT would have made) had fair procedure been followed and Mr Calvert given an opportunity to comment on that evidence; the problem, as was (memorably) observed by Lord Reed in *Serafin v Malkiewicz* [2020] UKSC 23 (see at [49]), is that “a judgment which results from an unfair trial is written in water”; and so the only fair and just remedy is a retrial.
22. The next question for the Upper Tribunal is whether to re-make the decision or remit the case to the FTT with directions for its reconsideration.
23. Given that a key issue in the appeal (and the issue involved in the procedural unfairness that comprises the error in the FTT decision) was a factual one requiring the weighing up of inconsistent evidence (that of Mr Calvert, as against that of Ms Young) as to extracting information from Northumbria police’s computer system – I have decided to remit the case back to the FTT. This is because the FTT is a fact-finding tribunal that usually sits in a panel that includes, as well as a judge, “lay” members with expertise and experience in information rights matters that come before the tribunal. I consider that the balance of fairness and justice favours the key factual matters in this appeal being resolved by such a panel (rather than by a single judge of the Upper Tribunal). I am also directing the parties being able to make submissions on (and so the FTT to consider) (i) whether to hold an oral hearing of the remitted case and (ii) any reasonable adjustments to enable full participation in the remitted proceedings by all parties, bearing in mind that Mr Calvert is a litigant in person and appears, from communications sent by Mrs McGurk during the course of the Upper Tribunal proceedings, to have ongoing health difficulties. It would not be appropriate for me to spell out what, if any, these adjustments should be: the FTT will determine this with, in the usual way, an eye to the overriding objective of dealing with cases fairly and justly.

Zachary Citron
Judge of the Upper Tribunal

Authorised for issue 18 April 2024