



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

UPPER TRIBUNAL CASE NO: UA-2023-000916-GIA

[2024] UKUT 83 (AAC)

PETER TILSON V INFORMATION COMMISSIONER

Decided without a hearing

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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

Reference: EA/2022/0212
Decision date: 21 December 2022

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS: the First-tier Tribunal is invited to consider joining the Council as a party to the proceedings, as suggested by the Information Commissioner.

REASONS FOR DECISION

The request for information

1. This case concerns a request for information made by Mr Tilson to Northumberland County Council. The council replied that all the information it held was on its planning portal. It maintained the position on internal review. Mr Tilson complained to the Information Commissioner, who concluded that the council did not hold the information requested.

The appeal to the First-tier Tribunal

2. Mr Tilson lodged his appeal with the First-tier Tribunal. It is fair to say that his grounds read more as a complaint about the council's failure to retain documents than a challenge to the Commissioner's decision that it did not hold them. It was on that ground that the Commissioner applied to the First-tier Tribunal to strike out the

proceedings as having no reasonable prospect of success. Mr Tilson sent a long reply.

3. The First-tier Tribunal struck out the proceedings on 21 December 2022. The operative part of its reasoning read:

I have concluded that the Appellant's prospects of success in this appeal must be seen as falling into the "fanciful" rather than the "realistic" category of cases. This is because the Tribunal's role in considering an appeal against a Decision Notice which found that information was not held is to decide for itself whether the information is or is not held. It is not its role to consider whether information should have been held, or to make enforcement or information orders against a public authority. It follows that the Appellant's case, as put in his Notice of Appeal, and as set out more particularly in his response to the proposed strike out, is not one that any Tribunal would have power to uphold.

The grant of permission to appeal to the Upper Tribunal

4. Mr Tilson applied late for permission to appeal to the Upper Tribunal, but the First-tier Tribunal refused to extend time for the application to be made. I admitted the application and gave Mr Tilson permission to appeal. I wrote:

8. I can find no flaw in that reasoning insofar as it relates to the grounds submitted when Mr Tilson lodged his appeal. The reasoning on his response to the proposed strike out is another matter. That response does contain a lot of material that relates to the practice the council should have followed. The First-tier Tribunal appears to have overlooked paragraph 24, which begins: 'The Appellant is not content with the finding that the Council does not hold the information requested.' That is a challenge to the Commissioner's finding. It is an issue that the First-tier Tribunal had jurisdiction to consider. The tribunal's reasoning does not deal with that argument.

9. That failure by the tribunal to consider the whole of Mr Tilson's response is sufficient to satisfy the test for giving permission to appeal.

10. There is now more information available than was before the First-tier Tribunal. Mr Tilson has since been to the Ombudsman and the council has provided its event log, which shows that it inserted into its portal a 'Statement and 3rd Party Reps – Peter Tilson' on 14 November 2019 at 14:43. That record has not been produced before and casts doubt on the reliability of the council's previous evidence. It shows that it did at one time hold information provided by Mr Tilson. That fact, together with the numerous citations provided by Mr Tilson to show the council's responsibilities on retaining documents, place a practical burden on the council to justify its assertion that it does not hold the information requested.

11. Just to avoid any misunderstand, the issue on this appeal is whether the tribunal was wrong to strike out the proceedings on Mr Tilson's appeal. The Upper Tribunal is not concerned with the separate issue whether the council holds the information he requested.

The parties' submission

5. The Information Commissioner has supported the appeal and invited the Upper Tribunal to remit the case to the First-tier Tribunal with the suggestion that that tribunal join the Council as a party to the proceedings. The Commissioner submitted:

8. A case should be struck out if the outcome of the case is “realistically, and for practical purposes, clear and incontestable”: *AW v IC and Blackpool CC* [2013] UKUT 30 (ACC) at §9.

9. On review, the Commissioner considers that, by a fine margin, the Appellant’s case read as a whole is not clearly ‘incontestable’. It is on this basis that the Commissioner does not oppose the appeal to the Upper Tribunal. The Commissioner invites the Upper Tribunal to remit the appeal of the Decision Notice to the FtT

6. Mr Tilson has made a detailed reply. He has commented on the application to strike out his proceedings and on the First-tier Tribunal’s use of the power to strike out. The former is now history, as the Commissioner has conceded that the case should be investigated by the First-tier Tribunal. The latter is a general point. I prefer to limit myself to the circumstances of this case. I accept the Commissioner’s submission that the appeal to the Upper Tribunal should be allowed. That will allow the merits of Mr Tilson’s case to be considered by the First-tier Tribunal.

**Authorised for issue
on 16 February 2024**

**Edward Jacobs
Upper Tribunal Judge**