



NCN: [2023] UKFTT 00384 (GRC)

Case Reference: EA/ 2022/0427

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Heard: by determination on the papers

Heard on: 19 April 2023

Decision given on: 20 April 2023

Before: Judge Alison McKenna

GAIL JUDSON

Appellant

- and -

THE INFORMATION COMMISSIONER

**First
Respondent**

and

REDCAR AND CLEVELAND BOROUGH COUNCIL

**Second
Respondent**

**DECISION
on Strike Out Application
AND DIRECTIONS**

1. The First Respondent's Strike Out Application dated 16 February 2023 is refused.
2. The public authority, Redcar and Cleveland Borough Council, is hereby joined as the Second Respondent to this appeal.
3. The Tribunal administration is to send the Second Respondent the case papers as soon as practicable.
4. The Second Respondent is directed to file and serve its Response within 28 days of the case papers and these Directions being sent to it.
5. The Appellant and the First Respondent may each file a Reply (which is optional) within 14 days of the Second Respondent's Response being sent to it.
6. The Tribunal will issue further Directions to bring this matter to a hearing.

REASONS

7. The Information Commissioner published a Decision Notice on 17 November 2022 which upheld the public authority's reliance on regulation 12(4)(a) of the Environmental Information Regulations 2004 ('EIRs') and required no steps to be taken. It also found that the public authority had disclosed the relevant information that it did hold. The Decision Notice held that the Appellant's information request should have been handled under the EIRs and not under the Freedom of Information Act 2000, as it had been. It also recorded a number of procedural failings by the public authority.
8. The Appellant filed a Notice of Appeal dated 9 December 2022. Her principal ground of appeal was that the Decision Notice had reached an erroneous conclusion when applying the balance of probabilities test to the Council's evidence. She raised a number of other issues which do not appear to fall within the remit of this Tribunal.
9. On 16 February 2023 the Information Commissioner, in filing his Response to the appeal, applied for a strike out under rule 8 (3)(c) on the basis that the appeal had no reasonable prospects of success. The Appellant was invited to provide submissions in response to the proposed strike out in the usual way but did not reply.
10. I note that the public authority in its letter of 27 May 2022 changed its initial stance in relation to a number of the Appellant's requests. Information that it had initially confirmed it held was then said not to be held. I also note from the Information Commissioner's Response to the appeal that it has subsequently come to light that there was further correspondence from the Council which the Information Commissioner had not seen during the course of his investigation. The Information Commissioner states that, in his view, this does not disturb his findings. He suggests that the Tribunal joins the public authority as a party to this appeal if it is not struck out.
11. I have considered the Upper Tribunal's decision in *HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation)* [2014] UKUT 0329 (TCC), in which it is stated at [41] that:

...an application to strike out in the FTT under rule 8 (3) (c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier to summary judgement under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing...The Tribunal must avoid conducting a "mini-trial". As Lord Hope observed in Three Rivers the strike out procedure is to deal with cases that are not fit for a full hearing at all.
12. Applying this approach, I have considered the parties' representations and concluded that this is not a case which may be described as 'not fit for a full hearing'. On the contrary, I find that the Appellant's grounds of appeal clearly establish a triable issue between the parties, which is that she challenges the Decision Notice's conclusions as to the engagement of regulation 12(4)(a) EIRs and whether all the information held has been disclosed. Given the confusion caused by the public authority's change of stance during its correspondence with her, it is certainly arguable that the Decision Notice reached an erroneous conclusion. Further, in my view, where information has subsequently come to light which the Information Commissioner was unable to consider in conducting the balance of probabilities weighing exercise, it is immaterial whether the Information Commissioner himself regards that evidence as failing to disturb his conclusions - the appropriate course is for the Tribunal to consider the matter afresh.
13. I make no comment about the strength or otherwise of the Appellant's case but I do find that it is fit for a full hearing and so I refuse the application to strike it out. This matter should proceed to determination as soon as practicable. I agree with the Information Commissioner that the Tribunal will be assisted in hearing directly from the public authority and so I have issued appropriate Directions to that end.

(Signed)

Dated: 19 April 2023

Judge Alison McKenna

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