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RECENT FOIA/EIR/DPA CASE LAW IN RELATION TO MPNs, VEXATIOUS REQUESTS, STRIKE OUTS AND COSTS

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Introduction

1. The purpose of this paper is to cover recent case law in the following areas:
   (1) Monetary Penalty Notices;
   (2) Vexatious/Unreasonable Requests;
   (3) Strike Outs; and
   (4) Costs.

(1) Monetary Penalty Notices

2. So far there have been three FTT decisions and one decision of the Upper Tribunal in relation to monetary penalty notices (MPNs). The first was *Central London Community Healthcare NHS Trust v IC* (EA/2012/00111). The appellant Trust had been faxing highly sensitive medical information in relation to patients receiving palliative care to the wrong fax number. Eventually a member of the public telephoned to say that he had been receiving these faxes and shredding them. The Trust reported itself and cooperated fully with the investigation. The Commissioner decided to fine the trust £90,000 but offered a reduced penalty if the Trust chose not to appeal.

3. The Trust chose to appeal and they continued their appeal right up to the Upper Tribunal which gave a decision on 8 November 2013 - *Central London Community Healthcare NHS Trust v IC* [2013] UKUT 0551 (AAC). The Trust lost on every ground. The principles that emerge from the litigation are:

   (1) The FTT's jurisdiction under section 49 of the DPA mirrors that under section 58 of FOIA – i.e. in an appeal against, a MPN, the FTT can re-consider the issues afresh (and could even impose a larger fine than the IC) – see §§50, 54 of the UT decision.

   (2) However, when the issue is the quantum of a MPN, the FTT will look at whether the fine is 'within a range of reasonable figures' – see §139 of FTT decision.

(3) The IC was not required to keep its offer of a reduced penalty open whilst an appeal was pending, or to allow a reduced payment to be made "under protest". The purpose of the scheme was to encourage early payment and to ensure an early resolution to the matter. There is no provision for a without prejudice payment. This is not a fetter on the right of appeal - §71 of the UT decision.

(4) The 'carve out' under s. 55A(3A) of the DPA only applies where the information comes to light as a result of a voluntary audit. The mere fact that a data controller has reported themselves and cooperated does not mean that it cannot be fined – see §24 of the UT decision.

(5) Self-reporting is not a significant mitigating factor because it is a legal obligation and cooperation is the 'least that could be expected'. The absence of evidence of further dissemination is not a powerful mitigating factor if there is no 'absolute guarantee' that the data has been destroyed – see §128 of the FTT decision.

4. The other two appeals concerning MPNs were *Scottish Borders Council v Information Commissioner* (EA/2012/0212) and *Niebel v Information Commissioner* (EA/2012/0260).

5. *Scottish Borders Council v Information Commissioner* (EA/2012/0212) began with an overflowing bin outside Tesco, where a member of the public found files containing the pension records kept by the appellant local authority. A data processing company had turned Scottish Borders files into CDs and then dumped the files in bins. So far as anyone was aware, no actual harm resulted. The ICO imposed a MPN of £250,000 on Scottish Borders.

6. The FTT allowed the appeal, holding that:
   (1) there could be no liability for contraventions before s.55A came into force (i.e. before 6 April 2010) – para. 15

   (2) The ordinary civil standard of proof applies, not the criminal standard – para. 20;

(3) Scottish borders were in contravention of DPA, Schedule 1 Part 2, para 12(b) because its contract with the data processor did not impose the same obligations on the processor as it had itself – para. 32.

(4) It was necessary to focus on the likely harm that would flow from the contravention, rather than from the trigger incident (i.e. what happened at the paper recycling bin) – para. 38.

(5) The test of 'likelihood' requires something more than a mere possibility – para. 43.

(6) In this case, the contravention was not likely to cause substantial damage or distress. The data processor had a relationship of 25-30 years with the council and they had good reason to trust him. What happened was a surprising outcome, not a likely one.

7. *Niebel* involved a company that was engaged in 'sending unwanted text messages on an industrial scale' seeking potential claims for mis-selling of PPI loans or accidents, contrary to Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003. The FTT held that test under s. 55 – that the contravention be of a kind that was 'likely to cause substantial damage or substantial distress' – was not a 'balance of probabilities' test (see para. 10 of the FTT decision and *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin) at [99-100], where 'likely' was held to mean a 'very significant and weighty chance', although not necessarily a more than 50% chance).

8. The FTT also held that 'substantial' was qualitative and quantitative. 'Substantial' reflects the seriousness of the harm and how widespread it might be (see para. 11). It was, as a result, very important, in a case like Mr Niebel's, that the number of texts be included in the Commissioner's description of the contravention. Looking at the 286 texts in the contravention, the FTT found that it was unlikely they would cause substantial damage or distress.

(2) Vexatious/unreasonable requests

9. Three Upper Tribunal (UT) decisions were handed down on 28 January 2012, addressing the proper test to be applied in deciding whether requests are "vexatious" (s14(1) FOIA) or "manifestly unreasonable" (Reg 12(4)(b) EIRs).

10. *IC v Devon County Council and Dransfield* [2012] UKUT 440 is now the leading case on s14(1). A "vexatious" request is one which involves a "manifestly unjustified, inappropriate or improper use of" the FOIA procedures. Characterising a request as involving such misuse, or as "vexatious" requires considering four (non-exhaustive) themes: –

    (1) the burden - on the public authority and its staff. This involves considering the previous course of dealings with the requestor, looking at factors such as the number of requests, their breadth or the pattern of their arrival;

    (2) the motive - of the requester. That FOIA is "motive blind" does not mean that there can be no examination, under s14, of the justification for the request, or its motive. It may be "ill-intentioned", or have drifted so far from its original purpose as to become disproportionate.

    (3) the value or "serious purpose" of the request. The UT recognised the potential for overlap with (2), and also cautioned about "jumping to conclusions" about a lack of serious purpose; but there should be an objective public interest in the release of information sought.

    (4) any harassment or distress, of and to staff – by the use of bullying language etc. This was not, however, a prerequisite for the application of s14.

11. *Craven v IC and DECC* [2012] UKUT 442 addressed "manifestly unreasonable" EIR requests. It confirmed that the test under the two regimes was, for practical purposes, the same. It follows that if there is uncertainty about which regime applies, public authorities may address requests on an 'either/or' basis. Further, an authority is entitled to refuse a single

extremely burdensome request as being "manifestly unreasonable", purely on the basis that the cost of compliance is excessive. This represents an important protection for public authorities.

12. Finally, in *Ainslie v IC and Dorset CC* [2012] UKUT 441 (AAC) the UT expressly confirmed current understanding of the FTT's appellate jurisdiction: the FTT may "undertake a full merits review of the Commissioner's decision".

13. In response to these judgments, the Information Commissioner updated his guidance on vexatious requests.

14. In the summer of 2013 there were a couple of decisions in relation to 'manifestly unreasonable' requests. Although they followed Craven in finding that 'manifestly unreasonable' is coterminous with 'vexatious', the FTT did not agree with the IC's importation of the FOIA time limits into EIR. This raises questions about the extent to which the approach taken to vexatious requests under the FOIA can be transposed to requests made under the EIR.

15. In *Yeoman v Information Commissioner* (EA/2013/0008) the IC's approach was overruled by the FTT. The case concerned requests for disclosure, from Cornwall Council, of all 'section 106 agreements' (i.e. - agreements between developers and local planning authorities that are negotiated under the Town and Country Planning Act 1990 as part of a condition of planning consent). When reaching the conclusion that the request was manifestly unreasonable, the IC had taken into account:
    (1) the length of time that it would take the public authority to respond to the requests (the Council estimated this would be around 28 hours 47 minutes);
    (2) the effective time limit of 18 hours in relation to FOIA applications. There was no similar effective time limit under the EIR, but, the IC felt that the time estimate was so far in excess of the FOIA limit as to render the request 'clearly unreasonable'; and
    (3) whether the public interest test favoured non-disclosure. The IC concluded that given the time involved in meeting the request, this would disrupt the Council's 'core duties'.

16. The FTT agreed with the IC's analysis that the length of time to respond to the request rendered it manifestly unreasonable. However, the Tribunal did not agree with the IC's importation of the FOIA time limits. It held that the absence of time limits from the EIR framework was a "fairly compelling indication" that the FOIA time limits were not a pertinent consideration in relation to EIR applications.

17. The Tribunal was also critical of the IC's approach to public interest. The Tribunal concluded that the IC had construed the public interest too narrowly, as relating only to the business community. The Tribunal stressed that there was a broader and "manifest public interest" in having the information sought released to the wider public (and not just the business community) so that they would know about the amount of money (or other obligations) associated with section 106 agreements. The public would also be able to check when commitments under section 106 agreements were due to arise and whether developers were honouring their commitments. This was a "core function" of the public authority rather than a distraction.

18. The Tribunal found that the IC had wrongly conflated the public interest test with the 'manifestly unreasonable' test, finding that length of time involve in answering the request meant that disclosure was against the public interest. The Tribunal stressed that the public interest test is distinct and not synonymous with the manifestly unreasonable test. Thus, although, the Tribunal concluded that, on balance, the request could properly be characterised as manifestly unreasonable, it also concluded that the public interest strongly favoured disclosure. The appeal was allowed and the Council was ordered to respond to the request.

19. The IC found his application of the 'manifestly unreasonable' test overruled again in *Silverman v IC* (EA/2013/0027), a case decided on the same day and before the same judge. Requests had been made to the Department of Transport for information relating to the Mr Silverman's campaign entitled 'Clean Highways'. The campaign sought to tackle litter problems on the UK's road network. The Department of Transport estimated that it would take it around 72 hours to respond to Mr Silverman's requests. The Commissioner felt this to

be slightly excessive but he did not carry out his own analysis or offer a substitute figure. The Commissioner also considered the following factors:

(1) the number of previous requests that had been made by Mr Silverman since May 2010;

(2) the public authority's positive response to previous representations from Mr Silverman; and

(3) the unsuccessful nature of the appellant's application for a litter abatement order in proceedings brought against the public authority.

20. The Commissioner concluded that these three points, taken together, meant that Mr Silverman's applications were 'manifestly unreasonable'. Mr Silverman disputed the Commissioner's conclusions regarding the time it would take to respond to his requests the conclusion that the requests would be burdensome and that the requests were obsessive.

21. Applying *IC v Devon County Council & Dransfield* [2012] UKUT 440 (AC), the FTT noted it was confronted with conflicting evidence on the burden to the public authority created by the request. It felt unable to provide its own time estimate but, on balance, it concluded that the time incurred in responding to the requests could not be properly characterised as an unreasonable burden. It also repeated its comments on the inappropriateness of importing FOIA time limits to the EIR framework.

22. The FTT further found that the number of applications (13 over a period of two and a half years) was not excessive "in light of the worthwhile nature of Mr Silverman's campaign". The Tribunal found the Commissioner's submissions in relation to the apparently obsessive nature of Mr Silverman's requests to be muddled and unpersuasive. It also rejected the conclusion that the failed application for a litter abatement order as of being of any notable relevance. Finally, it noted the fact that Mr Silverman had made a number of FOIA and EIR applications following this appeal which had been answered without complaint. This undermined the suggestion that his requests had reached a level where they could be

objectively characterised as obsessive. Consequently, the Tribunal unanimously concluded that Mr Silverman's requests could not be properly characterised as manifestly unreasonable. The appeal was allowed and the DoT ordered to respond to the appellant's enquiries.

23. Interestingly, in reaching its decision, the Tribunal placed significant weight on what it considered to be the "decent worthwhile" nature of Mr Silverman's campaign which it considered to have a "serious aim and purpose which was of general benefit to the whole community", perhaps suggesting that a campaign which was not considered as worthy or 'decent' (or uncontroversial?) may be subject to a different approach from the Tribunal.

(3) Strike Outs

24. Under Rule 8(3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009/1976, the Tribunal may strike out the whole or a part of the proceedings if:

> *"(b) the appellant has failed to cooperate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly or justly; or*
>
> *(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."*

25. Strike outs have been considered by the Upper Tribunal on a couple of occasions in the last year.

26. In *AW v IC and Blackpool CC* [2013] UKUT 030 (AAC) the Upper Tribunal was concerned with Rule 8(3)(c) and summarised the relevant principles applicable to a strike-out:-

> *"it is only appropriate if the outcome of the case is, realistically and for practical purposes, clear and incontestable. It is not usually appropriate if facts relevant to the ultimate outcome of the case are disputed."* (see Judge Edward Jacobs in Tribunal Practice and Procedure, 2nd edn, 2011, at §12.39).

27. The Upper Tribunal accepted that there was an arguable inconsistency between two relevant Decision Notices, such that "there was then plainly a contested issue of fact to be resolved".

In consequence, albeit that AW's case may not have been strong, it was "not hopeless". Since a full hearing and evaluation of evidence was required, the appeal was allowed.

28. In *AD v Information Commissioner and Devon County Council* [2013] UKUT 0550(AAC), the UT was concerned with Rule 8(3)(b). This was Mr Dransfield again. He was asked by the FTT judge to moderate his tone in email exchanges and warned that he might be struck out if he did not cooperate. Mr Dransfield's response was to accuse the other parties of 'conniving and colluding to pervert the course of justice' and producing a 'pack of lies and deception'. He even suggested that the Commissioner's legal representative and an UT judge should be arrested for conspiracy to pervert the course of justice. The FTT struck out his case. The UT held that this was too draconian a use of the power, which was supposed to be used for case management purposes. The use of offensive emails could and should have been dealt with by other means, e.g. filtering emails through the judge or just ignoring them. Judge Jacobs quoted the psychologist William James: "the art of being wise is the art of knowing what to overlook".

(4) Costs

29. Under Rule 10 of the Rules:-

> ***"10.*** *(1) The Tribunal may make an order in respect of costs (or, in Scotland, expenses) only—*
>
> *(a) .....*
>
> *(b) if the Tribunal considers that a party has* ***acted unreasonably in bringing, defending or conducting the proceedings****.." (emphasis added)."*

30. If an application is to be made under this Rule, a written application must be made within 14 days of receipt of the Tribunal's decision. The application must be accompanied by a schedule of costs (see Rule 10). In *Royal Mail Group Ltd 2 v ICO* EA/2010/0005, the Judge held that a decision on this costs application might be made on the papers if the parties agreed and, further, that the application could be determined by the Tribunal Judge sitting

alone (a decision made with reference to the Senior President's Practice Statement as to the Composition of Tribunals in the General Regulatory Chamber). See paragraph 7 of the decision. The Tribunal adopted the following approach to the word 'unreasonable':

> *"The Tribunal has adopted the ordinary meaning of the word "unreasonable" for the purpose of interpreting rule 10 (1) (c) of the Rules, being "not in accordance with reason, irrational" (as defined by the Oxford English Dictionary) as distinct from the precise administrative law definition of the word, connoted by Wednesbury unreasonableness". [para 17].*

31. In *European Environmental Controls Ltd v The Office of Fair Trading* CCA/2009/0002, the First-tier Tribunal (Consumer Credit) considered a costs application under rule 10 and commented that a judgement as to unreasonableness must depend on the facts of each case, there being no hard and fast principle applicable to every situation. It also commented that the Tribunal would not wish to discourage applicants from coming to the Tribunal for fear of a costs order.

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