Enforcing Tribunal decisions: where there's bark there's bite?

Isabella Buono, Barrister with Cornerstone Barristers, explores what happens when a public authority fails to comply with a Tribunal decision notice

Suppose that an individual succeeds on an information rights appeal, but the relevant public authority fails to comply with the Tribunal's decision notice. What, if anything, can be done?

As explored in this article, the answer is not as straightforward as one might think.

Contempt of court

The First-tier Tribunal ('FT') does not have access to the same arsenal of enforcement powers as that held by the High Court. If a person acts in breach of an order of the High Court, the Court is able to commit that person for contempt of court. The matter might be prosecuted by the Attorney General if the breach involved a serious interference with the administration of justice. Usually, however, the matter will be taken forward by one or more of the parties to the case. A person found in contempt can be imprisoned for up to two years or subject to an unlimited fine.

The FT is a creature of statute, having only those powers conferred upon it by Parliament. The power to commit for contempt is not among the powers which Parliament has chosen to confer on the FTT.

The question of how non-compliance with FT decision notices should be dealt with was considered by the Upper Tribunal ('UT') in the recent case of *Information Commissioner v Moss* [2020] UKUT 174 (AAC).

The case of *Information Commissioner v Moss*

This case arose from a request made by Mr Moss to the Royal Borough of Kingston upon Thames ('the Council') for information relating to a local regeneration project. The Council refused the request, relying on the exemption in section 12 of the Freedom of Information Act 2000 ('FOIA') which applies where the cost of compliance is estimated to exceed the prescribed 'appropriate limit' (currently £450).

Mr Moss complained to the ICO, which decided that his request was properly refused under section 12. Mr Moss appealed against that decision to the FT.

The FT decided that the Council's reliance on section 12 FOIA was justified. The Council had not, however, complied with its duty under section 16 FOIA to 'provide advice and assistance, so far as it would be reasonable to expect [it] to do so, to persons who propose to make, or have made, requests for information'. Accordingly, in its decision notice, the FT said that the Council was "now required to provide advice and assistance to enable a reformulation of the request within the appropriate limit… within 30 working days."

Mr Moss did not consider the Council to have complied with that substituted decision notice. He asked the ICO to take enforcement action, but it refused. He then applied to the FT for the Council to be committed for contempt, or for the Council's conduct to be certified as contempt. His applications were struck out. The FT did not consider itself to have jurisdiction to determine them.

The Registrar and President of the General Regulatory Chamber ('GRC') of the FT considered the relevant power of enforcement to lie, instead, with the Information Commissioner. The source of that power, it said, was section 54 of FOIA, which provides that the Information Commissioner may certify to the High Court (or, in Scotland, the Court of Session) that a public authority has failed to comply with a decision notice, information notice, or enforcement notice.

The Registrar and President considered that provision to apply to the enforcement of both (a) a decision notice which the Information Commissioner issued and which has not been appealed and (b) a decision notice substituted by the FT on appeal. In its view, given that the FT "stands in the shoes of the [Information Commissioner]", any replacement decision notice issued by the FT must "remain the Information Commissioner's… decision notice" for the purposes of section 54. Put simply, the replacement decision notice is the Commissioner's to enforce.

The Information Commissioner did not agree with that analysis. She therefore appealed against the FT's decision to the UT.

Enforcement powers of the Information Commissioner

The UT took a different approach to the Registrar and President of the GRC. It decided that the Information Commissioner does not have power under section 54 FOIA to enforce a decision notice substituted by the FT on appeal.

The UT considered that giving the Information Commissioner such a power would offend the 'fundamental constitutional principles' articulated by the Supreme Court in *R (Evans) v Attorney General* [2015] UKSC 21, including that decisions of judicial bodies "cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive."

If Parliament had wanted to "override these basic principles of the constitution" by giving the Information Commissioner a role in the enforcement of decision notices of the FT — including the power to decide not to enforce some decision notices — it should have said so expressly. Absent clear and unambiguous statutory language to that effect, Parliament could not be taken to have conferred on the Information Commissioner the power to enforce decision notices substituted by the FT on appeal.

The question, then, was: does the FT possess the power to enforce its own decisions?

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Enforcement powers of the First-tier Tribunal

In March 2018, when Mr Moss applied for certification of the Council's conduct, section 61 of FOIA provided that the FT could certify an offence of contempt to the High Court (or, in Scotland, to the Court of Session). That's to say, if a person did something (or failed to do something) in relation to FT proceedings which would constitute contempt of court if the proceedings were before the High Court, the FT could decide to send the matter to the High Court for it to decide whether the relevant act or omission was akin to contempt and, if so, how it ought to be punished (if at all).

On 25th May 2018, a new section 61 was substituted by paragraph 60 of Schedule 19 to the Data Protection Act 2018 ('the DPA 2018'). This new provision, which remains in force, differs from its predecessor only insofar as it provides for the FT to certify an offence of contempt to the UT rather than to the High Court. By paragraph 54 of Schedule 20 to the DPA 2018, if the relevant conduct occurred before 25th May 2018, the old version of section 61 of FOIA — providing for certification to the High Court rather than to the UT — still applies.

In *Moss*, the UT decided that section 61 of FOIA gives the FT a role in the enforcement of its own decision notices.

In reaching that conclusion, the UT pointed out that, under rule 7 of the First-tier Tribunal (General Regulatory Chamber) Rules ('the FT Rules'), the FT already has the power to refer failures in respect of giving evidence and producing documents to the UT. On such a reference, the UT can impose a fine or a term of imprisonment as punishment, pursuant to its powers under section 25 of the Tribunals, Courts and Enforcement Act 2007 ('the TCEA'). In *CB v Suffolk County Council* [2010] UKUT 413, for example, the UT ordered a headmaster to pay a fine of £500 for failing to comply with a witness summons issued by the FT in the course of proceedings concerning a child's statement of special educational needs.

In addition, under rule 8 of the FT Rules, if an appellant fails to comply with directions given by the FT, the FT has power to strike out their appeal. Also, if a respondent fails to comply with directions given by the FT, the FT has the power to bar them from taking further part in the appeal.

In view of those powers, the UT concluded that "not… much else [is] left… for section 61 [of FOIA] to deal with, apart from [non-compliance with a substantive] decision [of the FT]." Where a person — whether or not they are a party to the proceedings — fails to comply with an obligation imposed on them by a substituted decision notice of the FT, the FT has the power under section 61 of FOIA to certify the conduct as amounting to contempt.

The procedure which governs the making of certification applications is set out in rule 7A of the FT Rules. That rule requires the application to be made in writing, and to be received by the FT not later than 28 days after the conduct at issue first occurred. If an extension of time is sought, it must be included in the application and there must be an explanation for the delay.

A certification application must also include:

- details of the proceedings giving rise to the application;
- details of the act or omission relied on;
- if the act or omission arises following, and in relation to, a decision of the FT, a copy of any written record of that decision;

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- the grounds relied on in contending that if the proceedings in question were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court;
- a statement as to whether the applicant would be content for the case to be dealt with without a hearing if the FT considers it appropriate; and
- any further information or documents required by a practice direction.

If the FT decides to admit the application, it will send a copy of it and the accompanying documents to the respondent and will give directions as to the procedure to be followed in considering and disposing of the application.

What next for Mr Moss?

In *Moss*, the UT concluded that the FT had wrongly struck out the part of the proceedings relating to Mr Moss' application for certification of the Council's conduct as amounting to contempt. His application was therefore restored. It is due to be heard by the FT in late summer 2021.

The FT Rules do not prescribe any particular procedure for considering and disposing of this type of application. It would make sense for the FT to follow the well-established certification procedure which applies in relation to inquiries (formerly under the Tribunals of Inquiry (Evidence) Act 1921, now under the Inquiries Act 2005). This involves the inquiry chair inquiring whether there has been a contempt, listening to any submissions on the same, and, if the chair so concludes, exercising a discretion as to whether or not to certify the contempt.

Should the FT decide to certify an offence of contempt, it would then be for the High Court or the UT (depending on whether the act or omission at issue took place before or after 25th May 2018) to decide whether, as a matter of fact, an offence of contempt has been committed. Before making any such decision, the UT/High Court would be required, by section 61 of FOIA, to hear any witness who might be produced against or on behalf of the person charged with the offence, and to hear any statement that might be offered in defence. The certification decision made by the FT should carry some weight, but the matter is ultimately to be determined by the UT/High Court for itself, and so the certification decision should not merely be 'rubber stamped' (see, by analogy, the treatment of certification decisions under the Inquiries Act 2005 in *Re Paisley Junior* (No 3) [2009] NIQB 40).

If the respondent is found to be in contempt, it would also be for the UT/High Court to determine what (if any) sanction should be imposed. Under section 14 of the Contempt of Court Act 1981, the High Court has power to punish a person in contempt by committing them to prison for a period of up to two years, or by imposing an unlimited fine. By section 61(5)(b) FOIA, sections 3(5) and 25 of the TCEA and section 9 of the Contempt of Court Act 1981, the same sanctions are made available in this context to the UT.

If the 'bark' of the information rights regime is heard when the FT allows an appeal, it's here — in the mouth of the UT or the High Court when deciding how to punish an offence of contempt — that we find the 'bite'.

Isabella Buono
Cornerstone Barristers
ibuono@cornerstonebarristers.com