



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50705448**

Appeal Reference: EA/2018/0181

**Heard at Field House, London
On 30 May 2019
Promulgated on 20th June 2019**

Before

JUDGE CHRIS HUGHES

Between

RICHARD MARTINEZ

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Background

1. Mr Martinez was employed by the London Borough of Merton ("Merton") as a Commercial Waste Operator based at a depot in Garth Road for over a decade. In 2007 while at work he had a road traffic accident when a vehicle collided with Mr Martinez's vehicle. Mr Martinez restrained the driver whom he considered responsible for the accident. This led to Mr Martinez being charged and convicted of a criminal offence. He appealed against conviction to the Crown Court and his appeal was allowed in 2010.

2. Mr Martinez wished to raise a health and safety issue arising out of the accident; however, he felt unable to do so until the conviction was quashed and then he did so by raising a grievance on 1 June 2010 which reached a stage 3 hearing on 26 August 2010. He launched proceedings in the County Court against Merton on 1 November 2010 claiming £43,466.32. This claim was dismissed.
3. There was a deterioration in relations between Mr Martinez and his manager and Mr Martinez was dismissed. He brought proceedings in the Employment Tribunal (the ET) claiming unfair dismissal. A key argument he advanced was that his dismissal was unfair under the Employment Rights Act 1996 which provides: -

"100 Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –

(c)being an employee at a place where –

(i)there was no such representative or safety committee, or

(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,"

4. After a 10-day hearing in November 2015 in which Mr Martinez represented himself, the ET found in a decision dated 11 February 2016 that the principal reason for dismissal was not the health and safety matter. He subsequently appealed against the findings of the ET to the Employment Appeal Tribunal.

The request for information

5. The hearing before the EAT was on 18 January and 17 May 2017.

6. On 19 May 2017 Mr Martinez sought information from Merton: -

"1. How many Health and Safety representatives, if at all, were there at Merton Council's Waste Depot site based in Garth Road, PRIOR to 2010?

2. How many Health and Safety representatives, if at all, were there at Merton Council's Waste Depot site based in Garth Road, AFTER 2010?"

7. There were various exchanges, Merton sought clarification of the request.
8. The decision of the EAT was issued on 3 July 2017. In dismissing the appeal, the EAT reviewed the findings of the ET (bundle page 25, extract from EAT decision): -

"First the Employment Tribunal found that it was reasonably practicable for the appellant to have raised this with the health and safety committee. I should have made it clear that the appellant himself has made submissions and he has submitted to me that the health and safety committee was five miles away. He has also pointed out that there was no health and safety representative until July 2010... I have no doubt that the distance of five miles is a factor to take into account, but it seems to me that was an issue likely to have been ventilated before the Employment Tribunal, and that the finding at paragraph 45 that it was reasonably practicable for the matter to have been raised before the health and safety committee was a finding of fact. Accordingly, no error of law can arise."

9. On 18 July 2017 Merton sent a reply to the FOIA request relying in part on memory, Mr Martinez criticised this approach as not in accordance with FOIA, Merton sent a reply based on recorded information answering both questions with "3" on 20 July, Mr Martinez submitted a revised request on 20 July 2017: -

"1. How many OFFICIALLY QUALIFIED Health and Safety representatives, were there at Merton Council's Waste Depot site (WHERE I WAS BASED IE IN THE TWO WASTE DEPARTMENT PORTACABINS) In Garth Road, PRIOR to 2010 but no earlier than 2003 when I started at Merton?

2. How many OFFICIALLY QUALIFIED Health and Safety representatives, were there at Merton Council's Waste Depot site (WHERE I WAS BASED, IE IN THE TWO WASTE DEPARTMENT PORTACABINS) in Garth Road, AFTER 2010 and up to the end of 2014 when I finished at Merton?

If your answer/records still do not reflect that which Angela Satchell, the ex-H&S rep and I are all aware of, ie that there were zero officially qualified H&S reps based at my work portacabins during the years 2003 to 2010, then it will be blatantly clear to me that fraud has occurred and so in the pursuit of justice I will have no option but to then arrange for the Information commissioner's office to investigate."

10. On 9 August Merton responded in writing to a phone call from Mr Martinez of 8 August and certain of the criticisms he had raised to address the source of information. It provided information as to where the information came from which underlay the number "3" in the replies to the two questions, and formulated the request for information in a way distinct from either of the two formulations which Mr Martinez had stated. For the first question the answer was: -

"1. Answer 3.

Person A – recorded on a health and safety poster.

Person B – recorded in the Employment Tribunal Judgement in Mr R Martinez v London Borough of Merton case number 2303176/2014.

Person C – recorded in Mr R Martinez v London Borough of Merton case number 2303176/2014 and iTrent personnel records."

11. On 15 August Mr Martinez responded, pointing out the discrepancy between the question which Merton had answered and the reformulated question in which he had specified precisely where he was based: -

"it was just the two portacabins where I was based which is of relevance. Yet you seem to have counted the whole depot which is not what was requested in my FOI request.... If your next FOI reply is not based accurately on my two FOI requested questions below which are required to assist in my employment appeal tribunal for my being managed out, then it will look like Merton are undoubtedly trying to alter, block, destroy or conceal information, which is against section 77 of the FOI Act."

12. On 19 September 2017 Merton responded to Mr Martinez treating his letter of 15 August as a request for an internal review (bundle pages 58-61). It explained the limitations of FOIA: -

".. gives you a right of access to recorded information held by public authorities. However, there is not an obligation, and indeed it is not the purpose of the Act, to answer your questions if this would mean creating new information or giving an opinion or judgement that is not already recorded.

Merton council is satisfied that you have been provided with the record held regarding this matter. No further relevant record exists to provide to you, about the presence of Health and safety representatives at Garth road, within the parameters of your request(s). Where records are not held, or are not held in the format you would have expected, you have been provided with advice and assistance"

13. Mr Martinez complained to the Commissioner that Merton "refused or only partly fulfilled my request". With the complaint he sent a report by a health and safety expert dated May 2016 which criticised the county court decision (bundle page 67-70).

14. On 22 January 2018 the Commissioner wrote to Mr Martinez setting out the history of the request, Mr Martinez's clarification (which clearly significantly narrowed the geographical scope of the original request) and summarised Merton's responses to Mr Martinez, the letter confirmed (bundle page 77): -

"the focus of my investigation will be to determine whether [Merton] handled your request in accordance with the FOIA. Specifically, I will look at whether it is correct when it says that the information it has provided is the information it holds within the particular scope of your request.

As I explained to you during our telephone conversation, the Commissioner's remit does not include the matter of accuracy of information.

However, the Commissioner will ask [Merton] about its interpretation of your request which you have set out was specifically about Health and Safety representatives who were based at two particular portacabins during specific periods rather than who were responsible for H&S matters at the portacabins during the specified period. If my interpretation is incorrect, please advise me accordingly"

15. The letter asked Mr Martinez to provide a copy of the Employment Tribunal decision. In his response he stated (bundle page 79): -

"I therefore also attach the Tribunal Appeal Judges decision, which legal advice translated that the judgement required that I needed to overcome the remaining hurdle being that of proving that there was No, none, zero Health and Safety official where I was based at work.

...

Below also shows my adding new evidence to my Employment Tribunal evidence bundle, and which was to also include the FOI request result from my employer, but as you know from our conversation, that my employer have done everything they can do to avoid admitting that which Richard Evered's statement confirms being that they state there were &S officials in place at the time of my injuries and whistleblowing, yet evidence shows there was not."

The Commissioner's decision

16. In her decision notice the Commissioner set out the scope of her investigation. She concluded that no offence had been committed under s77. Her role was (decision notice paragraph 15): -

"to determine whether or not, on the balance of probabilities, Merton holds information falling within the scope of the request"

17. She considered that the wording of the request was crucial and that the request was for information about "officially qualified" H&S representatives based in two portacabins at Garth Road. She noted the contents of a witness statement submitted in support of Mr Martinez in the ET proceedings from Mr Evered who had started work at the portacabins in 2013 as Training and Road Safety Officer who stated, "I did not take over from any other health and Safety Officer/Representative at the time of my starting there, as I was the first Health and Safety representative to be based there". She noted that it was Mr Martinez's position that until that time there had been no H&S representatives based at the portacabins.
18. She examined the steps which Merton had taken to find the information (dn paragraphs 22-25) and Merton's conclusion that "it does not appear that information falling within the scope of the request has ever been held" (dn paragraph 26). She explored with Merton whether Mr Evered was a qualified H&S representative (dn paragraphs 27-32). She received confirmation that Merton had two successive H&S representatives for Waste Operations but neither of them was based in the Portacabins, although both were based at Garth Road (dn paragraph 33). In paragraphs 36 and 37 she explored the issue of why information was not held: -

“Specifically, she asked if information was not held because Merton had no H&S representatives or if it was not held because there were no records of the H&S representatives it did have.

In its submission Merton has set out that all Trade Union stewards act as H&S representatives and that although there is no single list of individuals named as H&S representatives, Merton, it appears, simply treats the list of trade union representatives as a list of H&S representatives. It is Merton’s position that although somewhat convoluted, this means that Merton meets its requirements under H&S regulations.”

19. She noted the very narrow scope of the request as clarified on 20 July 2017 and concluded *“The Commissioner considers that it is clear from the submissions provided by Merton that on the balance of probabilities, it does not hold recorded information falling within the scope of the request”*.
20. She noted that the request and responses had become convoluted and that the initial response *“was at best misleading and served to increase the complainant’s [Mr Martinez’s] concerns about the response.”* (dn 42). She further noted the breakdown in relations between Mr Martinez and Merton.

The appeal and response

21. In his appeal Mr Martinez set out the history of the road traffic accident and subsequent proceedings, his belief that he had been “managed out” of his employment because he had drawn attention to concern about health and safety in Merton, set out his understanding of the legal position under s100 Employment Rights Act 1996, argued that the Commissioner had been unduly lenient in her treatment of Merton and wished the tribunal to re-assess this.
22. The outcome he wanted from the appeal was for Merton to admit that there was no H&S representative at his place of work. He stated (bundle page 16): -

“With Merton either admitting to their failing, &/or this appeal succeeding and therefore confirming the view that Merton have not been able to provide any evidence to counter the witness statement of their own H&S rep and my FOI request, then I trust that a new Employment Tribunal Judge can therefore re-assess the injustice of my unfairly being managed out, just for raising a H&S neglect issue by my employer which lead to my work related injuries, as we as Merton now being misleading with my FOI request and the Commissioner’s enquiry”.
23. In resisting the appeal, the Commissioner maintained her position that she was entitled to rely upon the representations made by Merton and emphasised that Merton: -

“is not saying there was no H&S representatives at this time, just that they do not hold information to confirm or deny this either way.”

24. She did not agree with Mr Martinez's claim that she made "negative observations" about Merton and there was only one seemingly "negative view" and she had concluded that Merton was not in breach of s16 FOIA (the duty to provide advice and assistance to persons making requests for information) finding that such provision could have caused further confusion given Mr Martinez position.

The hearing

25. In the hearing Mr Martinez emphasised that he believed that he had been unfairly dismissed and that his aim in the hearing was to prove that there was no Health and Safety representative. He reviewed the various information provided by Merton with respect to health and safety representatives which he saw as inconsistent and misleading and what he saw as failings by Merton with respect to the fairness of the disciplinary proceedings. He called in evidence Mr Richard Evered who was employed at the portacabins as a "Training and Road Safety Officer" and that he had not taken over responsibility from any other "Health and Safety officer/Representative" and that when he took up his role there were no records created by an individual who had previously held that role.
26. In his submissions Mr Martinez argued that some of Merton's responses had been a blatant lie, that the Commissioner should have interviewed Mr Evered *"and that is why I believe the ICO is at fault"*. The outcome of the hearing which he sought was *"to impose appropriate standards on the Commissioner and Merton."* He hoped that this tribunal would *"help right the wrong and order the Employment Tribunal to re-open the case and award compensation now that the H&S issue had been overcome"*.

Consideration

27. Mr Martinez exercised his right under s50 FOIA to complain to the Commissioner. The Commissioner investigated the complaint and issued her decision notice. In her decision notice she found that Merton had released the information that it held.
28. The first form of the request made by Mr Martinez was about health and safety representatives at a depot owned by Merton. The second version was significantly more limited in that it sought to restrict the information to a specific part of the depot, and also to restrict the information to "Officially Qualified". I am not surprised that this cause some confusion. Initial responses by Merton drew on information covering the wider depot. Merton also sought information from individuals' memories and from a trade union - which would not be recorded information held by Merton. When it was focussed on the portacabins the picture changed. The issue of what was "officially qualified" also caused some confusion. In the questioning of Mr

Evered by Mr Martinez there appeared to be some confusion as to his precise status, he was clearly a manager with some responsibility for health and safety but not a representative, since such are appointed by trade unions and/or workforce.

29. Whether the specific form of the request is appropriate to provide useful information relevant to Mr Martinez's case in the ET and EAT proceedings I have some doubt, however that is not the question for this tribunal. The question for the tribunal is whether on the facts established the Commissioner's decision is correct in law. I am satisfied that it is since it is clear from the Commissioner's investigation and the explanations provided by Merton including the description of the steps it has taken to find the information that Merton does not hold information in the form requested, although it is clear that it holds information about individuals which it deals with as Trade Union and H&S representatives. What Mr Martinez has sought is a positive finding by this tribunal that there was no H&S representative in his workplace. Such a finding is not one the Commissioner, or the tribunal, has the authority to make. What the Commissioner has the authority to determine is whether or not Merton has disclosed the information matching the request or has withheld that information. She determined that Merton "*on the balance of probabilities it does not hold record information falling within the scope of the request*" (decision notice paragraph 39) Mr Martinez has demonstrated no grounds for disturbing that finding.

30. The appeal is dismissed.

Judge of the First-tier Tribunal
Date: 18 June 2019

Promulgated on 20th June 2019