First-Tier Tribunal

General Regulatory Chamber

(Information Rights)

Appeal reference: QJ/2020/0334/GDPR[1]

Between

CHRISTOPHER HART

Applicant[2]

and

INFORMATION COMMISSIONER

Respondent

TRIBUNAL: JUDGE LYNN GRIFFIN

Sitting in Chambers on 23 February 2021

DECISION

1. There will not be an oral hearing of either of the applications made under rule 8(3)(c).

2. Mr Hart's application to bar the respondent is refused.

3. This application reference number QJ/2020/0334/GDPR is struck out pursuant to rule 8(3)(c) because it has no reasonable prospects of success.

[1] Mr Hart has drawn attention to the case number as given in my case management direction of 12/2/21. By the time this reached the appellant a formatting error had taken place and the number was given as "Error reference not found QJ/2020/0334/GDPR" The phrase "Error reference not found" does not form part of the tribunal reference for this appeal and nothing should be read into its appearance in the header for those directions. A corrected version will be issued.

[2] Mr Hart has stated that there is a significance to the description of his position as an appellant rather than an applicant. Rule 2(3) defines "appellant" as including a person who commences proceedings by making an application and the word should be read accordingly.

REASONS

4. There are now three applications before the Tribunal. Those applications are

   (a) The Respondent's application to strike out Mr Hart's application under s166 Data Protection Act 2018 because they say it has no reasonable prospects of success made in her response dated 16 December 2020
   (b) Mr Hart's application to bar the Respondent from further participation in the appeal made in his submissions dated 9 February 2021
   (c) Mr Hart's application for an oral hearing to determine the above issues as raised in his submissions of 16 February 2021

Oral hearing

5. Rule 32 of the First-tier Tribunal (General Regulatory Chamber) Rules governs when the Tribunal must hold an oral hearing before disposing of proceedings. Rule 32(3) states

> 8(3) The Tribunal may in any event dispose of proceedings without a hearing under rule 8 (striking out a party's case).

6. This rule gives the Tribunal a discretion to determine whether to strike out a party's case under rule 8 without holding a hearing. This discretion must be exercised in accordance with the overriding objective in rule 2.

7. I have decided that there will not be an oral hearing to determine the first two applications because it is not necessary in order to deal fairly and justly with the applications. This is because

   (a) The Respondent has made her submissions in writing in relation to both applications
   (b) The Respondent has indicated that she would not propose to attend an oral hearing[3]

[3] Para 30 of her response

(c) Mr Hart has refused to make any representations on the issue of whether his appeal should be struck out under rule 8(3)(a) in advance of the Tribunal making that decision

(d) Mr Hart has made his application to bar the Respondent in writing

(e) Mr Hart does not suggest that a hearing is required as a reasonable adjustment

(f) Holding a hearing will delay the resolution of the applications which can be more swiftly but still properly considered without a hearing

(g) it is appropriate and proportionate to deal with this matter 'on the papers' and so without a hearing.

8. For these reasons Mr Hart's application for an oral hearing is refused.

Application to bar the Respondent & Respondent's Application to strike out

9. These applications are two sides of the same coin and so I will consider them together.

10. In his document of 9 February 2021 Mr Hart applies to bar the Respondent in the following terms

> *"Appellant has provided substantial grounds to Macmillan as to why the respondents response made under rule 23 (which include an invitation to have tribunal decide upon rule [8(3)(c)] should be barred from proceedings pursuant to rule 8(7)(a)." (sic)*

Mr Hart's position, in essence, is that the response made on behalf of the Information Commissioner has no reasonable prospects of success because of procedural failures and abuse of process in dealing with the complaint and the issuing of the outcome decision before completion of all the steps Mr Hart submits were appropriate.

11. The Respondent has replied to the application in her supplemental submissions dated 22 February 2021 which submit that the Commissioner

(a) has complied with all of the Tribunal's directions to date [rule 8(3)(a)]; and

(b) has co-operated with the Tribunal fully to enable it to deal with this matter swiftly and in accordance with the overriding objective [rule 8(3)(b)]

(c) and for the reasons relied on in her Response of 16 December 2020, the Commissioner submits that she has adequately demonstrated that there is a reasonable prospect of the Respondent's case succeeding [rule 8(3)(c)]

12. I agree that the Respondent has complied with all directions made and co-operated fully and will therefore consider the third aspect.

13. The Respondent has applied for Mr Hart's application under s166 Data Protection Act 2018 [DPA18] to be struck out as having no reasonable prospect of success under rule 8(3)(a). The grounds relied upon are set out in full in the Information Commissioner's response and can be summarised as follows

(a) the Commissioner has

(i) liaised with the data controller,

(ii) made a finding that the data controller has failed to comply with its data protection obligations in respect of Mr Hart's complaint

(iii) provided Mr Hart with the outcome of her investigation in relation to his complaint on 2 November 2020

(iv) apologised to Mr Hart for the delay in updating him in relation to his complaint

(b) because the Commissioner has taken steps to comply with the procedural requirements set out in section 166(1) of the DPA18, and has provided the Applicant with an outcome, there is no basis for the Tribunal to make an order under section 166(2) DPA18.

14. Mr Hart has refused to respond to the Respondent's application and says that he is not required to do so until the Tribunal has taken its decision on whether

or not to strike out his appeal. He relies on the use of the word "proposed" within rule 8(4) and says this supports his reading of rule 8. I do not agree. Such a reading of the rule would not be in accordance with the overriding objective and would leave an appellant/applicant in the nonsensical position of making representations about a decision that had already been taken. The word "proposed" in rule 8(4) in this context is used to mean "wished-for" or "requested" and also allows for the opportunity for making representations if the issue of whether to strike out proceedings is raised of the Tribunal's own motion.

15. There is no dispute in this case that Mr Hart has been provided with an outcome to his complaint. Moreover, there is no dispute that this outcome upheld his complaint; Mr Hart refers to this as a "positive decision". However, Mr Hart seeks an order from the Tribunal to direct the Information Commissioner to take further "appropriate steps", in the manner he suggests, to respond to his complaint over and above those steps that the Information Commissioner completed in order to respond by way of the positive decision. Mr Hart sets out the steps he wishes to be ordered at paragraph (i) on pages 31- 33 of his grounds of appeal dated 17 November 2020.

16. The question that arises is whether this tribunal has the power to order the Respondent to take any "appropriate steps" once she has provided an outcome to the complaint. If there is no power to do so Mr Hart's application under s166 will inevitably fail.

The powers of the Tribunal in s166 applications

17. Since the Data Protection Act 2018 came into force a person can apply to this Tribunal for an "order to progress complaints" under section 166.

18. A data subject has a right to make a complaint to the Commissioner if they consider that, in connection with the processing of personal data relating to them, there is an infringement of the General Data Protection Regulations

[GDPR], and/or Parts 3 or 4 of the Data Protection Act 2018: see Article 77 GDPR, and section 165 (1) & (2) Data Protection Act 2018.

19. Under section 166 Data Protection Act 2018, a data subject has a right to make an application to the Tribunal if they consider that the Commissioner has failed to take certain procedural actions in relation to their complaint.

20. Section 166 DPA18 as relevant states:

> *166 (1) This section applies where, after a data subject makes a complaint under section 165 or Article 77 of the GDPR, the Commissioner—*
> *(a) fails to take appropriate steps to respond to the complaint,*
> *(b) fails to provide the complainant with information about progress on the complaint, or of the outcome of the complaint, before the end of the period of 3 months beginning when the Commissioner received the complaint, or*
> *(c) if the Commissioner's consideration of the complaint is not concluded during that period, fails to provide the complainant with such information during a subsequent period of 3 months.*
> *(2) The Tribunal may, on an application by the data subject, make an order requiring the Commissioner—*
> *(a) to take appropriate steps to respond to the complaint, or*
> *(b) to inform the complainant of progress on the complaint, or of the outcome of the complaint, within a period specified in the order.*
> *(3) An order under subsection (2)(a) may require the Commissioner—*
> *(a) to take steps specified in the order;*
> *(b) to conclude an investigation, or take a specified step, within a period specified in the order.*

21. The Tribunal can only exercise powers given to it by Parliament as set out in legislation. When considering an application under s.166 the Tribunal is not concerned with the merits or strength of the underlying complaint.

22. Section 166 Data Protection Act 2018 does not provide a right of appeal against the substantive outcome of an investigation into a complaint under s.165 Data Protection Act 2018. Neither does it allow the Tribunal to direct to what extent it is appropriate to investigate any complaint; that is a matter for the Information Commissioner.

23. On an application under s.166 Data Protection Act 2018 the Tribunal is limited to considering whether to make an order of the kinds set out in s.166(2). Once the Information Commissioner has sent a response to the complaint there is no longer an Order for the Tribunal to make under s.166(2).

24. The powers of the Tribunal in considering such applications have been considered by the Upper Tribunal. These cases are binding on the First Tier Tribunal of which the General Regulatory Chamber is a part.

25. In *Leighton v Information Commissioner (No.2)* [2020] UKUT 23 (AAC) Upper Tribunal Judge Wikeley said at paragraph 31

> *"Appropriate steps" mean just that, and not an "appropriate outcome". Likewise, the FTT's powers include making an order that the Commissioner "take appropriate steps to respond to the complaint", and not to "take appropriate steps to resolve the complaint", least of all to resolve the matter to the satisfaction of the complainant."*

26. Further in the case of *Scranage v Information Commissioner* [2020] UKUT 196 (AAC) the Upper Tribunal went further in saying at paragraph 6:

> *"... there is a widespread misunderstanding about the reach of section 166. Contrary to many data subjects' expectations, it does not provide a right of appeal against the substantive outcome of the Information Commissioner's investigation on its merits. Thus, section 166(1), which sets out the circumstances in which an application can be made to the Tribunal, is procedural rather than substantive in its focus. This is consistent with the terms of Article 78(2) of the GDPR (see above). The prescribed*

circumstances are where the Commissioner fails to take appropriate steps to respond to a complaint or fails to update the data subject on progress with the complaint or the outcome of the complaint within three months after the submission of the complaint, or any subsequent three month period in which the Commissioner is still considering the complaint."

27. Mr Hart is not alone in thinking that this Tribunal has greater power than it holds, as has been acknowledged by the Upper Tribunal in the decision in Scranage, but the Tribunal is limited in its powers to those given by Parliament as interpreted by the Upper Tribunal.

28. For Mr Hart's application to go forward there must be a realistic (rather than a fanciful) prospect of its success as explained by Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538. For the reasons set out above I have concluded that this Tribunal has no power to order the ICO to take any further steps as applied for by Mr Hart. His complaint has been dealt with and an outcome provided to him. Therefore, his application under s166 DPA2018 has no realistic prospects of success.

29. For the reasons set out above it can be seen I have concluded that the response to this application has more than a realistic chance of success and so Mr Hart's application to bar the respondent is refused.

Conclusion

30. For all these reasons, this Application reference number QJ/2020/0334/GDPR is struck out pursuant to rule 8(3)(c).

Tribunal Judge Lynn Griffin
Dated: 23 February 2021
Promulgated date: 24 February 2021