



Appeal number: EA/2020/0353/GDPR
V¹

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights**

MOHAMMED BELAL UDDIN Applicant

- and -

THE INFORMATION COMMISSIONER Respondent

**Before:
JUDGE LYNN GRIFFIN
Sitting in Chambers on 4 February 2021**

**Appearances:
Applicant in person**

**Determined at a remote hearing by Cloud Video Platform which the
Applicant joined via telephone**

DECISION

1. The application is struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, because there is no reasonable prospect of the Applicant's case succeeding.

¹ V: video (all remote)

MODE OF HEARING

2. The proceedings were held by video hearing. The Applicant joined remotely by telephone. The Respondent had indicated that she did not intend to participate in the hearing. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

REASONS

Background to the Application

3. This application relates to a complaint made to the Respondent by Mr Uddin about the processing of his personal data that began in 2016 in the context of verbal and email communications with & amongst his work colleagues. At the time the Applicant was employed by BGC Technology International Limited [BGC].

4. The Applicant had emailed a colleague who worked in HR, Mrs Devika Patel [DP] at work, to say that he wanted to meet her for a chat, but not about any HR matter. He wanted to talk to her for an “informal/casual chat and not to discuss anything work-related”. BGC email was used for this approach. Mrs Patel had then verbally disclosed the nature of the correspondence to Ms Payal Malde [PM].

5. The Applicant made the complaint that leads to this application on 11 June 2019. Mr Uddin submits that in an Employment Tribunal², his case was struck out by the Judge because of a misunderstanding about who was the data controller. He says that the Respondent initially stated that the disclosure did not involve his personal data and later changed that advice. The Applicant believes this led to his case being struck out in the Employment Tribunal when BGC relied upon the initial advice.

The Notice of Application and the Response

6. The Notice of Application dated 8 December 2020 the Applicant sought an order under section 166(2) and 166(3) of the Data Protection Act 2018 to direct a response from the Information Commissioner's Office ("ICO"). He would like the First-tier Tribunal to make the following order:

“To ask the ICO to explicitly confirm (in light of its admission that it previously provided wrong advice to BGC) whether the DP to PM Disclosure, which was investigated as part of case RFA0832071, amounted to a breach of the DPA 98 (within a personal capacity as outlined above) and to provide this response as

² Case Number: 3203011/2019 Employment Judge Ross, 2 November 2020

soon as possible (ideally within 14 days), as BGC now denies this and has provided a contradictory version of events to the employment tribunal judge”

7. The Response dated 8 January 2021 invites the Tribunal to strike out the Applicant’s application.

The Law

8. 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 Regulation [GDPR], and/or Parts 3 or 4 of the Data Protection Act 2018 [DPA18]: see Article 77 GDPR, and section 165 (1) & (2) DPA18.

9. Under section 166 DPA18, 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.

10. Section 166 DPA18 as relevant states:

(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.

11. The reference to taking “appropriate steps” in section 166(1)(a) and (2)(a), includes “investigating the subject matter of the complaint to the extent appropriate” and “informing the complainant about progress on the complaints”, as set out in sections 166(4) and 165(5) DPA18.

12. The reference to “provide the complainant with.... the outcome of the complaint” in s. 166(1)(b) and 2(b) is not qualified with the word appropriate.

13. 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. Section 166 DPA18 does not provide a right of appeal against the substantive outcome of an investigation into a complaint under s. 165 DPA18. 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.

14. On an application under s. 166 DPA18 the Tribunal is limited to considering whether to make an order of the kinds set out in s. 166(2) requiring the Commissioner to

- a. Take appropriate steps to respond to the complaint or
- b. Inform the complainant of progress on the complaint or
- c. Inform the complainant of the outcome of the complaint.

15. 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).

16. The powers of the Tribunal in determining such an appeal have been considered by the Upper Tribunal in *Leighton v Information Commissioner (No.2)* [2020] UKUT 23 (AAC) in which 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.

17. In the case of *Scranage v Information Commissioner* [2020] UKUT 196 (AAC) the Upper Tribunal went further in saying:

“... 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.”.

18. These decisions of the Upper Tribunal are binding on the First Tier Tribunal as to the approach that must be taken to applications such as that made by Mr Uddin.

19. Mr Uddin thought that this Tribunal had the power to consider an application about the substantive outcome of the Information Commissioner’s investigation. He is not alone in thinking that, 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.

20. A person who wants a data controller (or processor) to rectify personal data or otherwise properly comply with the Data Protection Act 2018 or General Data Protection Regulations in relation to holding personal data must go to the High Court or a County Court pursuant to section 180 of the Data Protection Act 2018.

21. This Tribunal does not have an oversight function in relation to the Information Commissioner’s Office and does not hold them to account for their internal processes. The Parliamentary and Health Service Ombudsman is the body which has that function.

The Facts

22. There is no dispute that on 11 June 2019 the Commissioner received a complaint made anonymously, but in fact made by the Applicant, against BGC. The complaint related to the way BGC had handled the Applicant’s personal data.

23. The Commissioner took the following steps

- a. allocated a case reference; RFA0832071.
- b. 3 July 2019 an ICO case officer wrote to BGC to request further information in relation to the Applicant’s complaint.
- c. 3 July 2019 the case officer also wrote to the Applicant to advise that he had written to BGC and would write to the Applicant again once he had received a response from the company.

- d. 8 July 2019 the case officer wrote to the Applicant to provide an update.
 - e. 5 August 2019 the case officer wrote to the Applicant with an outcome to his complaint. The case officer was of the view that BGC had complied with its data protection obligations.
 - f. 11 September 2019 the case officer responded to the Applicant's correspondence since 5 August 2019. The case officer advised that he would not be taking any further action on the matter.
24. On 12 September 2019 the Applicant wrote to request a case review of RFA0832071. This matter was allocated RCC0875113 by the Commissioner.
25. The case review was completed and by letter dated 18 October 2019 the Applicant was provided with an outcome to that case review. The reviewing officer was satisfied that the previous case officer had handled the matter reasonably and in line with casework processes. The reviewing officer stated that the disclosures complained about would not fall under data protection legislation.
26. In response to correspondence from the Applicant on 18 December 2020 the Commissioner wrote to the Applicant to explain that the Applicant's recent queries did not raise any issues that the Commissioner was required to pursue and that there was no need to consider this matter further.
27. The Applicant had made an earlier application under s. 166 to this Tribunal given reference EA/2020/0345/GDPR. That was made on 23 November 2020 in relation to ICO case reference RFA0906261 (new case number: IC-70316-Z3N2). That appeal was withdrawn on 17 December 2020 because Mr Uddin was satisfied that "the information simply does not exist and is a fabrication by BGC (hence why they are unable to provide it)". The Commissioner's position in that application was that an outcome to the complaint in that case had been provided on 26 November 2020 and so no order under s. 166 was appropriate.
28. That complaint, RFA0906261, had arisen from a Subject Access Request [SAR] made by the Applicant to BGC. In reply to the complaint the Commissioner set out that BGC had explained that they had now sent additional personal data to the Applicant, that some personal data had been withheld under the legal professional privilege exemption, and that BGC had applied the exemption appropriately. The Commissioner was satisfied that BGC had now complied with the Applicant's SAR.

Submissions

29. The Tribunal is grateful to the parties for their written submissions provided for the hearing and to the Applicant for his oral submissions. Having read the bundle, read all the written submissions, and heard oral submissions, I reserved judgment on the application.
30. After the hearing the Applicant sent two emails to the Tribunal
- a. 04/02/2021 - at 12.01, in which he raised a point in relation to jurisdiction
 - b. 05/02/2021 - at 08.54, which included further submissions and an email exchange with BGC from 11/02/2021, plus three attachments to that exchange
31. The Applicant disagrees with the Commissioner that there is no need for further consideration. He makes three points to underpin his application under s.166
- a. There were two investigations which led to two different outcomes & there should only be one outcome and not multiple outcomes
 - b. The Commissioner said that if BGC made a significant deviation from what they had previously said in then the Commissioner would consider a reassessment. Mr Uddin says that there has been a significant deviation and so the Commissioner should reconsider
 - c. The Commissioner has failed to investigate the subject matter of his complaint to the extent appropriate
32. The Respondent submitted that
- a. The alleged disclosure of data that the Applicant complains of took place in 2016. The applicable law at the time of the incident was the Data Protection Act 1998. The Applicant has no right to make an application under section 166 in respect of it. The complaint is not one that therefore falls within the scope of section 165 DPA18 or article 77 GDPR.
 - b. The applicant had been provided with an outcome to his complaint
33. In reply to the Respondent's points the Applicant said during the hearing that BGC was withholding information and in August 2020 the Respondent had admitted providing the wrong advice to BGC. In addition, BGC had deviated from their original position. Mr Uddin submitted that the correspondence showed that BGC had withheld emails that showed the

processing of his data. He had made his complaint in 2019 and his submission was that the Tribunal should apply the law at that time and therefore had jurisdiction to apply DPA18. He said the Respondent had not investigated the complaint he made to the extent appropriate.

34. The Applicant further contended that the Respondent had a duty to provide advice under schedule 13 DPA18 and should correct their advice previously given to BGC which he believes would affect the result of the Employment Tribunal.

Conclusions

35. The Applicant's complaint stems from events which began in 2016. If the matters had definitively ended there the Tribunal would have no jurisdiction under DPA18 s166. However, these matters have continued to preoccupy the Applicant and to develop since that time and it is at least arguable that there was a continuing processing of the Applicant's data by BGC that would bring the case within the reach of s166 DPA18. For the purposes of this application it is proportionate to proceed on that basis.

36. Turning to s166 DPA18, the Respondent has considered the Applicant's complaint in case reference RFA0832071, taken steps as outlined above and informed him of the outcome.

37. The Applicant is not satisfied with that outcome and wishes it to be reconsidered but it is an outcome nonetheless.

38. This Tribunal has no power to make a decision about the merits of that outcome, whether it be right or wrong, nor to compare it to any other decision of the Commissioner. Neither does the Tribunal have power to examine whether there should be further or different steps to those taken by the Commissioner even if the circumstances have changed since the outcome was sent to the Applicant.

39. Furthermore, the Tribunal does not have any power to supervise or mandate the performance of the Commissioner's functions under schedule 13 DPA18.

40. There is subsequently no basis for the Tribunal to make an order under section 166(2) DPA18.

41. In order for Mr Uddin's application to go forward there must be a realistic, as opposed to a fanciful or unrealistic, prospect of its success as explained by Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

42. For the reasons set out above, I have concluded that this Tribunal would not be able to provide the Applicant with the order he seeks and that therefore the application has no reasonable prospect of success.

43. Having taken account of all relevant considerations, I strike out this application pursuant to 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 because there is no reasonable prospect of the application succeeding.

Lynn Griffin
Tribunal Judge

Date of Decision: 02 March 2021

Date Promulgated: 03 March 2021

© CROWN COPYRIGHT 2021