Appeal number: EA/2021/0072/GDPR
P[1]

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Neil White **Applicant**

- and -

Information Commissioner **Respondent**

Before:
JUDGE LYNN GRIFFIN

Determined on the papers, sitting in Chambers 28 May 2021

DECISION

1. Mr White's application is struck out pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, on the grounds that there is no reasonable prospect of it succeeding.

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[1] *P: paper determination which is not provisional*

MODE OF HEARING

2. The proceedings were due to be held by the cloud video platform on 28 May 2021. The notice of hearing was sent to the parties on 21 April 2021. The Respondent had indicated that she did not propose to attend the hearing. The Tribunal was ready to hear the case at 11am on 28 May 2021 but the Applicant did not join the hearing. The Tribunal clerk made attempts to contact him by telephone and email. No message was received from the Applicant so at 11.20 the CVP room was closed. At 11.40 an email was received from Mr White saying that he apologised for not attending but he had "*expected the matter to be dealt with on papers only and not require attendance*".

3. The Tribunal may make a decision without a hearing pursuant to rule 32 where that decision disposes of proceedings under rule 8 (striking out a party's case).

4. Having read all the documents including, the submissions of the Respondent in her response and of the Applicant's emails and attachments, I am satisfied that the Applicant has received notice of the hearing and that it is fair and just to proceed in this way.

REASONS

Factual Background to the Application

5. This application relates to a complaint made to the Respondent by Mr White on 19 December 2020 about a request for data he made to the organisation Doctor Care Anywhere Limited ("DCA") on 4 August 2020. The data requested related to his employment with this organisation.

6. The response from DCA had been that it would take 3 months to action the request. At the point of his complaint to the Respondent Mr White said

"As of today, no response has been received and follow up emails have not been answered. I am also concerned that my personal data was shared with a third party organisation without my consent. There was no contractual reason that would have allowed the transfer of personal information to the third party organisation. I am aware that this organisation has had significant issues with keeping personal data secure and

I feel that I have made reasonable requests and do not understand why they have been ignored."

7. Subsequent to his complaint to the ICO the Applicant sent another e-mail to the Commissioner, on 24 January 2021, which said he would like to include additional information in relation to the subject access request ("SAR") and secondly that DCA transferred his personal information to a third party organisation without his knowledge. He sent an email chasing a response on 17 February 2021.

8. The complaint was later allocated case reference IC-79571-N6L1 by the Respondent.

The Application to the Tribunal

9. In the notice of application to this Tribunal, dated 8 March 2021 the Applicant asked for assistance in receiving a response from the ICO, none having been received by him at that time.

10. The Applicant said that he would like the following remedy from the Tribunal *"... a ruling on the behaviour of the organisation from the ICO"*. He acknowledges in his submissions that he is not seeking to overturn the decision but asks the tribunal to "*... ensure the Commissioner fairly considered the complaint and did so against all its established frameworks to the appropriate extent intended by the statute*."

11. The application was interpreted by the Tribunal as an application under section 166 Data Protection Act 2018.

12. The Applicant is a litigant in person. Having regard to the Equal Treatment Benchbook and to the overriding objective, I have carefully considered the documents to examine whether there is any other remedy that the Tribunal has power to provide.

13. In the response to the application the Information Commissioner invited the Applicant to withdraw the application because he had received an outcome to her complaint.

14. That outcome was provided on 18 March 2021 and dealt with both aspects of the concerns raised in the initial complaint to the Respondent and his later email of 24 January 2021. This outcome was reconsidered in the light of further

material provided by the Applicant but was not altered, see the respondent's email of 24 March 2021.

15. In the event the applicant did not withdraw his application, the Information Commissioner has applied for this case to be struck out pursuant to rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. It is argued that as there has been an outcome provided to the Applicant, the Tribunal no longer has any power to make an order under s166 and thus the application has no reasonable prospect of succeeding.

16. The Applicant not having withdrawn his appeal, I now consider the application to strike out these proceedings on the basis that they have no reasonable prospects of success.

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. Mr White does not seek that remedy in any event.

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 provided an outcome 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 :

> *"... 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. The Tribunal does not have the power to consider the fairness or adequacy of the process once an outcome to the complaint has been provided. The Tribunal is not empowered to undertake a judicial review of the decision-making process. That *may* be a remedy available from the courts, but it is not for the Tribunal to advise the Applicant whether that is a course open to him and he should take independent legal advice about whether he can or should make any such application.

28. A person who wants a data controller (or processor) to rectify personal data, compensate them, or otherwise properly comply with the Data Protection Act 2018 or General Data Protection Regulations in relation to personal data must go to the civil courts[2] not a tribunal pursuant to sections 167-169 & 180 of the Data Protection Act 2018. I express no opinion one way or another about whether the Applicant can do so, or whether he should do so; that is a matter for him, about which this Tribunal cannot advise him.

29. 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

[2] High Court or County Court

internal processes. The Parliamentary and Health Service Ombudsman[3] is the body which has that function. I express no opinion one way or another about whether she can or whether she should raise the issue with the Ombudsmen; again, that is a matter for her, about which this Tribunal cannot advise her.

Analysis

30. The legal principles limiting the powers of the Tribunal in this case, can be distilled as follows; once an outcome to his complaint was provided to the Applicant then the Tribunal has no further power to direct steps be taken, the complaint reinvestigated or to consider whether the outcome provided was correct as a matter of law or fact.

31. The Applicant was provided with a response to his complaint on 18 March 2021 and this outcome was reconsidered in the light of further information he provided. The Applicant does not agree with the outcome; he seeks a review of the fairness of the process. This Tribunal has no power to consider an appeal against the Information Commissioner's substantive findings whether that be the conclusion reached or the way in which that decision was taken by the Information Commissioner.

Conclusion

32. Turning to s166 DPA18, and this application, the Respondent has considered the Applicant's complaint in case reference IC-79571-N6L1, and informed him of the outcome.

33. The Applicant is not satisfied with that outcome and wishes it to be subject to procedural review but it is, nonetheless, an outcome.

34. This Tribunal has no power to make a decision about the merits of that outcome, whether it be right or wrong. Neither does the Tribunal have power to examine whether there should be further or different steps to those taken by the Commissioner. This is the case regardless of the nature of the complaint made or its evidential basis.

35. Furthermore, the Tribunal does not have any power to supervise or mandate the performance of the Commissioner's functions.

[3] Parliamentary and Health Service Ombudsman (PHSO)

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

37. Having considered whether this tribunal could provide the Applicant with any other remedy I have concluded that while there may be a remedy available from the courts or PHSO (about which I make no conclusions or give any indication) having considered the nature of the issues raised by the Applicant there is no other remedy available from this Tribunal in relation to the application made on 8 March 2021.

38. In order for this application to proceed there must be a realistic prospect of its success. For the reasons set out above, I have concluded that this Tribunal would not be able to provide the outcome sought and that therefore the application is hopeless, or in other words has no reasonable prospect of success.

39. I know this decision will be a disappointment to Mr White however, this Tribunal can only act within the scope of its power and cannot provide him with the remedy he seeks.

40. 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.

Date: 28 May 2021

Lynn Griffin
Tribunal Judge