Appeal number: EA/2020/0220/GDPR/V

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

GORDON FORBES **Applicant**

- and -

THE INFORMATION COMMISSIONER **Respondent**

BEFORE: JUDGE MOIRA MACMILLAN

Appearances:
The Applicant represented himself.
The Respondent was represented by Mr Whiting

Determined at a remote hearing via video on 21 August 2020

DECISION

1. The Application is struck out pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

MODE OF HEARING

2. The proceedings were held by video. The Applicant and Respondent joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

3. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.

4. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 29.

REASONS

Background

5. The Applicant has applied to the Tribunal for an Order under s. 166(2) of the Data Protection Act 2018 ('DPA'), to progress a complaint he made to the Respondent about Miller Samuel Hill Brown LLP ('MSHB'). The Applicant has not provided a copy of his complaint but has provided a letter dated 6 July 2020 in which the Respondent sets out her determination of his complaint.

6. In his Notice of Appeal dated 8 July 2020, the Applicant relies on grounds that the Respondent has failed to properly consider his complaint. He submits that she wrongly relied on correspondence from MSHB to conclude that the Applicant's data rights had not been breached. The Applicant contends that the Respondent has failed to understand the facts of his complaint.

7. The Respondent did not receive a copy of the Notice of Appeal but made oral submissions at the hearing. She relies on grounds of opposition that she has already responded to the Applicant's complaint. She notes that the Applicant has not requested an internal review of her decision. She reminds the Applicant that he is able to do so and can bring proceedings against MSHB in the County Court or High Court under s. 167 DPA.

8. The Respondent submits that it is not for this Tribunal to decide the extent to which she must investigate a complaint made under s. 165 DPA and contends that the Tribunal does not have jurisdiction to change the scope or outcome of her investigation, or the conclusions that she has reached.

Law

9. Section 166 of the DPA 2018 creates a right of application to the Tribunal as follows:

Orders to progress complaints

(1) This section applies where, after a data subject makes a complaint under s. 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.

(4) Section 165(5) applies for the purposes of subsections (1)(a) and (2)(a) as it applies for the purposes of section 165(4)(a).

10. The reference in s. 166(4) to s. 165(5) means that the "appropriate steps" which must be taken by the Respondent includes investigating the subject matter of the complaint "to the extent appropriate" and keeping the complainant updated as to the progress of inquiries. The extent to which it is appropriate to investigate any complaint is a matter for the Respondent, as regulator, to determine.

11. The limited nature of the Tribunals jurisdiction in this context has been confirmed by the Upper Tribunal, most recently in *Scranage v Information*

Commissioner [2020] UKUT 196 (AAC) where Upper Tribunal Judge Wikeley observed 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."

12. Therefore s.166, when read together with s. 165, requires the Respondent to (i) consider a complaint once made, and (ii) provide the person who made the complaint with a response, both within 3 months. Thereafter, if the Respondent has not sent a final response to the complainant, she must update them on the progress of her consideration of their complaint at least every 3 months thereafter.

13. This requirement is reflected in the Orders available to the Tribunal under s. 166(2). The Tribunal can make an Order requiring the Respondent to investigate or conclude an investigation of a complaint if she has not done so (the 'appropriate steps' referred to in s. 166(2)(a)), or to provide the complainant with an update (s. 166(2)(b)).

Striking out an application

14. The Upper Tribunal has also provided guidance on the approach to be taken by this Tribunal when considering whether to strike out a case as having no reasonable prospect of success. In *HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation) [2014] UKUT 0329 (TCC),* the Upper Tribunal stated that:

"*…an application to strike out in the FTT under rule 8 (3) (c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier to summary judgement under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing…The Tribunal must avoid conducting a "mini-trial". As Lord Hope observed in Three Rivers the strike out procedure is to deal with cases that are not fit for a full hearing at all."*

Evidence

15. I have considered the available evidence. This shows that the Applicant made a complaint to the Respondent, although a copy of that complaint has not been sent to the Tribunal. The Applicant has provided the supporting evidence he sent to the Respondent.

16. The Respondent acknowledged receipt of the complaint and, having reviewed the supporting evidence, on 6 July 2020 sent the Applicant a letter setting out her final determination of his complaint.

Submissions

17. The Applicant submits that the Respondent has misunderstood a key aspect of his complaint. He suggests she is asking him to prove the impossible, by requiring him to show that correspondence sent by MSHB was not received. He wishes the Respondent to further consider his complaint.

18. In oral submission the Applicant explained that he had not been aware that he could request an internal review of the Respondent's response to his complaint and that he wished to pursue this.

19. The Respondent submits that the Applicant has already received everything the Tribunal could Order pursuant to s. 166(2) and that, as a consequence, the Application should be struck out as having no reasonable prospect of success.

Strike out

20. I have considered in accordance with *HMRC v Fairford Group* whether the Applicant has put forward non-fanciful grounds in support of his Application. When doing so I have considered the prevailing circumstances, rather than the circumstances that existed at the date of this Application.

21. I note that the Respondent has already sent a final determination of the Applicant's complaint. Although the Applicant is unhappy with the outcome, this Tribunal does not have jurisdiction to direct the Respondent to reconsider the matter, or require her to carry out another investigation, or reach a different outcome.

22. While the Respondent may not have considered every aspect of the Applicant's complaint, she has considered the subject matter of the complaint and has provided a response.

Conclusion

23. Having considered the submissions of both parties, I have concluded that there is no basis upon which the Tribunal could make an Order under s. 166 (2) DPA.

24. The Application is therefore struck out as having no reasonable prospects of success, pursuant to rule 8(3)(c) of the Tribunal Procedure Rules.

JUDGE MOIRA MACMILLAN

DATE: 21 August 2020

DATE PROMULGATED: 25 August 2020