FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS) **Appeal Reference: QJ/2020/0296/GDPR/V**

CVP Remote Hearing
On 2 December 2020

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SUSAN MILNE

Applicant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:
For the Applicant: In person
For the Respondent: No attendance

DECISION

Introduction

1. The hearing was undertaken, without technical difficulties, using the Cloud Video Platform. The respondent gave notice that she intended to rely solely on her written Response and did not wish to take part in this oral hearing, or any oral hearing in the future. The applicant attended the hearing. I am satisfied that it was fair and just to conduct the hearing in this way and that the applicant was able to fully participate in the proceedings.

Background

2. On 27 March 2020, the applicant made a complaint (now referenced IC-54399-R4Z9) to the Information Commissioner ("ICO") in relation to a company named

Hamilton Parkers ("Hamilton"). The complaint was resubmitted on 23 May 2020 because the applicant had not, at that time, received an acknowledgment from the ICO that the complaint had been received. In her complaint the applicant asserts that Hamilton failed to delete her personal data, despite a request in this regard having been made by the applicant to Hamilton.

3. The applicant has had previous occasion to make a complaint to the ICO about Hamilton. On that occasion, in 2018, the ICO found that Hamilton had not complied with its data protection obligations.

4. Having not received a substantive response to her complaint from the ICO, the applicant lodged the instant application with the Tribunal on 12 October 2020.

5. The Tribunal Registrar issued Case Management Directions on 20 October 2020, *inter alia,* listing the matter for a Case Management Hearing. Paragraph 9 of the Registrar's Directions states as follows:

> "…
>
> 9. It is possible that the Judge presiding over the Case Management Hearing will be able to make a final determination of the application. …"

6. On 3 November 2020, the ICO responded to the applicant's complaint. Having first apologised for the delay in responding and then explaining the role of the ICO, the letter of the 3 November goes on to state as follows:

> "Our view
>
> We have considered the information available in relation to this complaint and we are of the view that Hamilton Parkers have not complied with their Data Protection obligations. This is because you received a further email from the organisation on 24 March 2020. This is subsequent to Hamilton Parkers confirming that your personal data was no longer held by the organisation. We consider this to be an infringement of the legislation.
>
> Further action required
>
> We have written to Hamilton Parkers regarding their failing information rights practices. We have told them they should now review your erasure request and ensure that all personal data relating to you is erased within 14 calendar days.
>
> We have asked the organisation to provide further detail to the ICO regarding this incident. In addition we have requested that Hamilton Parkers undertake a review of their security policies, and take action to demonstrate to the ICO that the organisations data protection practices will improve.
>
> We keep a record of all the complaints made with us about the way organisations process personal information. The information we gather from complaints may form the basis for action in the future where appropriate. Thank you for bringing this matter to our attention."

7. The respondent also provided a written Response to the instant application on 3 November 2020 i.e. the same date as her response to the applicant. Paragraph 3 of the ICO's Response states:

> "The Commissioner opposes the application and invites the Tribunal to strike it out under rule 8(3)c of the First-tier Tribunal (General Regulatory Chamber) Rules 2009. In the alternative, the Application should be dismissed on the basis that the Commissioner has now taken steps to resolve the complaint "

8. The applicant lodged a lengthy Reply on 9 November 2020, in which, amongst other things, she states:

> "I now await the outcome of the Commissioner's request to the company, for further information in relation to its data protection practices and how it dealt with my request to erase my personal data."

Law

9. So far as material, the Data Protection Act 2018 ("2018 Act") provides that:

> **"165 Complaints by data subjects**
>
> (1) Articles 57(1)(f) and (2) and 77 of the GDPR (data subject's right to lodge a complaint) confer rights on data subjects to complain to the Commissioner if the data subject considers that, in connection with personal data relating to him or her, there is an infringement of the GDPR.
>
> (2) A data subject may make a complaint to the Commissioner if the data subject considers that, in connection with personal data relating to him or her, there is an infringement of Part 3 or 4 of this Act.
>
> (3) The Commissioner must facilitate the making of complaints under subsection (2) by taking steps such as providing a complaint form which can be completed electronically and by other means.
>
> (4) If the Commissioner receives a complaint under subsection (2), the Commissioner must—
>
> (a) take appropriate steps to respond to the complaint,
>
> (b) inform the complainant of the outcome of the complaint,
>
> (c) inform the complainant of the rights under section 166, and
>
> (d) if asked to do so by the complainant, provide the complainant with further information about how to pursue the complaint.

(5) The reference in subsection (4)(a) to taking appropriate steps in response to a complaint includes—

(a) investigating the subject matter of the complaint, to the extent appropriate, and

(b) informing the complainant about progress on the complaint, including about whether further investigation or co-ordination with another supervisory authority or foreign designated authority is necessary.

(6) …

(7) In this section—
…

"supervisory authority" means a supervisory authority for the purposes of Article 51 of the GDPR or Article 41 of the Law Enforcement Directive in a member State other than the United Kingdom.

166 Orders to progress complaints

(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.

(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)" (emphasis added)

10. The extent to which it is appropriate to investigate any complaint is a matter for the respondent (the ICO) to determine. The limited nature of the Tribunal's jurisdiction in this context has been confirmed by the Upper Tribunal, most recently in Scranage v Information Commissioner [2020] UKUT 196 (AAC) in which 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." (emphasis added)

11. 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, including an update as to outcome if there has been one (section 166(2)(b)).

Discussion

12. The lodging of the instant application by the applicant was in time - see rule 22(6)(f) of the Tribunal Procedure (General Regulatory Chamber) Rules 2009 ("2009 Rules").

13. As indicated above, the respondent chose not to attend the hearing of the 2 December 2020, despite the indication in the Registrar's Directions that the application could be finally disposed of at that hearing. The Registrar's Directions did not limit that final disposal to one which favoured the respondent. As can be seen from that which follows, I have decided to accede to the applicant's application and make an order under section 166(2) of the 2018 Act. Nothing new arose at the hearing which was not foreshadowed in the applicant's written submissions to the Tribunal or communications to the ICO and, consequently, having considered all the circumstances of the case in conjunction with the 2009 Rules, and in particular rule 2 thereof, I conclude that it is fair and just to determine this application in the applicant's favour (for the reasons given below) despite the ICO's absence from the hearing.

14. Turning then to the substance of my decision. First, it is not in dispute that the applicant made a complaint to the ICO of a type which is captured within section

165(2) of the 2018 Act. I conclude that such complaint was made was the 27 March 2020.

15. The respondent investigated but failed to inform the applicant of the progress of her complaint until the letter of 3 November 2020. In such circumstances, the applicant was undoubtedly justified in making the instant application to the First-tier Tribunal.

16. The issue before me is whether, given the letter of 3 November, there is now any basis upon which the Tribunal could make an order under 166(2) of the 2018 Act in this matter. I conclude not only can the Tribunal make such an order, but that it should do so.

17. The applicant submits, both in writing and at the hearing, that she cannot determine whether the ICO's letter of 3 November is said, by the ICO, to constitute an outcome to her complaint or, alternatively, whether the investigation of her complaint is still ongoing and that she is to receive either further details of the progress of her complaint or, indeed, an outcome of the complaint. Having carefully considered the terms of the letter of 3 November 2020, I find myself in exactly the same position as the applicant.

18. First, I observe that the letter of 3 November 2020 does not state that it constitutes the 'outcome' of the applicant's complaint, or that the applicant's complaint has been "closed". The fact that there is ongoing engagement by the ICO with Hamilton does not prevent the ICO 'closing' the applicant's complaint if the outcome of the compliant has been communicated to her. In such circumstances, the absence of a statement in the letter of 3 November that it constitutes the outcome of the applicant's complaint or that the complaint has been closed by the ICO is supportive, although far from determinative, of the fact that (i) the applicant's complaint has not been closed and (ii) that an outcome of the complaint has not been communicated to the applicant.

19. Second, when the first two paragraphs under the heading "Further action required" of the 3 November letter are read together, it is apparent that the ICO's investigation of Hamilton was still ongoing as of the 3 November 2020. An analysis of the further information that ICO requires from Hamilton includes confirmation that the applicant's data has been erased. This, it seems to me, can be derived from a fair reading of the first paragraph under that heading when read in conjunction with the first sentence of the following paragraph. Although I accept that much of the information that is required by the ICO from Hamilton is not information that is likely to be provided to the applicant, confirmation by Hamilton to the ICO that the applicant's data has been erased does not fall within that category – particularly in the unusual circumstances of this case in which Hamilton has previously failed to comply with an order that the applicant's data be erased.

20. In my view, when the entirety of the letter of the 3 November is duly analysed, it cannot be determined whether it is said, by the ICO, to provide the 'outcome' to the applicant's complaint. A fair reading of the 3 November letter leaves open the possibility that it does not. It is important for the applicant that have clarity on this issue because such information is, amongst other things, relevant to any

consideration she may have of taking proceedings in a different forum in relation to the matters which form the substance of the complaint.

Decision

21. For the reasons given above, I accede to the applicant's application and make the following Order under section 166(2) of the 2018 Act:

The Information Commissioner must, within 14 days of the date that this Decision is sent to her by the Tribunal:

(i) Inform the applicant as to whether the letter of the 3 November 2020 constitutes the outcome of her complaint made on 27 March 2020:

(ii) **If the letter of 3 November does not constitute an outcome to the complaint of 27 March 2020 then, on the same occasion that this is communicated to the applicant, the Information Commissioner must inform the applicant of the progress of such complaint. She must, thereafter, inform the applicant of the progress of her compliant no less frequently than every 28 days, until such time as there is an outcome to the complaint**.

Dated: 5 December 2020
Promulgated: 09 December 2020

signed

M O'Connor
Upper Tribunal Judge O'Connor