Appeal number: QJ/2019/0383/V

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

DIANA-ELENA ANTONESCU **Applicant**

- and -

THE INFORMATION COMMISSIONER **Respondent**

BEFORE: JUDGE MOIRA MACMILLAN

Appearances:
The Applicant represented herself.
The Respondent was not represented

Determined following a remote hearing via telephone and video
on 22 April 2021

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 joined by telephone. 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 717.

REASONS

Background to Application

5. On 24 July 2019 the Applicant applied to the Tribunal for an Order under s. 166(2) of the Data Protection Act 2018 ('DPA'), in respect of a complaint she made to the Respondent about the Pension Ombudsman's response to a subject access request ('SAR') she made on 4 May 2018 and 6 July 2018. The background to the SAR is that the Applicant previously taught in London and believes she is entitled to an occupational pension. She asserts that the Pensions Ombudsman destroyed her personal data earlier than required by statute and has therefore denied her the opportunity to claim her pension at an employment tribunal.

6. In her Notice of Appeal the Applicant cites the reference RCC0857803 as being the decision notice to which her Application relates. This is the reference used by the Respondent in a letter dated 17 July 2019, which explains the outcome of an internal review of a decision the Respondent made about complaint reference RFA0826322.

7. RFA0826322 is a complaint made by the Applicant on 27 February 2019 relating to the Pensions Ombudsman. The outcome of this complaint, communicated to the Applicant in a letter dated 21 June 2019, was that the Pensions Ombudsman had already provided all of the Applicant's personal data in response to her request. On 17 July 2019 the Respondent upheld this decision following the internal review.

Background to Case Management Hearing

8. This Application was previously listed for a Case Management Hearing on 9 October 2021, which both the Applicant and Respondent attended by telephone. At the conclusion of that hearing I determined that there was no Order for the Tribunal to make under s. 166(2), and that the Application should therefore be struck out under rule 8(3)(c).

9. The Applicant subsequently applied for permission to appeal the Decision, stating that she did not receive the hearing bundle until 27 October 2020. The Applicant further stated that she was in possession of relevant evidence that had not been before the Tribunal on 9 October 2020. Having considered her representations, on 8 February 2021 I set aside the 9 October 2020 Decision under rule 44(2).

10. On the same date I issued further Directions designed to ensure that the Applicant would receive copies of all documents before the case was next considered, and providing her with an opportunity to send the Tribunal any additional relevant information.

11. I announced my Decision to strike out this case for a second time at the conclusion of the Case Management Hearing on 22 April 2021. This written decision expands on the oral decision.

Service of papers

12. The Applicant was initially sent a copy of the Tribunal's papers in a single package, comprising more than 400 pages. This was not delivered due to a customs problem. HMCTS staff therefore re-sent the documents as four separate bundles, each by tracked delivery. I understand that the 400-page bundle may also have been delivered in due course.

13. I am satisfied that, by 22 April 2021, the Applicant had been made aware of all of the relevant documents before the Tribunal, something she acknowledged in a series of telephone calls and which was confirmed independently through tracked deliveries. As I understand this is a concern of the Applicant's, I will add that the only packages not delivered by 22 April 2021 were:

    a. A bundle comprising copies of the documents the Applicant has sent the Tribunal, such as her Notice of Appeal. The Applicant was initially told by HMCTS staff that it wold be sent to her using postal tracking number RI681200615GB, but following a telephone conversation in which the Applicant expressed doubts about this, a decision was subsequently taken not to send this material again. I am satisfied that the Applicant had already seen these documents, and had been sent copies of several in other packages, including in the hearing bundle she received on 27 October 2020.

b. A notice of hearing and covering letter, relating to the hearing on 22 April 2021. I am satisfied that the lack of receipt of this letter makes no material difference, since the Applicant was informed about the hearing in good time, and attended by telephone.

14. The Applicant told me at the second hearing that she had sent by post 50 pages of additional pages of evidence that she considers highly relevant to her application. These had not been delivered to the Tribunal by 22 April 2021, but the Applicant was told in advance that she would be given an opportunity to explain the relevance of these documents at the hearing and to read some of them out loud. She took advantage of this opportunity.

15. In general terms the Applicant's additional documents were letters to the Respondent and to the Pensions Ombudsman, and proof of postage of the same. I am satisfied from her description that these letters told the Respondent and the Pensions Ombudsman, both before and after the 17 July 2019 letter, that she had not received any of the personal data the Pensions Ombudsman had sent her.

16. In her Notice of Appeal the Applicant relies on grounds that the Respondent has made the wrong decision about her complaint. She requests compensation on the basis that she has suffered financial loss due to the failure to provide her data.

17. The Applicant's Notice of Appeal also refers to a separate complaint she made to the Respondent about Barclays Bank Limited. That matter is not before the Tribunal, but was discussed at the first Case Management Hearing and has been addressed in the Respondent's Response and below. It is not a matter properly before this Tribunal.

The Applicant's case

18. The Applicant states that she made SARs to the Pensions Ombudsman in May and July 2018, and in July 2018 also complained to the Respondent about the lack of a response. She submits that she wrote approximately 20 letters of complaint to the Respondent, but none were acknowledged until the letter she sent in February 2019. All of the complaints were about the same subject. These letters and proof of postage comprise much of the additional 50 pages of evidence to which the Applicant refers. She read three aloud during the hearing: they were letters from her 4 July 2019; 27 September 2019; and the ICO's letter of 21 June 2019.

19. The Applicant submits that the Respondent took several months to respond to her complaint and has not investigated it properly. She complains that the Respondent has simply accepted the Pensions Ombudsman's account that it has sent her the requested data. She contends that the Respondent has not investigated the matter in accordance with statutory obligations, as she should have investigated further once she was made aware that the Applicant had not received the requested data. She described the Respondent as having "*opened the complaint and shut it*".

20. The Applicant further submits that there are two errors in the Tribunal's Decision of 9 October 2020. She identified paragraph 6, which refers to her having received only part of her data from the Pension Ombudsman. This information is taken from one of the Applicant's letters, in which she states that she was sent the data by the Pensions Ombudsman but with 150 pages missing. The Applicant clarified in oral submissions that this refers in her letter is to the Pension Ombudsman's response to a 2016 SAR. I explained to the Applicant that there was no right of application to the Tribunal in relation to that matter.

21. The second error the Applicant referred to in submissions is at paragraph 22 of the 9 October 2020 Decision. The Applicant takes issue with the summary of the Respondent's case, as it says that the Applicant has been sent the requested data. I explained at the hearing that this is merely a summary of the Respondent's position.

The Respondent's case

22. The Respondent's Response dated 13 February 2020 relies on grounds of opposition that she has already responded to the Applicant's complaint. She agrees that she sent her determination of the Applicant's complaint by letter on 21 June 2019. The Respondent further agrees that, following the Applicant's request for a review of the determination, she sent a further letter on 17 July 2019, setting out the review outcome.

23. 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. She contends that the Tribunal does not have jurisdiction to change the scope or outcome of her investigation, or the conclusions that she has reached.

24. The Respondent's Response also addresses the Applicant's complaint about Barclays Bank Limited and confirms that a substantive response to that complaint was sent to the Applicant on 27 August 2019.

Law

25. Section 166 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).

26. 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.

27. 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."

28. 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.

29. 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

30. 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."*

Conclusion

31. I have considered the agreed bundle of evidence. This shows that the Applicant made a complaint to the Respondent about the Pensions Ombudsman on 27 February 2019. The Respondent did not reply to that complaint until 21 June 2019, which was significantly later than the 3 months statutory requirement.

32. It is apparent from that letter that the Respondent considered the Applicant's complaint and made enquires of the Pensions Ombudsman. The Respondent was told that the Pensions Ombudsman had responded to the Applicant's SARs on 26 October 2018 and 2 November 2018, and that this was the response to the last SAR it had received from her. The Respondent reached a decision based on this information and communicated the outcome of the complaint to the Applicant on 21 June 2019.

33. The Applicant requested an internal review of the Respondent's determination. This was carried out and the Applicant was sent the outcome of the review on 17 July 2019. It is the review decision that the Applicant refers to in the Notice of Appeal.

34. I have considered with care all of the Applicant's submissions. Having done so, I am satisfied that she has already received everything the Tribunal could order under s.166(2). This is because the Respondent has considered her complaint, made enquiries of the Pensions Ombudsman, and informed the Applicant of the outcome. The Applicant accepts this sequence of events in her own description of the Respondent's actions. Although the Respondent did not initially comply with the requirement to respond within 3 months and to keep the Applicant updated, I must consider whether there is any Order the Tribunal can make today.

35. I have considered whether there is any possibility that the Applicant is in possession of additional evidence which could have an impact on whether her complaint has been considered, and am satisfied that there is not. The Applicant is clearly unhappy with the Respondent's view of her complaint, but this does not mean that the complaint itself has not been considered.

Strike out

36. The Respondent has invited the Tribunal to strike out the application on the basis that it has no reasonable prospect of success.

37. I have considered in accordance with *HMRC v Fairford Group* whether the Applicant has put forward non-fanciful grounds in support of her Application. When doing so I have considered again whether there is an Order that the Tribunal could make today or in the future about the Applicant's complaint.

38. I note again that the Respondent has already sent the Applicant a final determination in relation to her complaint. Although the Applicant is clearly unhappy with the outcome, the 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.

39. It was explained to the Applicant at both hearings that the Tribunal cannot order the Respondent to take steps to require the Pension Ombudsman to provide data to her, or award compensation. Further, although the Barclays Bank Limited complaint is not before the Tribunal, the Applicant has been informed that, had it been, there would also be no Order for the Tribunal to make because the Respondent has already considered and responded to that complaint as well.

40. Having considered the submissions of both parties, and having reached a conclusion that there is no basis upon which the Tribunal could make an Order under s. 166 (2), I have decided that the Application should be struck out as

having no reasonable prospects of success, pursuant to rule 8(3)(c) of the Tribunal's Procedure Rules.

JUDGE MOIRA MACMILLAN

DATE: 29 April 2021

PROMULGATED: 04 May 2021