



NCN: [2023] UKFTT 758 (GRC)

Case Reference: EA-2023-0205-GDPR

**First-tier Tribunal
General Regulatory Chamber
Section 166 DPA 1998**

Before

TRIBUNAL JUDGE BUCKLEY

Between

DAVID WRIGHT

Applicant

and

THE INFORMATION COMMISSIONER

Respondent

JUDGE BUCKLEY

**Sitting in Chambers
on 13 SEPTEMBER 2023**

DECISION

1. The application under section 166 of the Data Protection Act 1998 is struck out.

REASONS

2. In this decision, ‘the application’ is a reference to the application made to the tribunal by David Wright under section 166 of the Data Protection Act 1998 (DPA). ‘The applicant’ is a reference to David Wright.

Application and response

3. The Commissioner applies for the application to be struck out under rule 8(3)(c) (no reasonable prospects of success) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 on the basis that the tribunal has no jurisdiction to consider the application under section 166.
4. The Commissioner submits that the applicant does not agree with the outcome of his complaint, but section 166 does not provide a mechanism by which applicants can challenge the substantive outcome of a complaint.
5. The applicant was given the opportunity to respond. By email dated 3 August 2023, he submits that he believes that the Commissioner has failed to take certain appropriate steps to respond to his complaint, and that he does not believe that it was his intention to challenge the substantive outcome of the Commissioner's investigation into my complaint.
6. The applicant states that it is his position that the Commissioner should respond more fully to the complaint by explaining the reasons for his decision. Further he states that the Commissioner has taken sides with the data controller by making a quasi-judicial decision that the exemption of legal professional privilege was applied appropriately. He asserts that the Commissioner is not in a position to decide whether or not this exemption applies, because this would be a legal ruling that is not within the Commissioner's jurisdiction to make.

Discussion and conclusions

7. The applicant states that the grounds of his appeal are:

‘..that there is doubt that the exemption of Legal Professional Privilege has been correctly or appropriately upheld by the ICO in this case.’
8. Under a section headed ‘Background information’, the applicant asserts that:
 - 8.1. He believes he is entitled to a more detailed explanation as to why the ICO is satisfied with the explanation given by the data controller and what the information consists of;
 - 8.2. The ICO did not consider whether the data controller's solicitor may have waived or partly waived privilege;
 - 8.3. Legal Professional Privilege should not be relied on to prevent disclosure of a misinformed and misleading view of policy and application of the law.
9. The outcomes that the applicant seeks are:
 - “1. The ICO should accept that there is some doubt as to whether Legal Professional Privilege applies in this case.
 2. The ICO should explain more fully why Jonathan Finch was ‘satisfied that NRW has applied the ‘legal professional privilege’ exemption in this instance.’

3. The ICO should disclose the explanation that NRW provided to the ICO ‘of what the information consists of’.
 4. The ICO should explain why ‘we are satisfied that it is appropriate of the information to be withheld under this exemption.’”
10. There are, in my view, two complaints in essence. First, that the Commissioner was wrong to conclude that legal professional privilege applies, and second that the Commissioner has not adequately explained the basis for his conclusion.
 11. The first is clearly a challenge to the outcome of the complaint and not within the jurisdiction of the tribunal (**Leighton v Information Commissioner** (No.2) [2020] UKUT 23 (AAC); **Scranage v Information Commissioner** [2020] UKUT 196 (AAC) **Killock & Veale & others v Information Commissioner** [2021] UKUT 299 (AAC)).
 12. In relation to the second, although a failure to provide adequate reasons has the appearance of a procedural complaint, I note the following paragraphs from **Killock v Veale:**

“87. s.166 is a forward-looking provision, concerned with remedying ongoing procedural defects that stand in the way of the timely resolution of a complaint. The Tribunal is tasked with specifying appropriate “steps to respond” and not with assessing the appropriateness of a response that has already been given (which would raise substantial regulatory questions susceptible only to the supervision of the High Court). It will do so in the context of securing the progress of the complaint in question. We do not rule out circumstances in which a complainant, having received an outcome to his or her complaint under s.165(b), may ask the Tribunal to wind back the clock and to make an order for an appropriate step to be taken in response to the complaint under s.166(2)(a). However, should that happen, the Tribunal will cast a critical eye to assure itself that the complainant is not using the s.166 process to achieve a different complaint outcome.”
 13. In my view that is exactly the situation here. The tribunal is being asked to assess the appropriateness of the response already given. In my view, the applicant is attempting to use the s 166 process to achieve a different complaint outcome. This is not the sort of procedural defect with which s 166 is concerned.
 14. In his response to the application to strike out the applicant raises a further issue, in effect about the Commissioner having exceeded her powers by determining whether a particular exemption applied. First, having reviewed the outcome letter and the case review it is clear that the Commissioner has not exceeded her powers and second, such an argument does not fall within the tribunal’s section 166 jurisdiction.
 15. In the light of all the matters set out above I have considered whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of the application succeeding at a full hearing. In my view, for the reasons set out above there are no reasonable prospects of the application under section 166 succeeding.

16. I have considered whether I should exercise my discretion to strike the application out. Taking into account the overriding objective, it is a waste of the time and resources of the applicant, the tribunal and the Commissioner for this application to be considered at a final hearing. In my view it is appropriate to strike the application out under rule 8(3)(c).
17. If I am wrong about the tribunal's jurisdiction to consider a complaint about the adequacy of reasons for an outcome, this would not be material to my decision. The Commissioner has explained the reasons for his decision to the complainant in the outcome letter and in the outcome of the case review. **Killock v Veale**, at paragraph 85, makes clear that in considering appropriateness, the tribunal will be bound to take into consideration and give weight to the views of the Commissioner as an expert regulator. In the sphere of complaints, the Commissioner has the institutional competence and is in the best position to decide what investigations she should undertake into any particular issue, and how she should conduct those investigations.
18. Having considered the grounds of application, the response and the reply, along with the attached documents, it is evident to me that that the Commissioner complied with his statutory duties in this case in that he:
 - 18.1. handled the applicant's complaint promptly,
 - 18.2. took appropriate steps to investigate the complaint to the extent appropriate in the circumstances, and
 - 18.3. informed the applicant of the outcome of the complaint.
19. Having reviewed the outcome letter and the outcome of the case review, and taking into account the guidance given in **Killock v Veale** in my view there are no reasonable prospects of the applicant successfully persuading a tribunal that the Commissioner has failed to take appropriate steps by providing inadequate reasons for his decision. In those circumstances I would have struck out the appeal in any event.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 13 September 2023

Promulgation Date: 15 September 2023.