Neutral citation number: [2024] UKFTT 001051 (GRC)

Case Reference: FT/EA/2024/0126/GDPR

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: on the papers in Chambers

Heard on: 19 November 2024
Decision given on: 25 November 2024

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

ALICE FLORENCE GANN

Applicant

and

INFORMATION COMMISSIONER

Respondent

Decision:

The proceedings are struck out under Rule 8(3)(c) because there is no reasonable prospect of the Applicant's case, or part of it, succeeding.

REASONS

1. These proceedings involve an application to the Tribunal under section 166(2) of the Data Protection Act 2018 ("DPA"). The Applicant asks for an order in relation to a complaint to the Information Commissioner (the "Commissioner").

2. Under Rule 8(3)(c) of the *Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009*, the Tribunal may strike out the whole or part of the proceedings if the Tribunal considers there is no reasonable prospect of the applicant's case, or part of it, succeeding.

3. In his response to the application, the Commissioner submits that the Tribunal has no jurisdiction to consider the application and/or it has no reasonable prospect of succeeding and accordingly should be struck out. The Commissioner has made a strike out application on this basis. The Applicant opposes the strike out.

4. The Commissioner says that the remedies sought by the Applicant are not outcomes that the Tribunal can grant under section 166 DPA because an order can only be made in relation to procedural failings.

5. Section 165 DPA sets out the right of data subjects to complain to the Commissioner about infringement of their rights under the data protection legislation. Under section 166 DPA a data subject can make an application to this Tribunal for an order as follows:

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 UK 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.

6. The Tribunal can only make an order under section 166(2) if one of the conditions at section 166(1)(a), (b) or (c) is met. There have been a number of appeal decisions which have considered the scope of section 166. It is clearly established that the Tribunal's powers are limited to procedural issues, rather than the merits or substantive outcome of a complaint. Some key decisions are:

a. ***Killock v Information Commissioner*** [2022] 1 WLR 2241, Upper Tribunal at paragraph 74 - "…*It is plain from the statutory words that, on an application under section 166, the Tribunal will not be concerned and has no power to deal with the merits of the complaint or its outcome. We reach this conclusion on the plain and ordinary meaning of the statutory language but it is supported by the Explanatory Notes to the Act which regard the section 166 remedy as reflecting the provisions of article 78(2) which are procedural. Any attempt by a party to divert a tribunal from the procedural failings listed in section 166 towards a decision on the merits of the complaint must be firmly resisted by tribunals*."

b. Mostyn J in the High Court in ***R (Delo) v Information Commissioner*** [2023] 1 WLR 1327, paragraph 57 - "*The treatment of such complaints by the commissioner, as before, remains within his exclusive discretion. He decides the scale of an investigation of a complaint to the extent that he thinks appropriate. He decides therefore whether an investigation is to be short, narrow and light or whether it is to be long, wide and heavy. He decides what weight, if any, to give to the ability of a data subject to apply to a court against a data controller or processor under article 79. And then he decides whether he shall, or shall not, reach a conclusive determination*...".

c. Mostyn J's decision in ***Delo*** was upheld by the Court of Appeal ([2023] EWCA Civ 1141) – *"For the reasons I have given I would uphold the conclusion of the judge at [85] that the legislative scheme requires the Commissioner to receive and consider a complaint and then provides the Commissioner with a broad discretion as to whether to conduct a further investigation and, if so, to what extent. I would further hold, in agreement with the judge, that having done that much the Commissioner is entitled to conclude that it is unnecessary to determine whether there has been an infringement but sufficient to reach and express a view about the likelihood that this is so and to take no further action. By doing so the Commissioner discharges his duty to inform the complainant of the outcome of their complaint*." (paragraph 80, Warby LJ).

d. The recent decision of the Upper Tribunal in ***Cortes v Information Commissioner*** (UA-2023-001298-GDPA) which applied both ***Killock*** and ***Delo*** in confirming that the nature of section 166 is that of a limited procedural provision only. "*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)….As such, the fallacy in the Applicant's central argument is laid bare. If Professor Engelman is correct, then any data subject who is dissatisfied with the outcome of their complaint to the Commissioner could simply allege that it was reached after an inadequate investigation, and thereby launch a collateral attack on the outcome itself with the aim of the complaint decision being re-made with a different outcome. Such a scenario would be inconsistent with the purport of Article 78.2, the heading and text of section 166 and the thrust of the decisions and reasoning in both Killock and Veale and R (on the application of Delo). It would also make a nonsense of the jurisdictional demarcation line between the FTT under section 166 and the High Court on an application for judicial review*." (paragraph 33).

7. The Applicant made a complaint to the Commissioner about data protection and vetting concerns regarding North Yorkshire Police. The Commissioner investigated the matter with the Police and sent a letter to the Applicant in response to her complaint on 4 April 2024. The letter stated, "*Having considered all the information provided to me at this time, and on balance, it does not appear NYP has infringed the GDPR/DPA18 in this case*". The letter went on to explain reasons for this conclusion and acknowledged the Applicant's concerns that the Police and provided her with contradictory and unclear information. The letter concluded that the case officer did not anticipate taking any further action at this time. The Applicant raised questions and concerns about this response, and the case officer explained that

their role was not to necessarily obtain answers to every question or resolve every aspect of an individual's complaint.

8. The Applicant's application to this Tribunal sets out the detailed background to this matter and reasons why she is not happy with the Commissioner's investigation, and concludes, "*It is on the basis of the information raised in this document that object to the conclusion reach that my police complaint document was legally accessed and recorded by the North Yorkshire Police Vetting Department*". It seems clear from this application that the Applicant is challenging the substantive outcome of the complaint to the Commissioner.

9. The Applicant has provided a detailed response to the strike-out application, which I have read and considered. She says that the Commissioner has not taken appropriate steps to respond to the complaint. This is based on evidence she provided to the Commissioner which she says was not investigated satisfactorily. She asks a number of questions about the Commissioner's conclusions. In summary, she says that, "*Further questions should have been asked by the ICO before this conclusion was reached*".

10. I understand that the Applicant may feel frustrated with the complaint outcome and feels that she has further questions. However, I do not agree that the Commissioner has failed to take "appropriate steps" within the meaning of the DPA. The Commissioner conducted an investigation and provided an outcome to the Applicant. The Tribunal's powers are very limited. The cases quoted above specify that allegations of an inadequate investigation cannot be used as a back-door way to reopen a concluded complaint. The Tribunal does not have power under section 166 to consider the merits or substantive outcome of a complaint. The caselaw makes it clear that this includes the scale and nature of the investigation – this is a matter for the Commissioner. Section 166 is limited to procedural issues.

11. I therefore find that there is no reasonable prospect of the case, or any part of it, succeeding. The proceedings are struck out.

Signed: *Judge Hazel Oliver*

Date: 20 November 2024