



Neutral citation number: [2024] UKFTT 00904 (GRC)

Case Reference: FT/EA/2024/0202/GDPR

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard: on the papers in Chambers

**Heard on: 10 October 2024
Decision given on: 14 October 2024**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

LAUREN SHARP

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 two complaints 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 application has no reasonable prospect of succeeding and accordingly the appeal should be struck out. 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 two complaints to the Commissioner on 20 December 2023 about how Salvesen Mindroom and the City of Edinburgh Council had dealt with her personal data, by disclosing documentation without valid consent. The Commissioner took the following action in response to these complaints:
- a. Salvesen Mindroom – investigated with the organisation, and provided an outcome to the Applicant on 21 March 2024 which found that although Salvesen Mindroom could have asked for clarification, they had complied with their data protection obligations and provided a reasoning for this assessment.
 - b. The City of Edinburgh Council - investigated with the organisation, and provided an outcome to the Applicant on 21 March 2024 which found that they had

complied with their data protection obligations and provided a reasoning for this assessment. The Applicant's representative asked for a case review on 28 March 2024. A further outcome was provided on 2 July 2024 which apologised for the delay but found that the original case officer had dealt with the complaint appropriately.

8. The Commissioner's position is that he considered the Applicant's complaints and came to the decision that he had reached when he had communicated the outcomes on 21 March 2024 and upheld on 2 July 2024. Accordingly, he says that there is nothing that remains extant in the Commissioner's handling of the Applicant's complaint, and so he has not failed to comply with the procedural requirements set out in section 166(1) DPA.
9. The Applicant has provided a response to the strike-out application, which I have considered. This raises a number of concerns about what happened with her personal data. She says that the Commissioner's decision is flawed and unlawful. She also says that one of the Annexes provided by the Commissioner had been deliberately concealed – the outcome from the case worker to the data protection officer at City of Edinburgh Council, which provides feedback on how consent from a third party should be dealt with. The Appellant says this is evidence that the case officer chose to ignore facts and not hold there had been a data protection breach, and says there has been an error of law.
10. The Applicant says, *"We ask the tribunal to make an order under for the Commissioner to take steps to conclude a proper investigation considering all of the facts mentioned above as the investigation carried out by the Information Commissioner has been flawed and not lawful and incomplete"*, and *"We ask the tribunal to make an order for the Commissioner to carry out a proper investigation and provide an outcome which does not flout data protection law, and ask them to consider Annex 7 and Annex 8 in their decision making and provide a lawful outcome of complaint"*.
11. The Commissioner has replied and says that the Applicant's comments about deliberate concealment of an Annex are not accepted and not relevant. He maintains that the Tribunal has no jurisdiction because the investigation into the complaints has been concluded and an outcome was provided on 20 March 2024.

Conclusion

12. I have considered the Applicant's written representations. It is clear that she is dissatisfied with the investigation carried out by the Commissioner and the outcome. The Applicant is challenging the substantive outcome of the complaint to the Commissioner. The Tribunal does not have power under section 166 to consider the merits or substantive outcome of a complaint. Section 166 is limited to procedural issues. As was made clear in **Cortes**, allegations of an inadequate investigation cannot be used to launch an attack on the outcome of a complaint. I can appreciate that this may be frustrating for the Applicant. However, the Tribunal does not have power to do what she is asking for.

13. 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: 11 October 2024

Promulgated on 14 October 2024