NCN: [2025] UKFTT 200 (GRC)

Case Reference: FT-EA-2024-0127-GDPR

First-tier Tribunal
(General Regulatory Chamber)
Information Rights **Decision given: 13 February 2025**

Before

JUDGE MOAN

Between

SAMANTHA BELLAMY

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Decision made on the papers.

Decision: The Respondent's application to strike out the application of the Applicant is granted. The appeal is struck out under Rule 8(2)(a) as an application that cannot be made to this Tribunal and under Rule 8(3)(c) on the basis that there is no prospect of the application being successful.

REASONS

1. The Applicant lodged a notice of appeal to the Tribunal dated 5th April 2024. The appeal form stated that the Applicant was appealing the decision of the Information Commissioner dated 4th April 2024. She said

that she had raised an issue with a medical report with the Information Commissioner and the data processors had refused to rectify factual errors. She considered that her GDPR rights had been infringed and sought that the Tribunal require the data handlers to comply with GDPR especially as regards accuracy in its reports

2. There was no reference to the statutory basis for the appeal and the appeal was started on the GRC 1 appeal form and not the GRC 3 order to progress form.

3. On 11th December 2023 the Appellant had submitted two complaints that a NHS Trust held inaccurate information within her medical records and that her records were excessive. As part of the investigation, the Commissioner was keen to distinguish between factual errors and disputes about medical diagnosis. It was noted that there were some difficulties establishing the nature and extent of the alleged inaccuracies and that an offer was made by the Trust to meet with the Appellant to identify and discuss those alleged inaccuracies had been declined. The Appellant was offered the opportunity to add notes to her records in those parts that she disagreed.

4. The Commissioner was satisfied that disputed records that were ultimately identified by the Appellant as being inaccurate were deemed to be medical opinion. Even if the errors were factual errors, the Tribunal cannot the Commissioner to a different outcome. So whilst the differentiation between medical opinion and fact is important for the Commissioner to determine his remit, neither provide a right of appeal to the Tribunal.

5. The Appellant received an outcome decision on 4th April 2024 in response to her complaint and she was dissatisfied with that outcome.

6. The Respondent responded to the appeal on 18th June 2024. In that response, the Commissioner confirmed that he provided the outcome to the complaint; that was not disputed by the Applicant. The Commissioner considered that the application made by the Applicant was not a permissible use of the section 166 procedure, if indeed the application was a section 166 application; the application was expressed as an appeal. The Tribunal was not in a position to make an order on the basis of a purported suggestion that the Commissioner had failed to investigate at all or to the extent appropriate. The Respondent made an application to strike out the appeal on the basis that the Tribunal lacked jurisdiction to deal with the appeal and/or there was no realistic prospect of the appeal succeeding.

7. The Tribunal gave directions dated 22nd October 2024 for the Appellant to respond to the strike out application by 6th November 2024. The Applicant is aware of the strike out application and no substantive response has been received. The Appellant requested an oral hearing to address the Tribunal but the Appellant has no right to demand an oral hearing on a case management issue. The Tribunal's resources are valuable. She has not given any reason why she could not respond in writing as directed.

8. The Applicant does have a right to make an application under s166 of the Data Protection Act 2028 as regards a complaint to the Information Commissioner. However, the scope of an application under section 166 of the Data Protection Act 2018 is to achieve some progress in a complaint that has not been progressed. Once an outcome is received, there is nothing left to progress. The Tribunal has no powers to investigate the investigation of the Respondent or supervise their investigation as is suggested in the notice of appeal.

9. An additional complication is that the Commissioner cannot require a NHS Trust or medical practitioner to amend a medical opinion. Factual errors may be rectified but medical opinion is an opinion based on an observation in a moment in time.

10. I considered it appropriate to conduct the review on the papers and without a hearing noting the nature of the strike out application made and having regard that the Appellant has had a full opportunity to respond to the issues. The Tribunal must strike out an application where it does not have jurisdiction. There is no room for discretion on that ground.

The legal framework and powers of the Tribunal

11. The Data Protection Act 2018 confirms the jurisdiction of the Information Commissioner for upholding information rights and data privacy. The Act provides limited scope for appeals to the Tribunal, proceedings in the County Court and the prosecution of offences before the criminal courts. The courts and tribunals can only deal with those issues that Parliament has intended it to do so as set out by the legislation. In data protection complaints, there is a power under section 166 to request an order to progress but other than that, there is no power to appeal to the Tribunal.

12. As stated on the Information Commissioner's website – complaints about data protection outcomes can be reported for review to the ICO's office or referred to the Parliamentary and Health Service Ombudsman. There is no right of appeal to the First Tier Tribunal from a data protection decision save in the very limited circumstances permitted by the Act for example under s162 as regards penalty notices etc. This is distinct from Freedom of Information requests where decisions of the

ICO can be appealed to the First Tier Tribunal. There also exists the right to apply for judicial review albeit that would relate to the reasonableness of decision-making discretion of the ICO rather than a disagreement with the decision itself, and noting the judicial review is costly and time-consuming. There is also a remedy available in the County Court.

Analysis and conclusions

13. The Tribunal has no power to order further steps to have been taken when an outcome has been provided and in circumstances when there has clearly been an investigation, nor does the Tribunal have power to demand that the Commissioner produce a particular outcome. The level of correspondence between the parties indicates that there had been some investigation. This was not the rare case of no investigation taking place at all.

14. Section 166 Data Protection Act 2018 does not provide a right of appeal against the substantive outcome of an investigation into a complaint under s.165 Data Protection Act 2018. Furthermore, the Tribunal does not have any power to supervise or mandate the performance of the Commissioner's functions. This is the very consistent conclusions o the High Court, Upper Tribunal and the Court of Appeal. There is no inherent or overarching jurisdiction of the Tribunal to monitor or scrutinise; these powers lie elsewhere but not with this Tribunal.

15. There is no realistic prospect of the application succeeding in the circumstances and it would be a misuse of the resources of the Tribunal and the parties to allow that application to continue any further. Time spent on a meritless application reduces those resources available to consider other applications. As has been advised on numerous

occasions, there are remedies available to the Applicant, just not before this Tribunal.

16. The Commissioner's opinion regarding the medical records and his inability to deal with a complaint about medical opinion is entirely correct. On the basis that the Commissioner does not have power to investigate and provide an outcome as regards a disputed medical opinion, the Tribunal have no powers to make an order to progress let alone to hear an appeal against that decision. This is very distinct from the Commissioner refusing to investigate where he has the ability to do so.

17. The NHS website provides the following guidance –

> *Sometimes, you may disagree with information written in your record, but the information could still be factually correct. For example, you may disagree with a diagnosis you were given in the past. Whilst you can still ask the organisation to amend the entry that you feel is inaccurate, an organisation should not change it if the health and care professional believes it is factually correct.*

18. Rectification of data such an incorrect date of birth is permissible where that data is clearly incorrect. Medical opinion is not factual but an opinion of the medical practitioner. Doctors are not obliged to remove recorded diagnoses with which the patient disagrees and indeed it may be dangerous/not in the safety interests of the patient to do so. There is often provision for a note to be added to the records to the effect that the patient disagrees with the diagnosis. This is in accordance with GMC guidance.

19. There is no power for this Tribunal to make an order against relevant NHS Trust. This application is not a civil claim against the Trust, this Tribunal has no power to hear a civil claim against the Trust.

20. The application is misconceived and cannot proceed because both the Tribunal have no power to consider it and because it has no realistic prospect of succeeding. The Appellant has utilised the opportunity afforded to her to seek to persuade the Tribunal otherwise.

21. There is no realistic prospect of the application succeeding in the circumstances and it would be a misuse of the resources of the Tribunal and the parties to allow that application to continue any further. Time spent on a meritless application reduces those resources available to consider other applications.

22. The Tribunal strongly suggests that the Appellant accept the invitation of the Trust to identify the errors in her medical records and seek rectification or annotation, as the case may be.

District Judge Moan sitting as a First Tier Tribunal Judge
11th February 2025