



Neutral citation number: [2023] UKFTT 01065 (GRC)

Case Reference: EA/2023/0372/GDPR

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

**Heard: on the papers in Chambers**

**Heard on: 14 December 2023  
Decision given on: 04 January 2024**

**Before**

**TRIBUNAL JUDGE HAZEL OLIVER**

**Between**

**SHIMAA HATAB**

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 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...". 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." (paragraph 80, Warby LJ).*

- c. 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 a response to a data subject access request, the security of the processing of her personal data and an alleged disclosure of personal data to a third party outside the UK. The case officer sent a letter to the Applicant on 3 May 2023 which said they had raised the complaint with the Chief Executive of the relevant organisation and explained they wanted them to work with her to resolve any outstanding matters. The letter also said, *"We have closed your case and don't intend to take any further action"*. The Applicant asked the Commissioner to reconsider and issue a decision notice. The Commissioner sent a review outcome to the Applicant on 26 July 2023 which explained that the initial complaint had been dealt with appropriately and advised that certain matters fell outside their remit.
8. The Applicant's desired outcome from the application to the Tribunal is, *"I want to issue an order to get access to the information regarding the non-redacted email logs and the identifiable information of the users of my Skype account who called an Egyptian number from my account"*.

9. The Commissioner says that he took steps to investigate and respond to the complaint. He provided an outcome on 3 May 2023, and a case review on 26 July 2023. The Commissioner says that he has taken steps to comply with the procedural requirements set out in section 166(1) DPA, and there is accordingly no basis for the Tribunal to make an order under section 166(2) DPA.
10. The Applicant opposes the strike-out application and has provided detailed written submissions. She argues that the mere provision of a letter of response does not mean that the Commissioner has automatically satisfied his investigatory duty, and says that the duty to investigate to the extent “appropriate” is a test of what is objectively reasonable in all the circumstances. She says that the procedures and the steps taken to investigate the complaint were not based on consistent and objective practices.
11. 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. I have considered the submissions from the Applicant. She says that she is not challenging the adequacy or merits of the complaint outcome. I disagree. The Applicant disagrees with the steps taken by the Commissioner and the extent of the investigation, but an outcome was provided to the Applicant. The caselaw set out above is very clear that section 166 does not allow the Tribunal to assess the appropriateness of a response that has already been provided by the Commissioner. The decisions in *Delo* also make it clear that the Commissioner has a broad discretion as to the extent of any investigation. As set out in the recent decision in *Cortes*, allegations that an outcome was reached after an inadequate investigation are a collateral attack on the outcome itself, with the aim of the complaint decision being re-made with a different outcome. This is not a permissible use of section 166.
12. 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: 14 December 2023