



NCN: [2023] UKFTT 00401 (GRC)

Case Reference: EA/2022/0039 GDPR

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Heard: by determination on the papers

Heard on: 28 April 2023

Decision given on:

Before: Judge Alison McKenna

Mr G BRIDA

Applicant

- and -

THE INFORMATION COMMISSIONER

Respondent

RULING

on Rule 4 (3) Application:

I refuse to allow the Notice of Appeal to be admitted out of time.

REASONS

1. On 6 April 2023, the Registrar refused to extend time for this Notice of Appeal to proceed. By application dated 20 April 2023, the Applicant ‘renewed’ his application. This was understood to be a request for the Registrar’s Decision to be considered afresh by a Judge, pursuant to rule 4 (3) of the Tribunal’s Rules¹. This I now do.
2. There is no requirement to set out grounds of appeal in relation to a request for a fresh consideration under rule 4 (3), but the Applicant has done so. He cites Upper Tribunal authority and relies on the overriding objective in a six-page submission, which I have considered carefully.
3. I note that I have discretion to extend the time limit rule 5 (3) (a) of the Tribunal’s Rules. The relevant legal principles which I am bound to consider in exercising my discretion are set out in the Upper Tribunal’s decisions in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC) and *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC). I have also considered the Upper Tribunal’s decision in *BPP University College of Professional Studies v HMRC* [2014] UKUT 496 (TCC) in which the *Data Select* principles were applied. (*BPP* was considered further in the Court of Appeal and the Supreme Court, but on a different point).

¹ [General Regulatory Chamber tribunal procedure rules - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/101441/General_Regulatory_Chamber_tribunal_procedure_rules.pdf)

4. In Morgan J's decision in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC):

[34] ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

5. Applying the recommended approach, I find: (i) that the purpose of the time limit is to ensure that proceedings are conducted in an orderly way and that the principle of finality in litigation may be observed; (ii) I find that the period of delay was 131 days, which is a significant period; (iii) in considering the explanation given for the delay, I note that the Applicant says he was not told that a time limit applied and that he found the available guidance confusing, especially as he is a litigant in person and has a disability. I find the reason for the delay to be a good one. Finally, (iv) and (v) I consider the consequences for the parties of extending or not extending time. If I refuse, then these proceedings will be brought to an end today. If I agree, then this matter will proceed to require the Information Commissioner to file a Response to the Notice of Appeal.
6. The Applicant seeks an Order under s. 166 DPA 2018. It is undisputed that the ICO gave him an outcome letter on his complaint (dated 14 December 2022), albeit one with which he did not agree. The Applicant filed his Notice of Appeal on 13 January 2023 in which he asked the Tribunal to direct a fresh investigation of his complaint.
7. The powers of this Tribunal in determining a s. 166 application are limited to those set out in s. 166 (2) DPA 2018. In order to exercise them, the Tribunal must be satisfied that the Commissioner has failed to progress a complaint made to the ICO under s. 165 DPA 2018. The jurisdiction to make an Order is limited to circumstances in which there has been a failure of the type set out in s. 166 (1) (a), (b) and (c). This Tribunal has no supervisory jurisdiction in relation to the handling of a complaint to the Information Commissioner's Office and the Tribunal may not review the Information Commissioner's decision to take no further action in relation to a complaint. That view has been frequently expressed by the Upper Tribunal and was also recently taken in the High Court by Mostyn J. in *R (Delo) v ICO* [2022] EWHC 3046 (Admin)² at [128] as follows:
- “...Sections 166(2) and (3) allow the Tribunal to order the Commissioner to take steps specified in the order to respond to the complaint. In my judgment, this would not extend to telling the Commissioner that he had to reach a conclusive determination on a complaint where the Commissioner had rendered an outcome of no further action without reaching a conclusive determination. This is because s. 166 by its terms applies only where the claim is pending and has not reached the outcome stage. It applies only to alleged deficiencies in procedural steps along the way and clearly does not apply to a merits-based outcome decision.”*
8. In this case, it is clear that the ICO progressed the complaint and informed the Applicant of the outcome decision. In the light of Mostyn J.'s judgment, it seems to me that this outcome letter (and case review letter) serves to deprive the Tribunal of jurisdiction under s. 166 DPA, as the complaint could no longer be said to be 'pending' when the Notice of Appeal was lodged. This would mean that a strike out under rule 8 (2) (a) of the Tribunal's rules would be appropriate.
9. I conclude that, if I were to extend time to allow the Notice of Appeal to proceed in this case, then I would immediately proceed to consider a strike out of the appeal under rule 8 (2) (a) on the basis that the Tribunal has no jurisdiction to determine it. Such a strike out would be mandatory.

² [BEN PETER DELO, R \(on the application of\) v THE INFORMATION COMMISSIONER & Anor - Find case law \(nationalarchives.gov.uk\)](https://www.nationalarchives.gov.uk)

10. In all the circumstances, I have concluded that it would not be appropriate to exercise my discretion to extend time to admit this Notice of Appeal, and so I now refuse to do so. It follows that these proceedings are at an end.

(signed)
Judge Alison McKenna

Dated: 28 April 2023

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