



Neutral citation number: [2023] UKFTT 676 (GRC)

Case Reference: EA/2023/0042/GDPR

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

Heard: on the papers in Chambers

**Heard on: 10 August 2023
Decision given on: 17 August 2023**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

LEE JOHNSON

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. **Scranage v Information Commissioner** [2020] UKUT 196 (AAC), paragraph 6 - *"In my experience – both in the present appeal and in many other cases – there is a widespread misunderstanding about the reach of section 166. Contrary to many data subjects' expectations, it does not provide a right of appeal against the substantive outcome of the Information Commissioner's investigation on its merits. Thus, section 166(1), which sets out the circumstances in which an application can be made to the Tribunal is procedural rather than substantive in its focus."* (emphasis in original).
 - b. **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."

7. The Applicant made a complaint to the Commissioner about processing of his personal data by Aviva Health. The Commissioner sent a letter to the Applicant in response to his complaint on 7 November 2022. The letter explained that they had considered the complaint. Aviva had provided a response which investigated his concerns and explained how they were complying with their data protection obligations, and the Commissioner would not be taking any further action.
8. The Applicant's desired outcome from the application to the Tribunal is, "*I seek censure by the ICO of Aviva Health for this issue, and criminal prosecution. In regard of myself, and for all, previous Aviva Health customers who have been affected by Aviva Health's policy of obtaining customers Personal & Sensitive Data by criminal means*". The grounds for the application are that the Commissioner has refused to censure Aviva Health for what he believes was a criminal offence of "enforced SAR".
9. 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.
10. The Applicant's response to the strike out application also makes it clear that he disagrees with the Commissioner's decision. He says, "*I'm not legally qualified in any respect, but I have to ask, what exactly is the role of the Information Tribunal?*". I can confirm that the role of the Tribunal under section 166 is limited to procedural issues. As noted in **Scranage**, there is a widespread misunderstanding about what can be done under section 166.
11. The Applicant's application seeks to challenge the outcome of the Commissioner's complaints process. This is not something that this Tribunal can consider under section 166. 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: 10 August 2023