



Neutral citation number: [2023] UKFTT 683 (GRC)

Case Reference: EA/2023/0108/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**

**LIYING YANG**

Applicant

**and**

**INFORMATION COMMISSIONER**

Respondent

**Decision:**

1. 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.
2. The Applicant's application for anonymity is refused, but as already directed by the Registrar on 11 April 2023, in order to protect the privacy of the Applicant the personal and private documents sent by the Applicant will be kept under Rule 14(6) and will not be disclosed or published.

**REASONS**

3. 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"), case reference IC-194615-F7T6.

## **Strike out application**

4. 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.
5. 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.
6. 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.
7. The Applicant provided a reply to the strike out application on 25 May 2023. This also requested a 28 day extension. She was given until 28 June 2023 to provide a reply. She has not sent a further reply to the Tribunal. Her original reply of 25 May does provide a substantive response to the application, so I have taken this into account in making my decision.
8. 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.*
9. 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."*
10. The breadth of the Commissioner's discretion in relation to complaints investigation was considered by Mostyn J in the recent High Court decision in **R (Delo) v Information Commissioner** [2023] 1 WLR 1327, at 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..."*
  11. The Applicant made a complaint to the Commissioner on 29 September 2022 about the way in which the Royal London Hospital ("RLH") had handled her personal data. A case officer sent a letter to the Applicant in response to her complaint on 22 December 2022. The letter explained that the final response from RLH was dated November 2021, and stated, *"The ICO is an evidence based regulator and can only act on concerns which are supported by recent evidence, dated within **three months** of the concern being raised with us. As the final response from the organisation is dated November 2021, this is also outside our service standard and we would be unable to take your complaint forward"*.
  12. The Applicant disagreed with this outcome. The case officer sent a further letter on 23 December 2022, which stated *"I understand you have tried to raise the same complaint this year, however the organisation provided you with a final response in November 2021 and have told you it will not be investigated as it was based on events which happened in 2005. The ICO is of the same stance and we will not be able to take a complaint forward when the organisations final response was over 12 months ago"*. The Applicant asked for this to be reviewed. The reviewing officer wrote to the Applicant on 10 January 2023 setting out the service standards and stating, *"I am of the view that the delay shown in this case is extensive, and*

*therefore I am satisfied that [the case officer] dealt with your complaint appropriately. As such this is not something that we intend to pursue further”.*

13. The Applicant’s desired outcome from the application to the Tribunal is, “*I would like the false and fake information to be corrected, especially the wrong information in the Post-Mortem report, in Antenatal notes, or any documents in Royal London Hospital*”.
14. 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. The Tribunal also does not have power to require information to be corrected in the way requested by the Applicant. The Tribunal’s powers are limited to ordering the Commissioner to correct any identified procedural failings in the Commissioner’s complaints process. There is no reasonable prospect of the case succeeding on this basis.
15. I have also considered whether the Commissioner’s decision not to investigate the complaint is a procedural issue that the Tribunal can consider under section 166.
16. I note that both of the case officer’s letters to the Applicant apply a strict time limit of three months. In ***Killock*** (reference as above), the Upper Tribunal found that it was a procedural error for the Commissioner to misconstrue his own service standards and apply a strict time limit of three months in order to decline to investigate a complaint (paragraphs 110 to 116). This is potentially a procedural error that can be considered by the Tribunal. However, it appears that this error was corrected by the reviewing officer. The letter of 10 January 2023 which reviews the case officer’s decision explains that the delay shown in this decision is “extensive”. This is an exercise of discretion, rather than the application of a strict time limit. In accordance with ***Delo***, the Commissioner has a broad discretion in relation to how and whether to investigate complaints. There does not appear to be a procedural error that can be addressed by the Tribunal.
17. The Applicant’s reply of 25 May 2023 says that her complaint was not about the service she received in 2005, but about wrong information that had been kept for many years. She says that the Commissioner falsely claimed the complaint was all about service in the past. This is a misunderstanding of the Commissioner’s decision. The Commissioner did not refuse to investigate the complaint because it related to events in 2005. The Commissioner refused to investigate the complaint because the last response from RLH about the subject matter of the complaint was in November 2021. The Commissioner’s service standards warn that undue delay may mean the Commissioner will not consider the matter at all, the Applicant did not complain to the Commissioner until 29 September 2022, and the reviewing officer took the view that the delay was extensive and so they did not intend to pursue the complaint further.
18. I therefore find that there is no reasonable prospect of the case, or any part of it, succeeding. The proceedings are struck out.

## Other case references

19. The Applicant's response to the strike out application refers to two other case references that were included in her original application. The Registrar decided on 11 April 2023 that neither of these matters would be considered further. Therefore, I have not considered these further and this decision relates to Commissioner case reference IC-194615-F7T6 only.

## Application for anonymity

20. The Applicant's reply of 25 May 2023 also makes an application for anonymity. She asks that the Tribunal "*do not disclose our personal and private information to public or any governments, national or international websites*", and asks for anonymity to the Tribunal services during the process and after a decision is made.

21. The Applicant has not explained the basis on which she is asking for anonymity. I note that the Applicant has sent personal and private documents to the Tribunal relating to both her and her daughter, and has referred to personal and private information in her correspondence to the Tribunal.

22. The Registrar considered this issue on 11 April 2023 and directed that, "*In order to protect the privacy of the Applicant the personal and private documents sent by the Applicant will be kept under Rule 14(6) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and will not be disclosed or published*". I agree that this is an appropriate way to protect this personal information.

23. None of this information has become public and it is not necessary to refer to any of this information in this decision. As the application has now been struck out, it will not be necessary for the Tribunal to refer to this information publicly in the future. The Registrar's direction is sufficient to protect the privacy of the Applicant and her daughter, and I do not make an order for anonymity.

Signed: *Judge Hazel Oliver*

Date: 10 August 2023