Neutral citation number: [2024] UKFTT 1047 (GRC)

Case Reference: FT/EA/2024/0125/GDPR

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: on the papers in Chambers

Heard on: 19 November 2024
Decision given on: 26 November 2024

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

TIANLI CUI

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 amended response to the application (dated 30 May 2024), the Commissioner submits that the Tribunal has no jurisdiction to consider the application and/or it has no reasonable prospect of succeeding and accordingly should be struck out. The Commissioner has made an application for strike-out on this basis.

4. The Applicant has had an opportunity to respond to this application. By email to the Tribunal dated 21 August 2024 the Applicant states they have not replied to the application to strike out as they were confused by incorrect dates within the original version of the Respondent's Response. In Directions by Registrar Arnell dated 21 August 2024, the Applicant was given an opportunity to provide submissions by 4 September 2024. The Tribunal has not received any submissions from the Applicant. I have assumed that the strike-out application is opposed by the Applicant.

5. 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.

6. 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.

7. 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*...".

c. 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. I would further hold, in agreement with the judge, that having done that much the Commissioner is entitled to conclude that it is unnecessary to determine whether there has been an infringement but sufficient to reach and express a view about the likelihood that this is so and to take no further action. By doing so the Commissioner discharges his duty to inform the complainant of the outcome of their complaint*." (paragraph 80, Warby LJ).

d. 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).

8. The Applicant made a complaint to the Commissioner about how the managing partner of a firm of solicitors had shared personal data with a third party. The Commissioner

investigated the matter with the solicitors. The case officer provided an outcome letter to the Applicant which said that that it is unlikely that an infringement of the data protection legislation had taken place and provided reasoning for this assessment. The Applicant made a case review request, and the reviewing officer provided an outcome confirming that the original case officer had made an appropriate determination and handled the complaint in line with the Commissioner's service standards. The Applicant was advised on options if they remained dissatisfied.

9. The Commissioner has completed an investigation and provided an outcome to the Applicant. The Applicant's application to the Tribunal says, "The views by the ICO are groundless". The desired outcome is, "Apologise, refund the contract fees and compensate for the appellant".

10. 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.

11. 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: 20 November 2024