



Neutral citation number: [2024] UKFTT 410 (GRC)

Case Reference: EA/2023/0250/GDPR

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: On the papers

Heard on: 22 May 2024

Decision given on: 28 May 2024

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

GARETH MASON

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.
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. He also submits that the Appellant does not, in fact, appear to be challenging the Commissioner's decision in relation to the complaint.

Applicable law

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...*".
- 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).

Conclusions

- 7. The Applicant made a complaint to the Commissioner about the way Royal Borough of Kingston upon Thames Council was handling his data protection concern. The case officer provided a response on 30 January 2023 (case reference IC-190849-Z2J1) which explained that he appeared to be making a request for personal data, and that information about a property would not be considered personal data. In further correspondence the case officer clarified that the information that he was requesting would not be considered personal data disclosable via a subject access request.
- 8. The Applicant's desired outcome from the application to the Tribunal is somewhat unusual, in that he is not directly challenging this decision. This application was made as part of a wider appeal which also covers two decisions of the Commissioner relating to requests for environmental information (IC-152199-X0G9 and IC-182307-J1M6). He complains that these requests were refused on the grounds of the exception for personal data. He says that this is inconsistent with the decision in IC-190849-Z2J. His application says, "*I agree with the Decision Notice under IC-190849-Z2J*".
- 9. It therefore appears to me that the Applicant is not actually challenging the substantive outcome of the complaint to the Commissioner. He says that he agrees with it. He has not made a valid application under section 166(2) DPA because he is not asking for any order in relation to this complaint outcome.

10. I also find that, if the Applicant is challenging the outcome of the complaint, the Tribunal does not have power under section 166 to consider the merits or substantive outcome of a complaint in any event. Section 166 is limited to procedural issues. The Applicant raises no issue about the procedure followed by the Commissioner.

11. I therefore find that there is no reasonable prospect of the case, or any part of it, succeeding. The proceedings are struck out.

12. This decision does not affect the appeals in relation to IC-152199-X0G9 and IC-182307-J1M6.

Signed: *Judge Hazel Oliver*

Date: 22 May 2024

Promulgated on: 28 May 2024